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D.

CALIFORNIA REPORTER

311 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

311 PACIFIC REPORTER
SECOND SERIES

48 Cal.2d 617

Fannie M. LAMOREUX, Plaintiff and Appellant,

v.

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY (a Corporation) et al., Defendants and Appellants; Union Sugar Company (a Corporation), Cross-Defendant and Respondent.

L. A. 24271.

Supreme Court of California,
In Bank.
May 28, 1957.

Rehearing Denied June 26, 1957.

Wrongful death action. The Superior Court, Imperial County, Elmer W. Heald, J., granted a new trial motion, and plaintiff appealed. The Supreme Court, Gibson C. J., held that even if decedent's employer and third party were joint tort-feasors and decedent had not been acting in course of his employment when injury occurred, and compromise agreement, in addition to releasing workmen's compensation claim, had also released employer from all causes of action arising from injury, such agreement would not also release third party.

Affirmed.

Opinion, 298 P.2d 658, vacated.

1. Appeal and Error 🔑123

No appeal lies from verdict. West's Ann.Code Civ.Proc., § 963.

2. Appeal and Error 🔑222

Where no objections were raised when new trial motion was made and decided, claimed defects in notice of motion were waived and could not be urged on appeal.

3. Appeal and Error 🔑1015(5)

Giving of erroneous instruction on last clear chance doctrine would require affirmance of order granting new trial after verdict for plaintiff in action for death of motorist in railroad crossing collision.

4. Pleading 🔑252(1)

Where a verified complaint contains allegations destructive of cause of action, defect cannot be cured by simply omitting such allegations, from subsequently filed pleadings without explanation.

5. Pleading 🔑229

A party should be allowed to correct pleading by omitting an allegation which, it appears, was made as result of mistake or inadvertence. West's Ann.Code Civ. Proc., §§ 472, 473.

6. Pleading 🔑36(7)

Under circumstances, wrongful death action plaintiff, who filed amended complaint, omitting decedent's employer as a defendant and containing no allegations connecting such employer with accident, before original complaint had been served on railroad and before answer or demurrer thereto had been filed by either decedent's employer or the railroad, would not be bound by original complaint's allegations that decedent's employer and the railroad had been "jointly engaged in raising the grade" at the crossing where the fatal collision occurred and that "they had so negligently and carelessly performed such work" that it constituted a trap for motorists using crossing. West's Ann.Code Civ. Proc., §§ 472, 473.

7. Release 🔑29(1)

The rule that the release of one joint tort-feasor releases all of others is intended to prevent double recovery for injury and is based on theory that there can be but one compensation for joint wrong, that each joint tort-feasor was responsible for the whole damage, that cause of action is satisfied once injured party is paid for his injury by one of joint tort-feasors, and that receipt by injured party of any sum, if accepted as payment in satisfaction of cause of action against one joint tort-feasor, is in law full satisfaction as to all joint tort-feasors.

8. Release 🔑29(3)

A release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against a successive, independent wrongdoer.

9. Workmen's Compensation 🔑2084

An insured employer is not liable for an industrial injury to his employees under general tort principles but only by virtue of workmen's compensation provisions of the Labor Code, and he is subject to proceedings before Industrial Accident Commission but not to suit in court for injury; and this is so even though employer acted jointly with third party. West's Ann.Labor Code, §§ 3600–3603.

10. Workmen's Compensation 🔑2177

A workman is entitled to receive compensation benefits prescribed by statute without jeopardizing his right to proceed against third party tort-feasor; and this is so even though third party's negligent activity was joint with that of employer and even though employee accepts, in compromise of compensation claim, a lesser sum than amount which Commission would award. West's Ann.Labor Code, § 3852 et seq.

11. Workmen's Compensation 🔑2177

If workman was acting in course of his employment when he was killed, release of all causes of action against employer would do no more than give employer what he would be entitled to by operation of law upon finding that injury was compensable as industrial injury; and third party would not be released by fact that compromise agreement, in addition to releasing compensation claim, also released employer from all causes of action arising from injury. West's Ann.Labor Code, § 3852 et seq.

12. Release 🔑29(1)

Even if decedent's employer and third party were joint tort-feasors and decedent had not been acting in course of his employment when injury occurred, and compromise agreement, in addition to releasing workmen's compensation claim, had also released employer from all causes of action arising from injury, such agreement would not also release third party. West's Ann.Labor Code, § 3852 et seq.

13. Dismissal and Nonsuit 🔑42

Where original complaint was superseded by amended complaint which omitted decedent's employer as party and, in effect, dismissed it from action, employer was not reinstated as party to wrongful death action when it was named a cross-defendant in defendant railroad's cross-complaint for indemnity; and subsequent filing of direction for dismissal of employer with prejudice, signed by plaintiff, was unnecessary and did not operate as a matter of law to discharge railroad from liability to plaintiff.

◆

David M. McGahey, Palm Springs, for plaintiff and appellant.

Horton & Knox and Reginald L. Knox, Jr., El Centro, for defendant and appellant.

Dickenson, Sattinger & McKee and Richard A. McKee, El Centro, for respondent.

GIBSON, Chief Justice.

Plaintiff's husband, who was employed by the Union Sugar Company, was killed when his automobile was struck at a railroad crossing by a train operated by San Diego and Arizona Eastern Railway Company.

She sued both Union Sugar Company, hereinafter called Employer, and the railway company, hereinafter called Railway, for damages for the wrongful death of her husband.[1]

Before defendants appeared in this action, plaintiff filed an application for workmen's compensation with the Industrial Accident Commission. Thereafter, Employer, its insurance carrier and plaintiff filed with the commission an agreement in which plaintiff released Employer and its insurance carrier from all claims she had against them on payment of the sum of $3,500. The settlement was approved by the commission.

An amended complaint, which did not name Employer as a defendant, was served on Railway, and it answered, pleading as one of its defenses that the release of Employer discharged Railway. At the same time, Railway filed a cross-complaint against Employer alleging that it had agreed in writing to indemnify Railway for any losses resulting from the use of the crossing and requesting judgment against Employer in any amount which plaintiff might recover in her action against Railway. A direction for dismissal with prejudice of the action against Employer, signed by plaintiff, was thereafter filed.

[1] The case proceeded to trial on the amended complaint and the cross-complaint. A verdict for $20,000 was rendered in favor of plaintiff against Railway, and a separate verdict in the same amount was rendered in the cross-action in favor of Railway against Employer. Plaintiff has appealed from an order granting a new trial in the main action, and Railway has appealed from an order granting a new trial in the cross-action. Railway also filed a separate notice of appeal from the verdict and judgment in favor of plaintiff in the main action. It appears, however, that no judgment was entered, and, since no appeal lies from the verdict, the attempted appeals from the verdict and judgment are dismissed. Code Civ.Proc. § 963; Sokolow v. City of Hope, 41 Cal.2d 668, 669, 262 P.2d 841.

[2] Plaintiff claims that the notice of motion for a new trial was defective, but since no objections were raised when the motion was made and decided the claimed defects in the notice were waived and may not be urged on appeal. Secreto v. Carlander, 35 Cal.App.2d 361, 363–364, 95 P.2d 476; see Bauer v. Helene Curtis Industries, Inc., 117 Cal.App.2d 66, 68–69, 254 P.2d 931; 3 Witkin, California Procedure (1954) 2069–2070; cf. Starkweather v. Eddy, 196 Cal. 73, 75, 235 P. 734.

[3] The trial court in advising the jury on the doctrine of last clear chance gave the instruction which was recently held erroneous in Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 306 P.2d 432, and in accordance with the holding in that case the order granting a new trial in the main action must be affirmed. It appears to be conceded that the granting of a new trial in the main action, if proper, warranted the granting of a new trial in the cross-action.

While the order granting a new trial must be affirmed for the reason stated, it is appropriate for us to pass upon other questions of law presented on appeal which may be necessary to a final determination of the case. Code Civ.Proc. § 53.

Defendants contend that the agreement releasing Employer operated to release Railway as a joint tort feasor, and that the dismissal with prejudice of the action against Employer discharged Railway of all liability to plaintiff.

The "Compromise and Release Agreement" executed by Employer, its insurance carrier and plaintiff was authorized by the provisions of sections 5000–5004 of the Labor Code.[2] The agreement recites that the parties desire to compromise and settle all liability of Employer and its insurance carrier, including the liability of Employer for alleged serious and wilful misconduct, and to obtain approval of the settlement by the Industrial Accident Commission. As part of the agreement there was submitted to the commission an agreed statement of facts, which may be summarized as follows: Plaintiff's husband, who was employed by Union Sugar Company as a carpenter, was killed as a result of a collision between an automobile driven by decedent and a train owned by Railway. On the date of decedent's death he performed services for Employer in the usual course of his employment, and his workday terminated at 11 a. m. He was on his way to his home and was driving his own automobile when the collision occurred at approximately 11:15 a. m. The accident did not occur on the premises or any approach thereto owned by, or under the control of, Employer, and decedent was performing no service incidental to his employment and was not being furnished transportation by Employer at the time of his death. (Railway alleged in its answer and in its cross-complaint that decedent was using the crossing in the course of his employment when the accident occurred which caused his death.) Railway had previously been engaged in raising the grade of its tracks at the crossing where the accident occurred and had dumped considerable loose dirt on the tracks. Decedent's car was stopped by the loose dirt and was then struck by the train. In support of her claim for compensation for wilful misconduct, plaintiff had alleged that Employer had dumped the loose dirt on the tracks, but, after further investigation, she was satisfied that the evidence would not support that allegation.

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[1] The conductor, engineer and fireman of the train, whose contentions are substantially the same as those of Railway, were also made defendants.

[2] Sections 5000–5004 of the Labor Code govern the matters of release and compromise of workmen's compensation claims and require approval of compromise agreements by the Industrial Accident Commission.

The agreement provided that, upon approval by the commission, plaintiff would be paid the sum of $3,500 "in full satisfaction and release of said claims (including any claim for serious and wilful misconduct against said employer) arising under the Workmen's Compensation, Insurance and Safety Laws of the State of California." Plaintiff further agreed to release and discharge Employer from all claims and causes of action, known or unknown, arising from the injury, and to execute and cause to be filed a dismissal with prejudice of the present action for damages insofar as it related to Employer.

In support of its contention that it is liable, if at all, as a joint tort feasor, Railway relies upon allegations in the original complaint that Employer and Railway were "jointly engaged in raising the grade" at the crossing, and that "they so negligently and carelessly performed such work" that it constituted a trap for motorists using the crossing. The amended complaint omits Employer as a defendant and contains no allegations connecting Employer with the accident.

[4–6] Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Gaglione v. Coolidge, 134 Cal.App.2d 518, 523, 286 P.2d 568; Hicks v. Corbett, 130 Cal.App.2d 87, 89, 278 P.2d 77; Lee v. Hensley, 103 Cal.App.2d 697, 709, 230 P.2d 159. However, a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence. Meyer v. State Board of Equalization, 42 Cal.2d 376, 386, 267 P.2d 257; see Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227; cf. Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 208–212, 212 P.2d 591, [indicating that great liberality should be exercised under Code Civ.Proc. § 473 in permitting amendments to correct mistakes]. The agreed statement of facts presented to the Industrial Accident Commission recites that plaintiff, after further investigation, became satisfied the evidence would not support the allegation that the loose dirt had been dumped on the tracks by Employer. Section 472 of the Code of Civil Procedure provides that any pleading may be amended once by the party as a matter of right at any time before answer or demurrer is filed. The original complaint was not served on Railway, and no answer or demurrer to that pleading was filed by either Employer or Railway. Under all the circumstances, we are of the view that plaintiff is not bound by the allegations of the original complaint which were omitted from the amended pleading.

As we have seen, Railway has alleged that the decedent was using the crossing in the course of his employment when the accident occurred, and it is plaintiff's position that the accident was within the workmen's compensation provisions of the Labor Code. On the other hand, the compromise agreement recites facts which, although set forth for the purpose of compromise only, seem to show that the injury was not suffered in the course of the decedent's employment, and Railway now argues that the accident was not industrial in character. No testimony has been called to our attention which would indicate that Employer's liability to plaintiff, if any, extended beyond the workmen's compensation provisions, and the facts recited in the compromise agreement do not establish that Employer was negligent or guilty of wilful misconduct or liable to plaintiff on any theory. However, we do not know what evidence will be presented at the new trial, and, to assist the parties and the court, we shall discuss the case, first, on the assumption that the deceased was acting in the course of his employment when he was killed and, second, on the assumption that he was not so acting at that time.

[7, 8] The rule that the release of one joint tort feasor releases all the others is intended to prevent double recovery for the injury and is based on the theory that there can be but one compensation for the joint wrong, that each joint tort feasor is responsible for the whole damage, that the cause of action is satisfied once the injured party is paid for his injury by one of the joint tort feasors, and that the receipt by the injured party of any sum, if accepted as payment in satisfaction of the cause of action against one joint tort feasor, is in law full satisfaction as to all joint tort feasors. Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal.2d 174, 180–181, 88 P.2d 690; Bee v. Cooper, 217 Cal. 96, 99 et seq., 17 P.2d 740; cf. Chetwood v. California Nat. Bank, 113 Cal. 414, 426, 45 P. 704. However, a release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against a successive, independent wrongdoer. Ash v. Mortensen, 24 Cal.2d 654, 658–659, 150 P.2d 876 [malpractice, release of negligent motorist]; cf. Duprey v. Shane, 39 Cal.2d 781, 794, 249 P.2d 8 [Ind.Acc.Com. award not bar to malpractice action].

[9] The liability of an insured employer to an employee who is injured during the course of his employment is fundamentally different from that of a third person whose negligent conduct, jointly with that of the employer, resulted in the injury. The third person, of course, is liable under general rules of tort law, as applied by a court. An insured employer, however, is not liable for an industrial injury to his employees under general tort principles but only by virtue of the workmen's compensation provisions of the Labor Code, and he is subject to proceedings before the Industrial Accident Commission but not to suit in court for the injury. Lab.Code, §§ 3600–3603; see Scott v. Industrial Acc. Comm., 46 Cal.2d 76, 83, 293 P.2d 18. The workmen's compensation statutes in this connection contained no exception that would lead to a different result on the ground that the employer had acted jointly with a third party.

[10] An employee is entitled to receive the compensation benefits prescribed by statute without jeopardizing his right to proceed against a third party tort feasor. The Labor Code provides that this right of action is not barred by the filing of a claim for compensation, and the decisions clearly show that neither the making of an award by the commission nor the payment of the award by the employer will preclude

suit against the third person. Lab.Code. § 3852 et seq.; Wallace v. Pacific Electric Ry. Co., 105 Cal.App. 664, 667–668, 288 P. 834; see Thompson v. Lacey, 42 Cal.2d 443, 445, 267 P.2d 1; Singleton v. Bonnesen, 131 Cal.App.2d 327, 329–330, 280 P.2d 481. Here also no exception has been made with respect to an action against a third party whose negligent activity was joint with that of the employer. It seems obvious from these rules that no such bar should arise from the employee's acceptance, in compromise, of a lesser sum than the amount which the commission could award. The code in effect provides that the payment of the full amount of workmen's compensation is not to be considered as satisfaction of the third person's tort liability, and the same rule should apply to payment of a compromise award.

[11] It follows, therefore, that if it should be found upon the new trial that the deceased was killed while acting in the course of his employment, the portion of the compromise releasing Employer from liability for workmen's compensation would not have the effect of likewise releasing Railway. Further, under this assumption, Railway would not be released by the fact that the compromise agreement, in addition to releasing a workmen's compensation claim, also released Employer from all causes of action arising from the injury. As shown above, an employee who is entitled to workmen's compensation as a result of an industrial injury has no right to proceed in court against his employer if the latter is insured, and any attempt by him to do so could result only in a judgment for the employer. The release of all causes of action against the employer would, therefore, be immaterial, since it is obvious that, in such a situation, the release would do no more than give the employer what he would be entitled to by operation of law upon a finding that the injury was compensable as an industrial injury.

[12] We shall next consider the case under the second assumption referred to above, namely, that the decedent was not acting in the course of his employment when the injury occurred. Railway contends that, if this is the fact, the liability of Employer is governed by the law of negligence, that Railway and Employer were sued as joint tort feasors and that the release of Employer operated to release Railway as a matter of law under the general rule that the release of one joint tort feasor releases all.

It would seem clear that, regardless of who was responsibile for the accident, the settlement of the claim for workmen's compensation was one of the main purposes of the agreement. The statutory liability of an insured employer for workmen's compensation is wholly different in principle from a tort feasor's liability under common law. The liability of a third party who acted jointly with the employer in causing the injury is derived from common law and is dependent upon fault, whereas the employer's liability is imposed by statute regardless of fault and is in the nature of an obligation to provide for insurance against industrial hazard. Apparently because of these factors the amounts of money permitted by statute as compensation awards in industrial accident cases are frequently smaller than the sums allowed by the courts in ordinary actions for comparable injuries. As we have seen, the common law rule relating to release of a joint tort feasor is based in part upon the theory that the acceptance of a payment in satisfaction of the cause of action against one wrongdoer is deemed full compensation for the injury as to all joint tort feasors, and this basis is not present where the payment is made in settlement of a workmen's compensation claim. The amount to be paid under such a compromise agreement must have been fixed in the light of the fact that the sums which may be allowed for workmen's compensation are limited by law and are usually less than the recoveries in court actions based upon negligence. It would therefore be unrealistic, and most unfair to the injured person, to hold as a matter of law that such a release payment was accepted as full compensation for the injury, and that as a result there was a release of a negligent third party, unless it appears that the employer was in fact a joint tort feasor with the third party and that there was an intent to release the joint tort feasors. Cf. Royal Indemnity Co. v. Olmstead, 5 Cir., 193 F.2d 451, 455–456, 31 A.L.R.2d 635; Guarisco v. Pennsylvania Casualty Co., 209 La. 435, 24 So.2d 678, 680; Bailey v. Delta Electric Light, Power & Mfg. Co., 86 Miss. 634, 38 So. 354, 355. The Royal Indemnity case involved the compromise of an automobile owner's limited liability, under section 402 of the California Vehicle Code, to pay for injuries caused by the negligent operation of his car by a renter. A stipulated judgment against the owner for less than the statutory limit was held not to represent an adjudication of the total amount of damages suffered, but simply a compromise of the owner's limited liability which did not satisfy the plaintiff's claim for the total amount of damages.

Some California decisions which followed the general rule that the release, for a consideration, of one of several asserted joint tort feasors bars an action against another have stated that it is immaterial whether the person who made the payment for the release was or was not legally liable. Tompkins v. Clay Street R. Co., 66 Cal. 163, 167–168, 4 P. 1165; Leff v. Knewbow, 47 Cal.App.2d 360, 365–366, 117 P.2d 922; Blackburn v. McCoy, 1 Cal.App.2d 648, 660, 37 P.2d 153; Hawber v. Raley, 92 Cal.App. 701, 705 et seq., 268 P. 943. These cases are clearly distinguishable, however, because none of them involved the settlement of a claim based upon a special limited liability such as workmen's compensation, the settlement of which does not, as a matter of law, constitute full payment or satisfaction for all the damage suffered.

There is no contention in the present case that Railway and Employer may have been independent, concurrent tort feasors, instead of joint tort feasors, and we will not discuss the effect of this possibility.

[13] Finally, we come to the question whether, under either assumption as to the nature of the accident, the filing of the direction for dismissal of Employer with prejudice, signed by plaintiff, operated as a matter of law to release Railway. The original complaint was superseded by an amended complaint which omitted Employer as a party and, in effect, dismissed it from the main action. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 3, 44 P. 339; Butchart v. Moorhead, 101 Cal.App. 659, 662, 282 P. 23; Schlake v. MacConnell, 69 Cal.App. 207, 209, 230 P. 974. Employer was not reinstated as a party to the main action when it was named a cross-defendant in Railway's cross-complaint. Accordingly, when the direction for dismissal with prejudice was subsequently filed, there was no cause of action pending against Employer, and a dismissal as to it was unnecessary. Under these circumstances, the direction for the dismissal, standing alone, did not operate as a matter of law to discharge Railway of its liability, if any, to plaintiff.

The orders granting a new trial are affirmed.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER and McCOMB, JJ., concur in the judgment.

48 Cal.2d 611

Morris LAVINE, Appellant,
v.
Roger JESSUP et al., Respondents.
L. A. 24143.

Supreme Court of California,
In Bank.
May 28, 1957.

Taxpayer's suit. The Superior Court, Los Angeles County, Bayard Rhone, J., rendered orders and judgment of dismissal, and an appeal was taken. On motion to dismiss appeal, the Supreme Court, Gibson, C. J., held that where court simultaneously sustained general demurrers without leave to amend and granted motions to strike complaint as sham and to dismiss action, and motions had not been supported by affidavits but were made upon assumption that complaint failed to state cause of action, for purposes of appealability, minute orders granting motions to dismiss were to be treated as though they were orders sustaining general demurrers without leave to amend and were not appealable, and time to appeal ran from entry of judgment.

Motions denied.

Opinion 302 P.2d 864 vacated.

1. Appeal and Error 🔑85, 347(1)

No appeal can be taken except from an appealable order or judgment, and time to appeal from such begins to run from entry thereof. West's Ann.Rules on Appeal, rule 2(b).

2. Appeal and Error 🔑85

Rules on Appeal do not effect statutory requisites of an appealable order or judgment. West's Ann.Rules on Appeal, rule 2(b).

3. Appeal and Error 🔑102

Order sustaining demurrer without leave to amend is nonappealable but appeal must be taken from ensuing judgment.

4. Appeal and Error 🔑102, 347(1)

Where court simultaneously sustained general demurrers without leave to amend and granted motions to strike complaint as sham and to dismiss action, and motions had not been supported by affidavits but were made upon assumption that complaint failed to state cause of action for purposes of appealability, minute orders granting motions to dismiss were to be treated as though they were orders sustaining general demurrers without leave to amend and were not appealable, appeal was required to be taken from judgment based thereon, and time to appeal ran from its entry. West's Ann.Code Civ.Proc., § 581d.

5. Dismissal and Nonsuit 🔑79

Provisions of statute providing that orders of dismissal shall be effective for all purposes when entered in minutes relates only to dismissals of types covered by statute of which it was a part prior to 1947 code changes and not to dismissal for failure of complaint to state cause of action. West's Ann.Code Civ.Proc., §§ 581, 581d.

Morris Lavine, Los Angeles, in pro. per.

Harold W. Kennedy, County Counsel, Iver E. Skjeie, Deputy County Counsel, and William J. Cusack, Los Angeles, for respondents.

GIBSON, Chief Justice.

Respondents have moved to dismiss plaintiff's appeal on the ground that the notice was filed more than 60 days after entry of the appealable judgment or order. Rules on Appeal, Rule 2.

The action commenced by plaintiff was a taxpayer's suit against various defendants including members of the Board of Supervisors of Los Angeles County. The complaint sought damages, restitution of public money, an injunction and other kinds of relief. Demurrers to the first four complaints were sustained with leave to amend. After the fifth (fourth amended) complaint was filed, certain defendants (respondents herein) filed demurrers and also motions to strike the complaint as sham and to dismiss the action.

Orders were entered in the minutes on November 10, 1955, granting the motions to strike and to dismiss, and sustaining the demurrers without leave to amend.[1] Subsequently, the court signed and filed a "Judgment of Dismissal," reciting that the foregoing motions and demurrers having come on regularly for hearing on November 8, 1955, and "the court having sustained said demurrers without leave to amend and having granted said motions by order duly made," it was "Ordered, adjudged and decreed that plaintiff's Fourth Amended Complaint be, and the same is hereby stricken and the action dismissed" as to the defendants "and that plaintiff take nothing by this action against said defendants." This judgment was entered on November 28, 1955.

Appellant's notice of appeal was filed January 19, 1956, too late if the entry of the minute orders started the 60-day period running, but timely if the period commenced to run at the time of the entry of the foregoing judgment.

[1, 2] The disposition of the motions to dismiss this appeal depends upon the application of the well settled propositions that no appeal can be taken except from an appealable order or judgment, as defined in the statutes and developed by the case law, and that the time to appeal from such a judgment or order begins to run from its entry. The Rules on Appeal, dealing with practice and procedure, fix the time to appeal and also state what constitutes the procedural act of entry which starts the time running, but they do not affect the statutory requisites of an appealable judgment or order. See Rules on Appeal, Rule 2(b) [expressly referring to "appealable" orders]; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 346–347, 182 P.2d 182 [findings required for judgment]; Hirschberg v. Oser, 82 Cal.App.2d 282, 287, 186 P.2d 53 [formal decree required]; Witkin, Four Years of the Rules on Appeal (1947) 35 Cal.L.Rev. 477, 480; (1948) 36 Cal.L.Rev. 483; 3 Witkin, California Procedure (1954) 2295, 2296.

[3] An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment. See Berri v. Superior Court, 43 Cal.2d 856, 860, 279 P.2d 8; Cole v. Rush, 40 Cal.2d 178, 252 P.2d 1; 3 Witkin, California Procedure (1954) 2162. Insofar as the minute orders in the present case constitute orders sustaining demurrers, the time for appeal did not commence to run until the entry of judgment. Respondents contend, however, that the orders granting the motions to dismiss were appealable and that the time to appeal commenced to run from the entry of those orders in the minutes.

[4] This case presents an unusual situation in that the court simultaneously sustained general demurrers without leave to amend and granted motions to strike the complaint as sham and to dismiss the action. The motions were not supported by affidavits setting up any extrinsic matters and obviously were made upon the assumption that the complaint failed to state a cause of action and was merely repetitious of prior complaints which had been ruled insufficient.[2] Defendants thus made their challenge solely on the face of the pleadings, and it seems clear that the questions presented by the motions were identically the same as those presented by the demurrers, i.e., did the complaint state a cause of action and, if not, could the defects be cured by amendment. The normal method of resolving such issues in favor of a defendant is by ruling upon a demurrer and thereafter rendering a judgment based upon the ruling. It is, of course, unnecessary for the court, in addition, to grant a motion to dismiss. As we have seen, the court subsequently signed and filed a judgment of dismissal which, after reciting that the demurrers had been sustained and the motions had been granted, adjudged that the action be dismissed. Under these circumstances an absurd situation would result if we were to hold that the portion of the ruling sustaining the demurrers is non-appealable and must be followed by a judgment of dismissal but that the portion of the ruling granting the motions is final and immediately appealable. Accordingly, we hold that, for the purpose of determining appealability, the minute orders grantings the motions to dismiss will be treated as though they were orders sustaining general demurrers without leave to amend. See Ross v. O'Brien, 1 Cal.App.2d 496, 498, 36 P.2d 1108. So treated, the minute orders granting the motions are not appealable, and, as in the case of orders sustaining demurrers, the appeal must be taken from the judgment based thereon.

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[1] The minute orders read as follows:

"Motion of defendants Walter M. Briggs, sued herein as Walt Briggs, and Civic Center Auto Parks, a corporation, sued herein as Civic Center Auto Park, Inc., to dismiss complaint as to said defendants (third call). Motion Granted."

"Demurrer of defendants Walter M. Briggs, sued herein as Walt Briggs, and Civic Center Auto Parks, a corporation, sued herein as Civic Center Auto Park, Inc., to fourth amended complaint (third call). Demurrer Sustained Without Leave to Amend."

"Motion of defendants Roger Jessup, Herbert Legg, William A. Smith, deceased, Leonard Roach and County of Los Angeles, to strike fourth amended complaint and/or to dismiss action (second call). Motion Granted."

"Demurrer of defendants Roger Jessup, Herbert Legg, Leonard Roach, William A. Smith, deceased, and County of Los Angeles to fourth amended complaint (second call). Demurrer Sustained Without Leave to Amend."

Similarly, in a case which did not involve multiple rulings, this court treated an order of dismissal as having been, in legal effect, an order which sustained a demurrer. Egan v. McCray, 220 Cal. 546, 547, 31 P.2d 1041; cf. Pulvermacher v. Los Angeles Co-ordinating Committee, 61 Cal.App.2d 704, 711, 143 P.2d 974.

Since the question of appealability of the multiple orders is to be determined in accordance with the rules pertaining to appeals from orders sustaining demurrers rather than under the rules relating to appeals from orders of dismissal, this case is not governed by section 581d of the Code of Civil Procedure, which provides that orders of dismissal shall be effective for all purposes when entered in the minutes.[3]

[5] Section 581d of the Code of Civil Procedure is not applicable for an additional reason. It was originally part of section 581, which prior to 1947 related to voluntary dismissals and dismissals for lack of prosecution or failure to prove a sufficient case. The provision that dismissals should be effective for all purposes when entered in the minutes was specifically limited to the types of dismissals there enumerated. In 1947, in order to separate some of the topics in section 581, the Legislature amended that section and enacted sections 581c and 581d. These enactments contain basically the same provisions as formerly appeared in section 581, and in our opinion they were intended as clarifications rather than changes in the law. Both the legislative history of section 581d and its location in conjunction with other sections derived from former

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[2] In Pianka v. State of California, 46 Cal.2d 208, 211–212, 293 P.2d 458, the motion to dismiss for sham was based upon an affidavit setting forth extrinsic matter, and we held that the proper way in which a complaint good on its face may be attacked for sham is by motion for summary judgment. We pointed out that this procedure eliminates any need for the nonstatutory practice of a so-called "speaking motion to dismiss."

[3] Section 581d of the Code of Civil Procedure provides:

"A written dismissal of an action shall be entered in the clerk's register or in the docket in the justice court, as the case may be, and is effective for all purposes when so entered.

"All dismissals ordered by the court shall be entered upon the minutes thereof or in the docket in the justice court, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes, and the clerk in superior and municipal courts shall note such judgments in his register of actions in the case."

section 581 show an intent to restrict its application to dismissals of the types covered by section 581 prior to the 1947 changes. This explanation of section 581d is in accord with our decision in Gwinn v. Ryan, 33 Cal.2d 436, 202 P.2d 51, which was limited to cases involving the dismissals mentioned in section 581 et seq. This is made clear by the fact that Egan v. McCray, 220 Cal. 546, 31 P.2d 1041, holding ineffective a minute order dismissing a case for lack of jurisdiction, was distinguished on the ground that it did not involve a dismissal for lack of prosecution. The instant case does not involve a dismissal on a ground mentioned in section 581 et seq., and, therefore, section 581d, as we have construed it, is not applicable.

It follows that the only appealable ruling was the judgment of November 28, and the appeal from this judgment, filed January 19, was timely.

The motions to dismiss the appeal are denied.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, J., dissents.

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151 Cal.App.2d 121

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Robert LOPEZ, Defendant and Appellant.
Cr. 5770.

District Court of Appeal, Second District, Division 3, California.
May 17, 1957.

Prosecution for unlawful sale of heroin. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where trial judge stated he had considered report of probation officer, pursuant to defendant's application for probation, his comment to the effect that he did not grant probation to anyone who sold heroin would not be deemed a declaration that he did not consider defendant's application, and in view of fact report of officer recited among other things that according to a deputy sheriff defendant was a rather well known "pusher" in his area, trial court would not be deemed to have abused his discretion in denying probation.

Judgment affirmed.

1. Criminal Law 🔑982

Probation is not a matter of right on part of defendant, but is an act of grace and clemency, and the trial court may grant or deny probation in its discretion.

2. Criminal Law 🔑982

Where trial judge stated he had considered report of probation officer, pursuant to defendant's application for probation, his comment to the effect that he did not grant probation to anyone who sold heroin would not be deemed a declaration that he did not consider defendant's application, and in view of fact report of officer recited among other things that according to deputy sheriff defendant was a rather well known "pusher" in his area, trial court would not be deemed to have abused his discretion in denying probation.

3. Criminal Law 🔑824(8)

In prosecution for unlawful sale of heroin, trial court did not err in failing to instruct jury, on its own motion, that certain testimony relating to a conversation between a deputy sheriff and defendant wherein deputy sheriff said that defendant previously sold narcotics to him, was introduced for limited purpose of establishing sale with which defendant was charged. West's Ann.Health & Safety Code, § 11500.

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Beecher S. Stowe, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse and Herschel Elkins, Deputy Attys. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of violating section 11500 of the Health and Safety Code in that he unlawfully sold heroin. In a trial by jury, he was convicted. He appeals from the judgment.

Appellant contends that, as a matter of law, the court abused its discretion "in refusing to consider" appellant's application for probation; and that the court erred in failing to instruct the jury that evidence as to other offenses was introduced for a limited purpose.

Deputy Sheriff Natividad testified that on November 4, 1955, about 7 p.m., he approached defendant, who was in front of the El Rey Cafe, and asked him if he had some narcotics—that he wanted to buy three capsules for $10; defendant asked who he (officer) was and where he was from; the officer replied that he was known as "Beto" and he was from East Los Angeles; defendant asked if he (defendant) had sold narcotics to him (officer) on a previous occasion; the officer replied that he had purchased seven capsules from him about a week and a half previously; defendant said that the reason he was asking so many questions was that he (defendant) wanted to make sure whether he (officer) was an officer; then defendant said that he was not worried because he had friends in the right places and he was not afraid of being arrested; the officer said that he (officer) had $11 and some change, and he asked defendant if he would give four capsules for that money; defendant replied that he would; the officer gave defendant $11.35 or $11.40; defendant put the money in his pocket and said he would be back in about 20 minutes; then defendant went across the street and entered a 1951 Chevrolet automobile; about 20 minutes later, defendant returned in a 1936 Oldsmobile and told the officer that he had not been able to get the narcotics; defendant told him to wait a few minutes; defendant went to a nearby cafe and returned within a few minutes and handed a tissue paper to the officer and said there were four capsules in it.

The capsules contained heroin.

Deputy Sheriff Gutierrez testified that on said November 4 he was in a telephone booth across the street from the El Rey Cafe, while Deputy Natividad was in front of that cafe; he (witness) saw a person approach Deputy Natividad, and that person and Deputy Natividad were together for a time; then that person crossed the street, entered a Chevrolet automobile, and went away; while that person was going to the Chevrolet, Deputy Gutierrez (witness) went within ten feet of him; that person was the defendant; about 15 minutes thereafter, defendant returned in a 1936 or 1937 Oldsmobile, alighted therefrom, and went to Deputy Natividad; he (witness) did not see anything pass from hand to hand, but it seemed as if they were shaking hands; then Deputy Natividad approached the witness and exhibited for capsules which were in a paper napkin; then the deputies entered their automobile and returned to the sheriff's office.

Defendant testified that on said November 4 he worked until 6 p.m. at 7th and Alameda Streets (Central Wholesale Market), where he was emptying trucks; then he went to 1411½ McDonnell Street to see a prize fight on television; he arrived there about 6:30 p.m. and remained there until approximately 11:30 p.m.; Francisco Vasquez and Steve Trujillo were at said address during that time; that address is about seven miles from the El Rey Cafe; defendant was not in the vicinity of that cafe on that evening; he never sold or delivered any narcotics to Deputy Natividad.

Francisco Vasquez and Steve Trujillo testified, in substance, that they were at 1411½ McDonnell Street on said November 4 from 6:30 p.m. until 11:30 p.m. and during that time defendant was there also.

[1, 2] With reference to appellant's contention regarding the denial of probation, appellant argues that the court refused to consider his application, and that the court had pre-determined the application for probation. That argument is based upon a statement of the trial judge which was made at the time set for hearing the application for probation. At the time set for the hearing, the judge asked counsel for defendant if he had seen the probation report. Counsel for defendant replied that he had seen it and that "I do feel that the Probation Officer feels that this man is a fit subject for probation." Then the judge said: "I do not grant probation to anybody that sells heroin, counsel, in spite of their recommendation. If they are going to peddle heroin, they run their own risk, as far as this Court is concerned. Probation is denied in this matter." Appellant's argument is based upon that statement. Probation is not a matter of right on the part of a defendant, but it is an act of grace and clemency; and the trial court may grant or deny probation in its discretion. People v. Payne, 106 Cal.App. 609, 613, 289 P. 909. An applicant for probation has the right to have his application considered by the court. People v. Blankenship, 16 Cal.App.2d 606, 609, 61 P.2d 352. In the present case, at the end of the probation officer's report there is a statement, signed by the trial judge, which is as follows: "I have read and considered the foregoing report of the Probation Officer. Noble Judge of the Superior Court." The argument that the trial judge did not consider the probation report is not sustained by the record. In his statement on the report, the judge said that he did consider the report. His comment, at the probation hearing, to the effect that he does not grant probation to anyone who sells heroin was not a declaration that he did not consider defendant's application and the report thereon. The comment did not mean that the trial judge did not properly exercise his discretion in ruling upon the application for probation. The report recited, among other things, that according to a deputy sheriff "the defendant is a rather well known 'pusher' in his area." In appellant's application for probation he said he had not been arrested previously. His arrest record, as shown by the probation report, was that he had been arrested four times previously. It appears that the judge considered defendant's application for probation. The judge did not abuse his discretion in denying probation.

[3] A further contention of appellant is that the court erred in failing to instruct the jury that evidence as to other offenses was introduced for a limited purpose. Appellant argues that such an instruction should have been given for the reason that Deputy Natividad, in relating a conversation between him and defendant, said that defendant had previously sold narcotics to him. As above shown, the conversation was a part of the negotiations between defendant and the deputy regarding the sale herein, and the particular statement referred to was made in reply to a question by defendant as to whether defendant had previously sold narcotics to the deputy. No objection was made to the statement, and there was no motion to strike it, and there was no request that the jury be instructed that the statement was received for a limited purpose. Defendant cross-examined the deputy regarding the statement. He asked the deputy the following questions:

"Q. I think you stated in your conversation that you had with Mr. Lopez in front of the El Rey Cafe initially, you stated that you had made a narcotic purchase from him approximately a week and a half before. A. Yes, sir.

"Q. From your own knowledge, do you know that you did make a narcotic purchase? A. Yes.

"Q. Are you qualified as an expert to testify as to whether or not there were narcotics in that purchase? A. I saw the results of the chemical analysis conducted by Mr. Klein and the results were that the seven capsules that I purchased from him on October 19th each contained heroin."

The court was not required, on its own motion, to give an instruction limiting the purpose for which the statement might be considered. See People v. Holbrook, 45 Cal.2d 228, 233, 288 P.2d 1. In the case just cited the court said (45 Cal.2d at page 233, 288 P.2d at page 4): "There is no merit to defendant's claim that the trial court, upon its own motion, should have instructed the jury that the evidence of defendant's intent to commit an abortion upon the policewoman could not be considered in arriving at a verdict on the charge of an abortion upon Miss Solis. When the evidence of the events relating to the policewoman's visit to defendant's office was offered and received, defendant made no objection on the ground that it should be admitted only for purposes of the count charging an attempted abortion, and he did not request an instruction that the jury could consider it only for a limited purpose. It is true that in some situations a court must, of its own motion, instruct upon the law relating to the facts of the case * * * but the court, in the absence of a request, was not required to give an instruction limiting the purposes for which the evidence could be considered."

In the present case, the court gave an instruction to the effect that the offense charged in the information was alleged to have occurred on November 4, 1955; and that it "is your duty as jurors to determine by your verdict whether the defendant was guilty or not guilty of that alleged particular offense, and, regardless of what your belief may be as to his innocence or guilt in connection with any other occasion shown by the evidence, you must not find him guilty of the charge made against him in the Information unless you find that he committed that particular offense."

The court did not err in instructing the jury.

The judgment is affirmed.

SHINN, P. J., and VALLÈE, J., concur.

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151 Cal.App.2d 201

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Nolan KELLER, Defendant and Appellant.
Cr. 1100.

District Court of Appeal, Fourth District, California.
May 21, 1957.

Defendant was convicted of burglary and robbery and was adjudged to be an habitual criminal under the Penal Code. No motion for new trial was made and no appeal was taken from the judgment. Thereafter the defendant filed a petition for writ of error coram nobis and motion to annul, vacate, and set aside the judgment. The Superior Court of San Diego County, Dean Sherry, J., entered an order denying the petition, and the defendant appealed. The District Court of Appeal, Griffin, J., held that contention of defendant that on face of record it appeared that he was wrongfully adjudicated an habitual criminal under the Penal Code could not be reviewed on its merits in coram nobis proceeding.

Order affirmed.

Criminal Law ⟹997(4)

Contention of defendant that on face of record it appeared that he was wrongfully adjudicated an habitual criminal under the Penal Code could not be reviewed on its merits in coram nobis proceeding. West's Ann.Pen.Code, § 644(b).

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William O. Hogan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Defendant and appellant, on October 18, 1955, was charged in an information, in one count, with the crime of burglary, and in a second count with robbery. It was likewise charged therein that he had suffered four prior convictions, to wit, on January 18, 1946, the crime of robbery, second degree; in July, 1946, assault with a deadly weapon; on February 27, 1950, burglary, second degree; and on February 27, 1950, grand theft. It is also alleged as to each such prior felony conviction that appellant served a term of imprisonment therefor in the state prison at San Quentin. Defendant was represented by his own counsel, a lawyer having many years of the actual practice of criminal law, and entered a plea of not guilty to the charges. In person, and through his counsel he admitted the four prior convictions as thus charged.

A jury trial resulted in a verdict of guilty on both counts. He was, on November 15, 1955, sentenced to state's prison, sentences to run consecutively on each count, and consecutively as to any incompleted sentence. He was also adjudged to be an habitual criminal under section 644, subdivision (b) of the Penal Code. No motion for new trial was made, and no appeal was taken from the judgment.

On October 2, 1956, nearly one year later, defendant filed in the Superior Court, a "Petition for Writ of Error Coram Nobis, and Motion to Annul, Vacate and Set Aside the Judgment" alleging the trial judge lacked jurisdiction to adjudge him an habitual criminal by accepting a plea to his previous felony convictions without proving that he had served prior terms upon separate sentences in a state's prison, and upon charges separately brought and tried. It is further claimed he was denied effective and competent aid of counsel in that he was "ill advised to admit his prior convictions", as alleged in the information.

On this appeal from the order denying the writ, this court appointed other counsel to represent the defendant. His only argument is that on the face of the record it appears that defendant was wrongfully adjudicated an habitual criminal under section 644, subdivision (b) of the Penal Code. He claims the allegations in the information are insufficient as to the first prior charge of robbery because defendant was, in that case, first sentenced to the California Youth Authority in September, 1945, and on January 18, 1946, was found to be incorrigible and transferred to San Quentin State Prison without first being returned to the court for this transfer, as provided by section 747 of the Welfare and Institutions Code; that a commitment to a Youth Authority does not constitute a prior conviction under Penal Code Section 644, citing People v. Lockwood, 146 Cal.App.2d 189, 303 P.2d 621; 17 Op.Attys. Gen. 34, cited under West's Annotated Welfare and Institutions Code, section 1772.

Defendant, in his petition, also contends that as to the third and fourth prior convictions charged, it appears that these judgments were alleged to have been pronounced on the same day; that in fact he was charged in the same information with the two offenses arising out of the same transaction; that he did not serve separate terms for such offenses; and that accordingly he should not be declared an habitual criminal by reason of these two prior convictions.

It is further argued that as to the first and second prior convictions alleged, he did not serve separate terms on these charges, having been convicted on the second prior charge (assault with a deadly weapon) while being confined in the state's prison; that this second sentence was to run consecutively with the unexpired term determined in the first prior conviction charged; that since he was paroled in April, 1949, he did not, in fact, serve a *separate sentence* under the assault with a deadly weapon charge; that the information only charged that he had been previously convicted of the felonies named, and that he served a term in the state's prison, but did not allege that he had been previously convicted *upon charges separately brought and tried*, and that he *served separate terms* therefor in a state's prison as required by section 644, subdivision (b) of the Penal Code (see also People v. Dunlop, 102 Cal.App.2d 314, at page 317, 227 P.2d 281) giving the court jurisdiction to adjudge him an habitual criminal; that therefore an admission of the charges alleged did not constitute an admission of these facts; and that accordingly a hearing should be had in respect to the facts claimed.

Assuming the allegations contained in the petition to be true, there is some merit to defendant's argument. People v. Figuieredo, 146 Cal.App.2d 807, 304 P.2d 161; People v. Sukovitzen, 138 Cal.App.2d 159, 291 P.2d 107; In re McVickers, 29 Cal.2d 264, 270, 176 P.2d 40; People v. Morton, 41 Cal.2d 536, 539, 261 P.2d 523; People v. Dunlop, supra.

However, the cases relied upon by him were appeals from judgments or orders denying new trials, or were based upon an order rendered in a habeas corpus proceeding. He did not appeal from the judgment. No cases are cited directly holding that the questions here presented could be properly determined in a coram nobis proceeding. In fact, the authorities in this state are to the contrary.

In the late case of People v. Carroll, 149 Cal.App.2d 638, 309 P.2d 128, 130, decided April 1, 1957, it was said that "if the judgment that appellant Carroll was an habitual criminal was not supported by the evidence, that fact was known to him at the time such judgment was entered and could have been corrected on appeal or by a motion for a new trial"; and that this question cannot be reviewed on its merits in a coram nobis proceeding. It was further held that such questions are of issuable fact and mixed law and fact which were developed before the trial court at the time the judgment was pronounced and could have been raised on an appeal from the judgment. See also People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505; People v. Gennaitte, 127 Cal.App.2d 544, 548, 274 P.2d 169; People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13; People v. McVicker, 37 Cal.App.2d 470, 99 P.2d 1110; People v. Moore, 9 Cal.App.2d 251, 253, 49 P.2d 615; and People v. Whitton, 112 Cal.App.2d 328, 332, 246 P.2d 60.

This same holding has prevailed where a defendant claims denial of effective aid of counsel. People v. O'Connor, 114 Cal.App.2d 723, 726, 251 P.2d 64; People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635; People v. James, 99 Cal.App.2d 476, 222 P.2d 117.

Questions of a limited nature pertaining to habitual criminal determinations have been allowed to be reviewed in a habeas corpus proceeding.

In In re McVickers, supra, 29 Cal.2d at page 270, 176 P.2d at page 44, it was stated:

> "The courts of this state have uniformly permitted more extensive use of the writ of habeas corpus to review adjudications of habitual criminality than would be possible under the [laws of other states; that it was satisfied] that the writ can consistently be made available to a prisoner who has been adjudged an habitual criminal although in truth and fact he is not, without so enlarging its scope as to make it in effect a writ of error to review the correctness of a conviction."

It quoted from People v. McVicker, 37 Cal.App.2d 470, at page 475, 99 P.2d 1110, and said: " 'If the said two "priors" were improperly invoked * * * then upon the arrival of the time when appellant [Petitioner McVickers] would be entitled to release from confinement for the primary offenses, the legality, of his continued or prolonged confinement solely because of the prior convictions can be tested on *habeas corpus.*' " See, also, People v. Morton, supra, 41 Cal.2d at page 544, 261 P.2d 523.

Order denying writ affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Matter of the ESTATE of Jessie Lee TOLER, Deceased.*

Civ. 5514.

District Court of Appeal, Fourth District, California.

May 21, 1957.

Rehearing Denied June 10, 1957.

Hearing Granted July 17, 1957.

Probate proceeding for preliminary distribution. The Superior Court, Orange County, Robert Gardner, J., ordered that $200,000 be distributed to guardian of life tenant, and remainderman appealed. The District Court of Appeal, Mussell, J., held that where estate was reduced to cash and court's order for preliminary distribution to distribute $200,000 to guardian of life tenant on condition that sum be deposited in trust company and that expenditure and investments of sum be made by and through proceeding in matter of guardianship, court did not intend to distribute sum to life tenant in fee, and no such distribution was effected.

Affirmed.

1. Executors and Administrators 🔑295

The law favors the delivery of a legacy for specific property to a legatee, devisee or heir for partial distribution as soon as this can be done without jeopardizing the rights of other persons who are interested in estate. West's Ann.Prob.Code, § 1000 et seq.

2. Life Estates 🔑21

Where estate was reduced to cash, life tenant was entitled to full use and enjoyment of his estate, restricted only in that estate of remainderman should not be permanently diminished in value by his neglect to do what an ordinarily prudent person would do in preserving his own property. West's Ann.Prob.Code, § 818.

3. Executors and Administrators 🔑315(1)

Where estate was reduced to cash and court's order, for preliminary distribution, distributed $200,000 to guardian of life tenant on condition that it be deposited in trust company and that expenditure and investment of such funds be made by and through proceedings in matter of guardianship, and order did not provide that sum was distributable to life tenant in fee, order was not improper because it failed to direct that, on death of life tenant, remaindermen named in the will should receive amounts therein provided, and court did not intend to distribute sum to life tenant in fee, and no such distribution was effected. West's Ann.Prob.Code, §§ 1000 et seq., 1514.

Harold B. Newrock, Whittier, for appellant.

Clyde C. Shoemaker, Los Angeles, for respondent.

MUSSELL, Justice.

This is an appeal from an order for preliminary distribution made after a hearing on a petition therefor by Benjamin Edward Toler, an heir at law and devisee under the last will and testament of Jessie Lee Toler, deceased. Appellant, Minnie Carter, who is also a devisee and legatee named in said will, contends that the order is erroneous in that (1) It purports to give the petitioner Benjamin Edward Toler an estate in fee simple, whereas by the terms of the will he is entitled to a life estate in the rest and residue of the estate, with the remainder over to certain beneficiaries; (2) No order appears therein directing that on the death of the life tenant, the remaindermen named in the will shall receive the property in the respective amounts as provided by said will; and (3) The court failed to order that the income from the rest and residue was subject to administration and other expenses set forth in the first paragraph of the will.

Jessie Lee Toler died on September 26, 1946, at the age of 83 years. The pertinent parts of her will, dated June 13, 1946, are as follows:

> "First: I direct my Executor, hereinafter named, as soon as it shall have sufficient funds in its hands therefor,

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* Opinion vacated 319 P.2d 337.

to pay the expenses of my last illness, my funeral charges, all my just debts, and also any inheritance or estate taxes that may become due, by virtue of my demise, or by virtue of any devise or bequest hereunder.

"Fourth: I give, devise and bequeath the following property and/or sums of money to the following persons:

"(A) The sum of Five Thousand Dollars ($5,000.00) to my friend, Mrs. Minnie Carter; and

"(B) The sum of Five Thousand Dollars ($5,000.00) to my sister, Annie Brenot.

"Fifth: All of the rest and residue of my estate, real, personal, and/or mixed, wherever situated, I give, devise and bequeath to my brother, Benjamin Edward Toler, for and during his natural life, with the right to the full use and benefit of all of the rents, issues and profits therefrom with the remainder over in fee to the following persons and in the following amounts, to-wit:

"(A) One-half (½) thereof to my good friend, Mrs. Minnie Carter;

"(B) One-fourth (¼th) to my nephew, Eddie Ponder, or his heirs by right of representation; and

"(C) The remaining one-fourth (¼th) thereof to be divided equally among the following persons, or if any be deceased, their heirs by right of representation: Susie Ponder, Annie Brenot, William Morris, Roland Morris, Marie Brenot Murdock, Lillian Brenot Glasman, and Eddie Brenot."

The will was admitted to probate on October 18, 1946, and the Bank of America National Trust and Savings Association was appointed executor thereof. The appraised value of the real and personal property belonging to the decedent at the time of her death was the sum of $186,657.11 and the principal asset of the estate was a ranch consisting of approximately 75 acres of oranges, 6 of lemons and 3 of avocados, some unimproved land, dry farmed for hay and grain, and a homesite of approximately 2 acres.

In 1947 the executor obtained a court order authorizing it to continue the business of operating the citrus orchards and conducted this operation for approximately 8 years. Notice to creditors was published October 22, 1946, and all claims filed against said estate, amounting to $2,566.20, were paid within six months thereafter. On February 25, 1949, an order settling the first account current, which had been filed for the period from October 18, 1946, to January 6, 1949, was made by the court, in which order it was determined that all inheritance taxes had been paid; that the time for filing and presenting claims against said estate had expired and all claims filed had been paid. On or about August 5, 1954, the ranch belonging to the estate was sold at a probate sale for $291,500 and the sale was confirmed by the court on or about February 15, 1955. The second account current and report of the executor for 1949 to 1955 showed a balance of property on hand as of April 27, 1955, of $311,717.79, of which $309,296.47 was cash.

On December 19, 1955, a petition for preliminary distribution under the provisions of section 1000 of the Probate Code was filed on behalf of said Benjamin Edward Toler by his duly appointed guardian, Susan E. Ponder. The petition was heard by the court on December 30, 1955, and submitted for decision. On February 20, 1956, the court granted the petition and made and entered an order for preliminary distribution of the sum of $200,000, under and according to said will for the use and benefit of said Benjamin Edward Toler. This is the order from which the appeal herein is taken. It is stated therein that there is no dispute between the parties as to the pertinent facts upon which said petition for preliminary distribution was based; that due notice of the hearing of said petition has been given; that all claims filed against said estate have been paid; that all taxes have been paid; that said decedent bequeathed cash legacies of $5,000 each to Minnie Carter and Annie Brenot; devised and bequeathed the entire rest and residue of her estate, real, personal and mixed, to her brother, said Benjamin Edward Toler, for and during his natural life, with the right to the full use and benefit of all the rents, issues and profits therefrom, with the remainder over in fee to the persons and in the amounts hereinafter set forth; that both of said cash legacies were fully paid as of June 1, 1955; that the claims of the executor and of the attorneys for the executor for extraordinary commissions and fees mentioned in the petition for preliminary distribution herein and the accounts of said executor are being contested by written objections and exceptions filed herein by Benjamin Edward Toler and other parties interested in said estate; that as of December 15, 1955, the executor had on hand assets of the estate aggregating $308,934.69, of which $307,013.37 was in cash. The order then provides:

> "That said Benjamin Edward Toler is entitled to preliminary distribution of such portion of his legacy, devise or share of said estate under said last will of said decedent as the Court may designate as safe and proper; that although said estate is not in a condition to be finally closed or distributed, there may be safely and properly distributed at this time to said Benjamin Edward Toler, as devisee, and legatee under the last will of said decedent, without loss to the creditors or any creditor of the estate, or injury to the estate, or any person interested therein, the following described property, to wit: the sum of Two Hundred Thousand Dollars ($200,000.00) cash, in lawful money of the United States, the same to be distributed by the executor of said estate to said Susan E. Ponder, as the guardian of the person and estate of said Benjamin Edward Toler, an incompetent person, the possession thereof to be distributed to said guardian on condition that said funds aggregating said sum of $200,000.00 be deposited by said guardian in a trust company, as depositary or custodian, pursuant to and in compliance with the provisions of section 1514 of the Probate Code, in connection with the reduction of the bond of said guardian, in the matter of the estate and guardianship of said Benjamin Edward Toler, an incompetent person, case No. 371353, pending in the Superior Court of the State of California, in and for the County of Los Angeles, and the expenditure and investment of said funds to be through proceedings in the matter of said guardianship and by said Susan E. Ponder, as guardian of the person and estate of said Benjamin Edward Toler; that the giving of any bond by the petitioner herein may be safely dispensed with.

"It is therefore ordered by the Court that property of said estate consisting of the sum of $200,000.00, in cash, lawful money of the United States, be and the same is hereby distributed to said Susan E. Ponder, as guardian of the person and estate of said Benjamin Edward Toler, an incompetent person, on condition that said sum of $200,000.00 be deposited in a trust company, as depositary or custodian, pursuant to and in compliance with the provisions of section 1514 of the Probate Code, in connection with the reduction of the bond of said guardian, in the matter of the estate and guardianship of Benjamin Edward Toler, an incompetent person, case No. 371353, pending in the Superior Court of the State of California, in and for the County of Los Angeles.

"It is further ordered that the Bank of America National Trust and Savings Association, a national banking association, as executor of the last will and testament of said Jessie Lee Toler, deceased, shall and it is hereby directed to deliver the possession of said sum of $200,000.00 to said Susan E. Ponder, as guardian of the person and estate of said Benjamin Edward Toler, on condition that said funds be deposited in a trust company as above provided; and that said executor is hereby authorized and directed to deliver said sum of $200,000.00 to such trust company as may be appointed as depositary or custodian of said sum of $200,000.00 in the matter of said guardianship, said appointment to be evidenced by a certified copy of the order directing the deposit of said funds with such trust company, and the receipt of such depositary or custodian shall be a valid discharge and acquittance for said sum of $200,000.00 so delivered.

"It is further ordered by the Court that the expenditure and investment of said funds on deposit with said depositary or custodian shall be made by and through proceedings in the matter of said guardianship by said Susan E. Ponder, as the guardian of the person and estate of said Benjamin Edward Toler, an incompetent person, subject to the order and direction of the court in which said guardianship proceedings are pending.

"It is further ordered that the giving of any bond by the petitioner herein be dispensed with and that said preliminary distribution is ordered without bond."

[1] The statutory provisions governing preliminary distribution in an estate are found in Statutes of 1953, Section 2, Chapter 417, Probate Code, § 1000 et seq. There is no dispute as to the facts upon which the order of distribution was based or the sufficiency of the evidence to support the facts. The law favors the delivery of a legacy or specific property to a legatee, devisee or heir for partial distribution as soon as this can be done without jeopardizing the rights of other persons who are interested in the estate. In re Estate of Morelli, 102 Cal.App.2d 39, 42, 226 P.2d 716. And as is said in Re Estate of Glenn, 153 Cal. 77, 80, 94 P. 230, 231: "It is his property, and he has the right to enjoy the same at the earliest possible moment consistent with the proper administration of the estate." Here, the court concluded that partial distribution could safely and properly be made without loss to the creditors or any creditors of the estate, or injury to the estate or any person interested therein. This conclusion is not challenged by the appellant.

The appellant contends that the order distributes a fee simple estate in $200,000 to the life tenant, Benjamin Edward Toler, instead of a life estate, as provided by the will. We do not so construe the order. The meaning and effect of the will was not questioned and it is not claimed or contended by petitioner that he is entitled to anything more than a life estate in the remainder of the estate after the payment of the cash legacies. He states that he stands upon his rights to the "full use and benefits of all of the rents, issues and profits" of said life estate, as provided by said will. The reporter's transcript shows that at the hearing on the petition, counsel for petitioner stated to the court that preliminary distribution was important "because all this money is lying in the bank and the bank hasn't indicated in its account it is paying interest on it" and that he asked the court to "make it possible, if it can be done with safety to the rest of the people, the remaindermen, for the money to go to work so that Mr. Toler may have some income from it."

The court stated in the order that Toler had a life estate in the remainder of the estate after the special bequests had been paid and that the estate was not in a condition to be closed or distributed; and that the special bequests and all claims filed against the estate have been paid.

[2] Section 818 of the Civil Code provides that the owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

In the instant case the estate was reduced to cash and the life tenant was entitled to the full use and enjoyment of his estate, restricted only in that the estate of the remaindermen should not be permanently diminished in value by his neglect to do what an ordinarily prudent person would do in preserving his own property. Bliss v. Security-First Nat. Bank, 81 Cal.App.2d 50, 55, 183 P.2d 312. It is further held in that case, 81 Cal.App.2d at page 56, 183 P.2d at page 316, that

> "Where a decree distributes a legacy to a person for his natural life with the unused portion thereof to go to a remainderman, it creates a mere life estate in the first taker and vests the unused portion of the estate in the remainderman. And the first taker holds the estate not as owner but as trustee in the sense that he must have due regard for the rights of him who will succeed to the title in fee. This constitutes him an implied trustee. Hardy v. Mayhew, 158 Cal. 95, 104, 110 P. 113, 139 Am.St.Rep. 73; Collins v. Hartford Accident & Indemnity Co., 178 Va. 501, 17 S.E.2d 413, 418, 137 A.L.R. [1046] 1054."

[3] It follows that the life tenant herein was entitled to the possession of the $200,000 involved, subject to the limitations as to its use as prescribed by the rules heretofore announced. The trial court ordered distribution of this money to Toler's guardian, on condition that it be deposited in a trust company and that the expenditures and investment of said funds be made by and through proceedings in the matter of said guardianship. The order does not provide that the said sum of $200,000 is distributed to Toler in fee and can be reasonably construed to mean that the court did not intend to distribute a fee simple estate therein to Toler.

In 21 Cal.Jur.2d, section 800, page 203, it is said that the probate court has a broad discretion in passing on a petition for preliminary distribution, and in the absence of a clear showing of abuse its conclusion that the estate is in such condition that it may or may not be subject to preliminary distribution will not be disturbed on appeal. And in section 803, page 205, it is said:

> "As to all matters except the act of the representative in himself purchasing estate property, the rule that all presumptions must be indulged in favor of the regularity of a proceeding leading to the rendering of a judgment and in support of the judgment is applied to a decree of preliminary distribution with no less rigor than to any other kind of judgment. It is therefore presumed that the evidence on which a decree of preliminary distribution was predicated was in all respects sufficient and competent and that any legal objections that could have been made against it were made by the party objecting to the granting of the petition and were decided by the court at the hearing."

The claim of appellant that the order was erroneous in that it failed to direct that on the death of the life tenant the remaindermen named in the will should receive the property in the respective amounts named in the will is without merit, as, under the circumstances shown, it is presumed that Toler's guardian will not dissipate the corpus of the estate. All expenditures from the fund transferred to her are controlled by the court, and when final distribution is ordered in the estate, any further expenses of administration can be properly allocated by the court.

We conclude that the probate court did not intend by its order to distribute the $200,000 involved to the petitioner, Benjamin Edward Toler, in fee; that no such distribution was effected by the order and that the rights of the appellant were not prejudiced thereby. As so construed, the order for preliminary distribution is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

151 Cal.App.2d 369

W. Francis WILSON, Plaintiff and Appellant,

v.

J. Newton BRAMBLETT, Frank J. Stefanich, Stuart M. White, James G. Huebner, Tim Mazzoni, and F. M. Hammack, Defendants and Respondents.

Civ. 5399.

District Court of Appeal, Fourth District, California.

May 28, 1957.

Action on note given for services rendered to partnership by plaintiff, who had actual knowledge of terms of partnership agreement and limitations respecting authority of members thereof. From adverse judgment of the Superior Court, Fresno County, Arthur C. Shepard, J., the plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that partners' liability on original note, which was signed by only two of general partners, and copy thereof was conditional, depending on obtaining of signature of another general partner to note or ratification by individuals signing and that note was not duly executed and delivered.

Judgment affirmed.

1. Partnership ⟹217(3)

In action on note for services rendered to copartnership by plaintiff, who had actual knowledge of terms of partnership agreement and limitations respecting authority of members thereof, evidence sustained finding that partners' liability on original note, which was signed by two of general partners, and copy thereof was conditional, depending on obtaining of signature of another general partner thereto, and that note was not duly executed and delivered.

2. Bills and Notes ⟹64

Where note is given under agreement that it is not to become binding until signed by another person, failure to obtain such additional signature precludes recovery as between original parties or transferees who have notice of agreement, unless obtaining of additional signature is wrongfully prevented by maker.

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Iener W. Nielsen, James Robert Nielsen, Fresno and Kent A. Blake, Phoenix, Ariz., for appellant.

Aten & Aten and Lawrence W. Young, Fresno, for respondents.

GRIFFIN, Justice.

[1] Plaintiff and appellant W. Francis Wilson, an attorney at law in Phoenix, Arizona, brought this action against certain named defendants, including respondents J. Newton Bramblett, Frank J. Stefanich, Stuart M. White, James G. Huebner, Tim Mazzoni, and F. M. Hammack, to recover on a promissory note for $9,845.54, alleged to have been executed on August 30, 1951, by defendant C. M. S. Kipling (not served) and respondent Stefanich. It was subsequently signed by C. M. S. Kipling, as general partner, under the typewritten title "The Kipling Syndicate". The note was for claimed attorneys' fees rendered to The Kipling Syndicate, a California copartnership. The court found generally in favor of defendants; that no such note was ever *executed or delivered* by said individuals or the partnership; that Kipling's power, as a general partner, was limited, and did not include the power to execute a note on behalf of the syndicate; that the syndicate was a limited partnership, and plaintiff well knew of such limitation and did not act in good faith; that the delivery and liability of the parties under said note was conditioned on the fact that Bramblett, a general partner, would also sign it; that in fact he did not sign it and there was no actual delivery to plaintiff of said note; that it was materially altered by plaintiff and accordingly the note was of no force and effect. Plaintiff was denied recovery. Judgment went for defendants and respondents.

It is appellant's contention that the evidence does not support the findings of (1) a limited partnership; (2) that Kipling and Stefanich did not have authority to execute the note for the partnership; (3) that it was conditionally delivered; or (4) that appellant materially altered it.

The facts indicate that on January 7, 1950, at Fresno, defendants signed articles of limited partnership to acquire and develop and sell certain oil properties in Arizona. It was capitalized under a unit system, showing the names of the limited, as well as the general partners, and the number of units owned by each. The general partners were Bramblett and Stefanich, of California, and Kipling and Harris, of Phoenix, Arizona. Under the partnership agreement the remaining defendants were limited partners and the disbursement of any money was to be made by Bramblett and Stefanich, who had the sole authority to sign all checks. Only the general partners had authority to carry on the business of the copartnership. The limited partnership agreement, although signed by all parties concerned, was neither sworn to nor recorded, as required by Section 15502 of the Corporations Code. The evidence shows the reason it was not recorded was due to the likelihood that other people might be haunting them as prospective investors. Apparently appellant knew of those claimed defects and the court so found. It also found, in effect, that as between the partnership and appellant, there had been a sufficient compliance with the law under subdivision (2) of that section. It does appear that for convenience sake, in purchasing and negotiating for other land or leases, on May 10, 1950, all limited and general partners gave a limited written power of attorney to Kipling to "execute documents of conveyance * * * leases * * * and such other documents as are necessary to acquire or dispose of real property" belonging to the syndicate. It did not include the execution of promissory notes on behalf of the syndicate. The evidence also shows that the syndicate also formed a corporation and operated through such corporation. Appellant was president of it and acted as attorney for both companies. He had some arrangement to purchase stock in it, if it proved productive. The account of attorney's fees and expenses incurred arose for his advice and services rendered to both. All of the files and records were kept in appellant's office, including a copy of the partnership agreement. Some oil drilling followed which apparently was not entirely successful. Appellant rendered monthly accounts to the syndicate for the claimed indebtedness due him. Harris, a general partner, terminated his interest in the syndicate and the three remaining general partners conducted the business. There is testimony that as to important issues the general plan was to obtain the consent or ratification of all three, but as to minor matters, this was not necessarily always the case.

On August 30, 1951, Stefanich and Kipling met with appellant in his office to obtain some papers from him. Plaintiff refused to turn them over until they arranged for the payment of his claimed attorney's fees. They were unable to pay him. Appellant then prepared a promissory note, in typewritten form and in duplicate, covering the amount indicated. It recites: "* * * we, the undersigned, jointly and severally promise to pay" plaintiff the amount indicated, at $100 per month, beginning October 1, 1951, including 4 per cent interest until paid. Then follows three lines under which were typed the names C. M. S. Kipling, Frank J. Stefanich, and J. Newton Bramblett. No mention was made therein of the syndicate, in any form. For all intents and purposes the note on its face indicates an individual liability and not a partnership liability. The note and the copy were then signed by Kipling and Stefanich. There is some conflict in the evidence as to what was said in connection with the claimed delivery of the note. All agreed that Stefanich would return to Fresno, tell Bramblett of the transaction, and see if he would sign it, and if so, it would then be forwarded to appellant. The copy was left with appellant. On Stefanich's return, Bramblett refused to sign, or at least did not sign the original note. Considerable correspondence ensued between the parties.

From this it may well be indicated that the original note or the copy was not to be effective as to the other two makers or the partnership unless Bramblett also signed. On September 19, 1951, appellant wrote Stefanich: "I want that note signed by Newt (Bramblett) in exchange for the one that I have, or else I want to know that he isn't going to sign". (It appears that appellant had previously threatened to sue the syndicate and these individuals for this sum, on an open book account.) On September 24, 1951, Stefanich replied that Bramblett was out of town for three weeks and he could not see him until his return; that he explained the situation to Bramblett and he said he wanted to think it over. He wrote: "You have our two signatures which will hold for the time anyhow." On October 8th, Stefanich wrote appellant: "Though Newt hasn't said he won't sign the note, the fact remains he has not. Whether he will join with Kip and I within the next few days I am not at all certain though I think he will. However, this situation raises a point since Kip and I signed under the condition the note wouldn't be binding on either of us if Newt didn't also sign. Just where do we stand?"

On October 12th, plaintiff answered:

> "My understanding of the delivery of the note was that the executed note which I had in my possession was a settlement of the debt as far as you and Kip were concerned, and that you were to secure a note signed by you, Kip and Newt and return the same to me in exchange for the note that I kept. However, please be informed that if you wish to state that the note was conditionally delivered conditioned upon Newt's signing the note which you have with you, it is perfectly all right with me, and it is possible that my memory in that connection is not correct. If you wish to settle this matter as far as you and Kip are concerned, it will be necessary for you and Kip to write me a letter stating that you ratify the note which has already been delivered. If you wish to settle this matter by executing the note which you have in your hands and have Kip and Newt execute it likewise, you may send the same to me on or before the 20th day of October, together with the first payment due on the 1st day of October, 1951. If I have not received either of the foregoing settlements by that time, I shall proceed to institute an action for the *collection of the account*." (Italics ours.)

On October 20th, Stefanich sent $100 "to be applied to the reduction of the open account", and stated to appellant: "Newt has not yet signed the note, so in view of the situation we can let the subject of the note ride until I see you. *Anyway* we decide to proceed, on the open account or a note the result will be the same in the long run for all practical purposes. Certainly I don't want to be bound on a note unless all three of us are similarly bound, I am sure you will agree."

Appellant apparently wrote on the duplicate note that the $100 was a payment on the note. However, on October 23rd, appellant replied that he had credited the $100 "to the account" and said:

> "I can understand your feeling of not wanting to do something with regard to the account that the other fellows are not willing to cooperate on. The only thing in this regard is that you are probably all jointly and severally liable for the entire amount, and as you say, in the long run there is not a lot of difference between an open account and a note, * * *
>
> "I will expect another hundred dollar payment on the 1st of November, and on the 1st of each month thereafter. However, it is to be distinctly understood that unless the note which I have is *ratified* or the note which you have is *signed by the three of you*, there is no implication whatsoever that no action will be brought on the account even if the hundred dollars is paid each month.

"I appreciate your leaving me in a position where I can best protect myself, and think you are very foolish to let it ride that way." (Italics ours.)

On November 3rd, Stefanich enclosed another $100 "for payment of account." Apparently some time passed during these negotiations. No action was filed on the account or on the note. The original note, dated August 30, 1951, was still in the hands of Stefanich. Appellant testified that in December, 1951, Stefanich and Kipling were in his office; that Kipling said he could legally sign for the partnership and appellant had him sign the duplicate note, which had been retained by appellant, adding in typewriting: "The Kipling Syndicate By (Signature) C. M. S. Kipling, General Partner." The original contained no such endorsement or insertion. Bramblett testified it was not until January, 1955, after this action was instituted, that he, for the first time, was informed of this addition. Stefanich testified he was present in Wilson's office in December, 1951, with Kipling, discussing other matters; that the subject of Bramblett's refusal to sign the note came up; that Kipling volunteered the statement that he, as a general partner, was authorized to sign for the partnership but he did not do so at the time; that he did not know Kipling had signed for the partnership, as indicated, until December, 1954; that he never authorized him to sign it as such general partner and he was never notified at the time it was signed that Kipling was signing for the partnership, and that appellant never received his consent nor the consent of any of the general or limited partners to add it. It was not until October 28, 1954, when appellant brought this action.

[2] Many of the several defenses made by respondents and found by the court as to why the note was unenforceable against these defendants appear to be tenable. Without discussing them, we conclude that respondents' liability on the original note and copy thereof sued upon was conditional, depending on the signature of Bramblett or ratification by the individuals signing, and was not duly executed and delivered, within the meaning of that term. This conclusion is sufficiently supported by the evidence and the law, even though appellant retained a copy of the note. It therefore becomes unnecessary to determine the other claimed defenses. Appellant had actual knowledge of the terms of the partnership agreement and the limitations respecting the authority of the members thereof. The return of the original note to appellant was conditioned on its being signed by respondent Bramblett. It was never returned. Respondents' repudiation of the note left plaintiff free to sue on the original account. Although the evidence is conflicting, it appears that Bramblett and Stefanich never authorized the signing of the partnership name to the carbon copy of the note by Kipling. Appellant elected to stand on his chance of recovery on the carbon copy of the note, as thus altered. This was his unfortunate choice. It has been definitely held that where a note is given under an agreement that it is not to become binding until signed by another person, the failure to obtain such additional signature precludes a recovery as between the original parties or transferees who have notice of the agreement, unless the obtaining of the additional signature is wrongfully prevented by the maker. 10 C.J.S. Bills and Notes § 79, p. 517; 8 Cal.Jur.2d 537, sec. 213; Rogers v. Harris, 138 Cal.App.2d 1, 6, 291 P.2d 68; Silva v. Gordo, 65 Cal.App. 486, 224 P. 757; Allen's Collection Agency v. Lee, 73 Cal.App. 68, 238 P. 169; Peterson v. Matchinske, 108 Cal.App. 7, 291 P. 248; Harper v. French, 29 Cal.App.2d 214, 84 P.2d 216; Sec. 3097, Civ.Code; 8 Corpus Juris, p. 206, Sec. 336. Although the evidence on this question, and the question of ratification of the note is conflicting, the court's finding has evidentiary support.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

150 Cal.App.2d 716

SUBSEQUENT INJURIES FUND, STATE OF CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION, Bethlehem Pacific Coast Steel Corporation, a corporation, and Raymond Baldes, Respondents.

Civ. 22168.

District Court of Appeal, Second District, Division 1, California.

May 8, 1957.

Proceeding against Subsequent Injuries Fund by employee who sustained an injury to his eye resulting in industrial blindness in such eye subsequent to a previous industrial injury. The Industrial Accident Commission entered an order awarding additional compensation payable from Subsequent Injuries Fund, and the fund sought a writ of review. The District Court of Appeal, Doran, J., held that where there was no finding as to whether pre-existing injury of employee was known to employer, Commission improperly awarded additional compensation payable from Subsequent Injuries Fund.

Order annulled and proceeding remanded with instructions.

Workmen's Compensation ⚷1030

Where there was no finding as to whether pre-existing injury of employee was known to employer, Industrial Accident Commission improperly awarded additional compensation payable from Subsequent Injuries Fund. West's Ann. Labor Code, § 4751.

◆

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., Arthur L. Martin, Deputy Atty. Gen., for petitioner, Subsequent Injuries Fund.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, for respondent, Industrial Accident Commission.

DORAN, Justice.

The record discloses that on November 6, 1953, Raymond Baldes while employed as a maintenance mechanic for Bethlehem Pacific Coast Steel Corporation, suffered an industrial injury to his right eye resulting in industrial blindness in such eye. There had been a previous industrial injury on October 1, 1953.

The employee's application for hearing against the Subsequent Injuries Fund on December 28, 1954, states, "That prior to the industrial injuries involved herein, applicant was permanently and partially disabled with a mental disease, described as follows: Psychotic depressive reaction manifested by depression, psychomotor retardation, anxiety, worry, transient hallucinations, and delusions, feelings of helplessness, and inability to cope with difficulties, in partial remission".

In the course of the proceedings, the Subsequent Injuries Fund being a party thereto, the Commission finally found in its Decision After Reconsideration, that the employee's combined disability resulting from the industrial injury of November 6, 1953, and the prior permanent disability, amounted to 79 per cent of total disability. The Subsequent Injuries Fund was held liable for the difference between the 46% rating for the industrial disability and the 79% total combined disability rating, or a liability for 132 weeks at the rate of $30 per week, and thereafter a life pension of $8.77 per week.

The Subsequent Injuries Fund, seeking a writ of review, alleges (1) "That the respondent commission acted without and/or in excess of it jurisdiction. 2. That the Decision was unreasonable. 3. That the Findings of Fact do not support the Decision or Award. 4. That the Decision and Award against the * * * Subsequent Injuries Fund was not supported by substantial evidence". The petitioner seeks to have the Decision and Award annulled. This position is predicated upon the theory that Raymond Baldes' mental condition was asymptomatic prior to the industrial injury of November 6, 1953 (and unknown to the employer) and therefore improperly used as a basis for an award against the Subsequent Injuries Fund".

In State of California, Subsequent Injuries Fund v. Industrial Accident Commission and Joseph Strauss, 135 Cal.App.2d 544, 288 P.2d 31, 34, the reviewing court said: "In construing section 4663, Labor Code (the basic law of apportionment) it has been held, in effect, that if the commission finds that the pre-existing disease or condition was 'disabling' (that is, symptomatic and interferes with the employee's ability to work) then an apportionment between the prior disability and the resultant disability due to the subsequent injury would be made. See Subsequent Injuries Fund v. Industrial Acc. Comm., 39 Cal.2d 83, 244 P.2d 889."

This was followed by Urquiza v. Industrial Accident Commission, 144 Cal.App.2d 322, 300 P.2d 871, 873, where the same court stated: "We affirm the statement made in that [Strauss] case, 135 Cal.App.2d at page 553, 288 P.2d at page 37: 'We conclude that section 4751, Labor Code, was not intended to apply to asymptomatic disease processes which were unknown to both employee and employer and which in nowise interfered with the employee's ability to work'." The proceeding was therefore remanded to the commission to determine whether or not the employer had such knowledge of the employee's preexisting disability, and if so, the degree of disability caused by the combination, etc.

The same principle was followed in State of California, etc. v. Industrial Accident Commission, and Marguerite Bachrach, 147 Cal.App.2d 818, 306 P.2d 64, 69, and the reviewing court there said: "Did the employer know (or should have known) as a reasonable person of the preexisting arthritic processes? The kind of physical impairment the Legislature had in mind was one of which the employer had knowledge since the statute was designed to encourage the employment of partially disabled people and an obscure disability unknown to the employer would present no handicap to employment."

In the instant case the record leaves no room for doubt that the employee had a serious mental condition preexisting the industrial injury. During Navy Service, Mr. Baldes had been hospitalized for neuropsychiatric survey, and had been rated by the Veterans Administration as having incurred his mental illness while in the Armed Forces. However, the employee apparently experienced no difficulty in respect to the employer's work, although there was medical evidence to the effect that "applicant was somewhat disabled from work before Nov. 1953, by reason of his personality disorder". There is apparently no evidence touching upon the question of the employer's knowledge of the previous disability.

The difficulty then, is similar to that encountered in the Urquiza case previously cited [300 P.2d 873], where the court said: "The commission should have determined whether or not Smith [employer] had such knowledge. While the record on the subject is confusing, the commission could have required the confusion to be cleared up or could have found against petitioner for failure of proof. However, the commission gave no consideration to this matter * * *".

In view of the recent cases cited, there can be no doubt as to the rule which should be applied, and that the Subsequent Injuries Fund would only be liable in those cases where the preexisting injury was known or would have been known to the employer. In this connection it may be noted that the employee in the Urquiza case had suffered an eye injury as in the present situation and had a preexisting mental disability.

The order is therefore annulled and the proceeding remanded to the respondent commission for further proceedings not inconsistent with the views expressed herein.

WHITE, P. J., and FOURT, J., concur.

Dorothy M. HOLTZ, Plaintiff and Appellant,
v.
Byron W. TAYLOR, Mrs. Byron W. Taylor, United Plumbing and Heating Company, Inc., a corporation, Pardee Building Corporation, a corporation, Eleonora Bertha Wanglie, Administratrix of the Estate of Orville Brew, a/k/a Orville E. Brew, deceased, Doe IV–V, Defendants,
United Plumbing & Heating Company, Inc., a corporation, and Pardee Building Corporation, a corporation, Respondents.
Civ. 21880.

District Court of Appeal, Second District,
Division 1, California.
May 9, 1957.

Rehearing Denied June 6, 1957.
Hearing Granted July 8, 1957.

Action arising out of automobile collision against administratrix of deceased motorist, his employer, and the automobile owner, allegedly a co-employer. The Superior Court of Los Angeles County, Ellsworth Meyer, J., rendered judgment of nonsuit against two defendants and plaintiff appealed. The District Court of Appeal, White, P. J., held that where, plaintiff compromised her claim against owner upon receiving amount which would have been due from him in event jury verdict was that he was liable only as owner and not as co-employer, and dismissed action as to him, plaintiff's conduct operated as release and the dismissal as one with prejudice, so that there was, in effect, a retraxit relieving from liability, the admitted employer, as one alleged to be jointly liable.

Affirmed.

1. Appeal and Error ⚷494

Appeal from order granting nonsuits was considered even though no judgment of nonsuit was included in record. West's Ann.Code Civ.Proc., § 581d.

2. Automobiles ⚷244(26)

In action for deaths of occupants of automobile which collided with automobile driven by plumber who was going with his wife from Las Vegas, where he worked, to their home in Los Angeles for the weekend, evidence failed to show that plumber was acting within scope of his employment by his Las Vegas employer.

3. Compromise and Settlement ⚷4

Where, in automobile collision case against administratrix of deceased motorist, owner of automobile which he had been driving, and his admitted employer, during jury deliberation, plaintiff who contended that automobile owner was liable as joint venturer of admitted employer compromised her claim against owner upon receiving amount which would have been due from him in event jury verdict was that he was liable only as owner and not as co-employer, and dismissed action as to him, plaintiff's conduct operated as release, and dismissal as one with prejudice, so that there was, in effect, a retraxit relieving from liability the admitted employer, as one alleged to be jointly liable. West's Ann.Code Civ.Proc., § 581, subd. 4.

◆

William Jerome Pollack, Abraham Gottfried, Beverly Hills, for appellant.

Spray, Gould & Bowers, Frank J. Breslin, Jr., Los Angeles, for respondent Pardee Building Corp.

Dryden, Harrington, Horgan & Swartz, Vernon G. Foster, Los Angeles, for respondent United Plumbing and Heating Company, Inc.

WHITE, Presiding Justice.

Plaintiff, Dorothy M. Holtz, brought the instant action for damages for the wrongful deaths of both her husband and son, who (in addition to the guest in their automobile) were killed when an automobile driven by Orville Brew collided with theirs, between six and seven o'clock in the evening of Friday, June 11, 1954, at Pearblossom, California, approximately 227 miles from Las Vegas, Nevada, on the road to Los Angeles. Orville Brew and his wife, the only occupants of the automobile driven by Brew, also died in the collision. Brew worked in Las Vegas and lived in Los Angeles. The record contains the testimony of no one who saw the collision.

The defendants include the Brew Estate, Brew's Las Vegas employer, United Plumbing & Heating Co., Inc., Brew's former employer, Byron W. Taylor, who owned the car driven by Brew and a plumbing supply shop in Los Angeles, was a plumber licensed in California and not in Nevada, but was interested in the Las Vegas job upon which Brew had been employed by United at Taylor's request, Mrs. Taylor, and Pardee Building Corporation, owner of real property upon which Brew might have done some work in connection with the installation of a sprinkler system.

By minute order dated December 20 and entered December 22, 1955, a motion for nonsuit was granted to the defendant Mrs. Taylor; and "Motion of defendant United Plumbing & Heating Company, Inc., for a nonsuit is granted and said defendant is given its costs against plaintiff Dorothy M. Holtz, in the sum of $185.90 * * *." A like motion of defendant Pardee was granted with costs of $85.85. Plaintiff has appealed from the order granting nonsuits as to the defendants United and Pardee.

[1] While United's notice to plaintiff dated December 27, 1955, states that "on December 20, 1955, a judgment of nonsuit was entered", no judgment of nonsuit is included in the record on the instant appeal. However, if "* * * no judgment was entered, none was required * *. [W]hen a motion for nonsuit is granted the minute entry thereof is sufficient for all purposes and is treated the same as a final judgment and therefore appealable." Budrow v. Wheatcraft, 115 Cal.App.2d 517, 522, 252 P.2d 637, 640; Code Civ.Proc. § 581d. Therefore, only the appeal from the minute order granting the motions of defendants, United and Pardee, for nonsuits as to them requires our consideration.

At the close of the argument on defendant Pardee's motion for nonsuit, the Court asked, "What evidence is there relative to the Pardee defendant?" and plaintiff's attorney, Mr. Pollack, answered "None". On examination of the evidence, we likewise find no evidence of any liability on the part of defendant Pardee. Nevertheless, plaintiff, in her Opening Brief states: "This is an appeal from the granting of the judgment of nonsuit in favor of United and Pardee. However, appellant is pressing the appeal only with respect to United." In her Opening Brief, plaintiff further states: "There is only one question involved in this appeal: Did plaintiff's evidence establish prima facie that the negligence of Brew was imputable to United?" Under the circumstances of the instant action, only delay and annoyance could have been accomplished by the appeal from the minute order granting defendant Pardee's motion for nonsuit. The appeal is manifestly frivolous.

Brew was on United's payroll as a journeyman plumber. United paid the Brew Estate for nine hours work by Brew on the day of his death. United billed the general contractors therefor and was repaid by them. That was the customary procedure regarding labor furnished by United in connection with its subcontract.

The accident occurred between six and seven o'clock on Friday evening. Brew and his wife were on their way home to Los Angeles for the weekend and had travelled 227 miles after Brew left work in Las Vegas.

Appellant's argument is difficult to follow, but it includes the following assertions: "The negligence of Brew was imputable to United on any one or more of * * * three different theories: (a) Brew was an employee of United acting within the scope of his employment; (b) Brew was an employee of United and Taylor (joint venturers) acting within the scope of his employment; or (c) Brew was an employee of United and Taylor (joint venturers) and besides * * * was also an agent, servant and employee of Taylor acting within the scope of his employment while driving Taylor's car at the time of the collision."

[2] The record contains no substantial evidence that Brew, while on his way with

his wife to their home in Los Angeles, was acting within the scope of his regular employment, or any employment, by United.

[3] Conceding for the purpose of argument that United and Taylor were acting as joint venturers, and that Brew was acting within the scope of that joint venture while driving Taylor's automobile at the time of the accident, respondent United urges that it has been released by appellant's dismissal as to Taylor during the jury's deliberations at the trial, because a retraxit as to one of several who are jointly liable for negligence acts as the release of all. Appellant counters with the claim that the "covenant not to sue Taylor is not a retraxit". Whether the dismissal as to Taylor was in fact a retraxit is the first question to be determined on this appeal.

The record is far from clear with respect to Taylor's dismissal from the action.

The allegations of the amended and supplemental complaint are that "defendants, and each of them, were the owners of the motor vehicle referred to"; that Brew "was the agent, servant and employee of defendants, and each of them, and was acting within the time, place and scope of his said employment and agency"; that Brew "was driving the aforesaid motor vehicle with the consent, permission and knowledge of defendants, and each of them"; that Brew "and the other defendants, and each of them" negligently maintained, drove and operated their said motor vehicle". The prayer of the complaint is for judgment against defendants, and each of them. Defendant Taylor's testimony that his insurance company had paid the beneficiaries of the deceased guest in the Holtz car was taken for the purpose of showing the reduced amount of the liability imputed to him as owner of the automobile driven by Brew.

The Reporter's Transcript includes the following:

"Mr. Pollock (Attorney for plaintiff and appellant): Let the record show that the plaintiff, Dorothy M. Holtz, is dismissing the action without prejudice as to the defendant Byron W. Taylor; that it is the intention of all the parties that *he* reserves all his rights against the estate of Orville Brew. Is that right counsel?

"Mr. Melby (Attorney for defendant Administratrix of the Estate of Brew): That is the understanding.

"Mr. Sackett (Attorney for defendant Taylor): That is the understanding."

The minutes of the court dated December 21 and entered December 23, 1955, read in part as follows: "Trial is resumed * * the jury retires for deliberation. Motion of plaintiff to dismiss the action as to the defendant Byron W. Taylor without prejudice is granted, and counsel for plaintiff and for said defendant stipulate each party is to bear their own costs. It is stipulated by counsel for all parties herein that plaintiff retains all rights as against the defendant Administratrix of the Estate of Brew deceased. At 3:14 p. m. the jury returns into Court for further instructions, and at 3:19 p. m. the jury retires. At 3:25 p. m. the jury returns into Court with an incorrectly completed verdict and at 3:27 p. m. the jury again returns to the jury room for deliberation. At 4:05 p. m. the jury returns into Court with the following verdict: Title of Court and Cause: We the jury in the above entitled action, find for the plaintiff Dorothy M. Holtz and against the defendant Eleanora Bertha Wanglie, Administratrix of the Estate of Orville Brew, deceased, and assess damages in the sum of $40,000.00, and against the defendant Byron W. Taylor and assess damages in the sum of $——— * * *".

And, according to the Reporter's Transcript, the court then said to the jury: "* * * the plaintiff and defendant Taylor just a few minutes before you came down reached a settlement between themselves, and therefore it really was not of any practical value to answer your questions, after they had agreed to that and the plaintiff had entered a dismissal as to the defendant Taylor.

"* * * If, as contended by the plaintiff, the man Brew was an employee and acting in the scope of his employment, then

Taylor would be liable for the same amount as Brew. If, however, it was not a case of acting within the scope of his employment, but merely a simple permissive use, then Brew would be liable for whatever you found to be the damages, and Taylor would be liable to the statutory limit, but not beyond the statutory limit * * *".

In appellant's opening brief, she states: "* * * While the jury was deliberating plaintiff covenanted with Taylor not to prosecute the action further as against him for the sum of $6711.68 (the approximate balance of his insurance after payment of the death claim of Arthur H. McBain, who was riding in the automobile with the Holtzes) * * *". And in her reply brief, she states that "plaintiff executed a covenant not to sue Taylor wherein she reserved all her rights against United and the action was dismissed without prejudice as to that defendant." She then refers the Court to paragraphs 2 and 4 of the covenant, which she states read as follows:

"In executing this Covenant, I, Dorothy M. Holtz, expressly reserve any and all rights of action, claims, or demands which I may have against the estate of Orville E. Brew, and any other person, firm, or corporation, * * *

"It is further understood and agreed that it is a covenant not to sue and not a release".

Both appellant and United have cited numerous cases discussing the differences between a covenant not to sue and a retraxit. We are mentioning only those which were helpful to us in determining the question engaging our attention.

In Flynn v. Manson, 19 Cal.App. 400, 126 P. 181, plaintiff alleged injury because of the wrongful act of the defendants. She then moved to dismiss as to one defendant in consideration of $250, "reserving the right to proceed against the remaining defendants". A judgment of dismissal in favor of the one defendant was entered. When the matter came up for trial, the motions of the other defendants for dismissal as to them were granted, and the judgments of dismissal were affirmed on appeal. The court therein, 19 Cal.App. at page 403, 126 P. at page 182, quotes from Chetwood v. California National Bank, 113 Cal. 414, 426, 45 P. 704, as follows: "While plaintiff may sue one or all of the joint tort-feasors, he can have but one satisfaction. Once paid for the injury he has suffered by any one of the joint tort-feasors his right to proceed further is at an end. Where several joint tort-feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. By his withdrawal plaintiff announced that he has received satisfaction for the injury complained of. * * * It matters not, either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against one it is in law a satisfaction of the claim against them all". And, in the Flynn case, supra, 19 Cal.App. at page 404, 126 P. at page 182, the court held that *the saving clause did not prevent the dismissal as to one defendant from operating as a release of all.*

In the instant action, plaintiff received from Taylor the amount which would have been due from him in the event the jury's verdict should have been that Taylor was liable only as the owner of the automobile, and that Brew was not at the time of the accident acting in the course of any employment by Taylor (either alone or as a joint adventurer), which question was withdrawn from the jury by plaintiff's settlement with and dismissal as to defendant Taylor. The dismissal was made before the jury had rendered its verdict that Brew had been guilty of any negligence which could be imputed to Taylor, and before the jury had assessed plaintiff's damage.

Plaintiff having compromised her claims against Taylor and accepted the balance of his insurance coverage as owner of the automobile driven by Brew, and having dismissed as to Taylor while the jury was still deliberating, the agreement between plaintiff and Taylor, for all practical purposes was a release in consideration of the payment received. Abb v. Northern Pac. R. Co., 28 Wash. 428, 68 P. 954, 58 L.R.A. 293; Hawber v. Raley, 92 Cal.App. 701, 707, 268 P. 943.

In Pellett v. Sonotone Corporation, 26 Cal.2d 705, 160 P.2d 783, 160 A.L.R. 863, the agreement involved was that a certain joint tort-feasor defendant would defend the action until judgment and that the plaintiff, in the event of success in the action, would not levy execution upon any of the property of that certain defendant. It was neither a release nor a covenant not to sue and there was no dismissal of the action as to the defendant. In that decision, however, Mr. Chief Justice Gibson, speaking for the court, 26 Cal.2d at page 711, 160 P.2d at page 786, said:

"* * * the distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based mainly, if not entirely, on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit. The rule regarding a covenant not to sue was apparently adopted as an exception to the strict release rule because the courts desired to modify the latter rule by indirection."

In Markwell v. Swift & Co., 126 Cal.App.2d 245, 272 P.2d 47, 48 an action involving personal injuries suffered by the plaintiff because of the negligence of four named defendants, after the cause had been called for trial and before the first witness took the stand, plaintiff in open court dismissed as to the defendants Swift and Company and Ralph Chilton, in consideration of $250 and $100 respectively. Plaintiff's attorney announced to the court that plaintiff "will give a covenant not to sue and a covenant not to sue further". At the conclusion of plaintiff's case, motion for nonsuit was made by the other defendants on five grounds including "That the dismissal of the defendants, Swift & Company and Ralph Chilton, constituted a retraxit and barred any recovery against the remaining defendants". That motion was granted. Plaintiff appealed. This court, 126 Cal.App.2d at page 252, 272 P.2d at page 51, said: "While it is true, as contended by appellant, that a mere covenant not to sue one or more joint tort feasors does not operate to relieve other joint tort feasors [citing cases], such however is not the situation here presented. * * * The question to be determined is whether such a voluntary dismissal of two of the alleged tort feasors upon payment of a valuable consideration, under the circumstances here shown, is sufficient to constitute a retraxit and bar recovery against the remaining defendants * * *".

And further, 126 Cal.App.2d at page 253, 272 P.2d at page 51: "The rule therefore, would appear to be that where * * * the record discloses that a voluntary dismissal was entered as to two defendants in consideration of appellant having received some satisfaction in compensation for her injuries, all the requisite elements necessary to establish a retraxit, namely a voluntary dismissal and the receipt of some satisfaction, were present * * *."

Mr. Justice Carter, speaking for the court in Gagnon Co., Inc., v. Nevada Desert Inn, 45 Cal.2d 448, 455, 289 P.2d 466, 472, said: "* * * a mere statement that the judgment of dismissal is 'with prejudice' is not conclusive". That is equally true of the granting of a motion to dismiss "without prejudice". To determine whether a dismissal is with or without prejudice, it is necessary to consider all the facts and circumstances surrounding the motion and order.

Under the facts and circumstances of the instant action, we are persuaded that the dismissal as to defendant Taylor released him from liability and that it likewise released the other defendants alleged to be jointly liable for the same acts of negligence. The record on the instant appeal containing no written consent to dismiss signed by the other parties affected thereby, and the plaintiff's motion for dismissal having been made during the deliberations of the jury, it appears that the dismissal could have been granted only under the provisions of Code of Civil Procedure, Section 581, subsection 4, which authorizes only dismissals "with prejudice".

To us it appears that the nonsuit as to United was properly granted for the reason that plaintiff's evidence would not support a judgment in her favor against defendant United.

Because the retraxit as to Taylor precludes any further action against United even if the nonsuit as to it were erroneous, we deem it unnecessary to discuss the evidence in further detail.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

151 Cal.App.2d 72

Gulio FANUCCHI et al., Plaintiffs and Appellants,

v.

COBERLY-WEST COMPANY, a California Corporation, et al., Defendants and Respondents.

Civ. 5388.

District Court of Appeal, Fourth District, California.

May 16, 1957.

Hearing Denied July 10, 1957.

Class action by 18 cotton growers, on behalf of themselves and others similarly situated, against ginning company and its agents to recover for portion of cotton seed allegedly wrongfully withheld. The Superior Court of Kern County, Gordon L. Howden, J., rendered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that action could be properly maintained as class action since plaintiffs were an ascertainable class, basic facts necessary to establish liability were exactly the same with respect to each grower and since recovery by any grower would have to be on pro rata basis.

Reversed.

1. Action 🔑38(2)

A complaint states but one cause of action, irrespective of number or types of relief sought, if it is brought to enforce a single right.

2. Action 🔑1

There is marked difference between cause of action and legal theory or theories upon which recovery might be based.

3. Action 🔑38(1)

Statement of set of facts disclosing primary right in plaintiff and primary duty on defendant constitutes but one action, regardless of fact that several legal theories would support recovery by plaintiff.

4. Parties 🔑10

Class action may be brought to enforce constructive trust.

5. Action 🔑38(2)

Complaint, in cotton growers' class action against ginning company and its agents to recover for portion of seed derived from cotton delivered by growers to company on theories that arbitrary method of accounting employed by it resulted in its improperly retaining overage, that company violated Agricultural Code in failing to weigh seed before commingling it and that it reported improper weights of seed, stated but one cause of action based on breach of duty by company as growers' agents, irrespective of fact it prayed for constructive trust, restoration of excess seed or reasonable value thereof, and appointment of a receiver. West's Ann. Agric.Code, § 1299.19.

6. Parties 🔑10

Action by 18 cotton growers on behalf of themselves and others similarly situated, against a ginning company and its agents. to recover for portion of seed derived from cotton delivered to defendants over a period of years for ginning, on theory that defendants had failed to comply with provisions of statute requiring weighing of cotton seed of an individual grower before commingling it and had, by application of improper arbitrary formula, improperly retained portions of seed belonging to growers without keeping proper records, could be properly maintained as class action. West's Ann.Agric.Code, § 1299.19.

7. Parties 🔑11

Requirements of a class suit are that there exist a well defined community of interest in questions of law and fact and that suit be brought on behalf of definite ascertained or ascertainable class.

8. Appeal and Error 🔑917(1)

Reviewing court was required to accept allegations of a complaint to which demurrer had been successfully interposed.

9. Parties 🔑10

A class action could not be defeated by defendants' presentation of affidavits assertedly of one-third of members of class stating that they did not seek the relief and did not wish to be part of the class which plaintiffs represented.

10. Pleading 🔑192(2)

Demurrer for uncertainty will not lie where ambiguous or uncertain facts are presumably within knowledge of demurring party.

11. Pleading 🔑193(1)

Class action by 18 cotton growers against ginning company and its agents to recover for portion of seed delivered to company, as growers' agent, for ginning, on theory that it had been wrongly withheld and commingled was not founded on contract and complaint was not demurrable for failure to allege whether contract was written or oral. West's Ann.Code Civ. Proc., § 430, subd. 10.

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Vizzard, Baker & Sullivan, Bakersfield, Walch & Griswold, Hanford, W. A. McGugin, Fresno, for appellants.

Borton, Petrini, Conron & Brown, Jack W. Bradley, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This action was brought by 18 plaintiffs, on behalf of themselves and all other growers similarly situated, against a ginning company and its agents, to recover for a portion of the cotton seed derived from cotton delivered by the growers to the defendants over a period of years, for the purpose of ginning and processing the cotton and accounting for the proceeds. After separating the cotton lint from the cotton seed in each grower's cotton, the defendants weighed each grower's lint and accounted therefor. However, each grower's cotton seed was not separately weighed, but the seed coming from all the growers was commingled and weighed as a whole. The defendants fixed the amount of cotton seed to be attributed to each grower by using an arbitrary formula, without regard to the actual weight of the seed in each grower's cotton, and on that basis statements and payments were made to each grower. This action is based on the theory that by this method of accounting to the respective growers for their cotton seed, the amounts paid to each grower for his cotton seed were erroneous, and that a large "overage" of cotton seed remained which the defendants retained for their own use and for which the growers have never been paid.

The defendants interposed a demurrer to the second amended complaint setting up a general demurrer, and a special demurrer in which 13 grounds were separately stated. After a hearing on the demurrer the court expressed the opinion in writing that since the alleged misconduct of the defendants was the product of innumerable transactions, it could not be the subject of a class action; that while it is true that the "overage" of the grower's cotton seed, "for which they have not been compensated," has been commingled by the defendants into a "fungible mass", the possible defenses as to each transaction are so numerous that a trial as a class action would be intolerable; that "if the class action will not lie, then the causes of action of the various plaintiffs have not been separately stated"; and that the question as to whether this was a proper class action should be finally settled (by a suggested appeal) before proceeding with the trial. An order was then entered that the special demurrer was sustained on the grounds of misjoinder of parties plaintiff, failure to separately state causes of action, and want of capacity to sue, with ten days leave to amend; that the general demurrer and the special demurrer as to all other grounds was overruled; and that a motion to strike was ordered off calendar. In ordering the entry of this order the court said: "In making the foregoing rulings I have passed only on the question of the right of the plaintiffs to maintain a so-called 'class action'." (The grounds of special demurrer which were overruled alleged that the complaint was based on three sorts of contract, without stating whether they were oral or written; that the complaint was uncertain, unintelligible and ambiguous in many respects; and that the action was barred by various statutes of limitation.) The plaintiffs did not amend with respect to the three grounds on which the special demurrer was sustained, within the time allowed, and on motion of the defendants a judgment was entered dismissing the action. The plaintiffs have appealed from that judgment.

Briefly stated, the complaint alleges the following facts, among other things: that the plaintiffs complain on behalf of themselves and of all other growers in Kern and Tulare Counties who had cotton ginned by the defendants; that the name and address of each and every such grower is set forth in the books of the defendants and can definitely be ascertained therefrom; that the members of the class, exceeding several hundred, are so numerous that it is impractical to bring them all in individually; that proof of a common or single state of facts will establish the right of each member or grower to recover; that there are no records or means of ascertaining the amount of cotton seed overage which should be attributed to any one grower, except by use of said common set of facts; that the questions of fact and law involved are identical for each of said growers and affect each and every grower in the same manner; that in order for any one of said growers to recover he would have to prove the one common set of facts; that the defendants intermingled the cotton seed coming from the cotton delivered to it by all the growers into a mass of fungible goods, and each grower became an owner of his pro rata share thereof along with each and every other member of the class; that all of said growers produced the same variety of cotton by use of uniform methods of cultivation and harvesting; that the defendants used a uniform method of determining the amount of cotton seed in the cotton delivered to it by each of said growers; that the cotton seed of any one of said growers was never weighed or sampled; that after the defendants commingled the seed of each grower with that of every other grower, without weighing or sampling any of it, there was no way or means of determining the exact amount of seed delivered by or belonging to any one of them; that any distribution among the growers must be on a pro rata basis; that each year each grower was given gin statements purporting to contain the actual weight of his cotton seed, which purported weight had been arbitrarily fixed by the defendants at an amount less than the true weight; that in each of the years in question the named plaintiffs and hundreds of other growers delivered their cotton to the defendants to be ginned by them; that said cotton, including the cotton seed therein, was owned by the grower who delivered it to said gins; that in processing said cotton the defendants weighed and kept separate the lint of each grower from that of every other grower; that the cotton seed of each grower was never weighed, and was intermingled with the cotton seed of every other grower; that the intermingled mass of cotton seed belonging to all of said growers was weighed and records of such weights were kept in defendants' books; that the ownership interest of each grower in the intermingled mass of cotton seed varied in direct ratio to the whole of said mass, as the amount of cotton delivered by each grower bore to the whole of the cotton delivered by all growers; that the only possible means of determining each grower's interest in this commingled mass of cotton seed is by determining the total amount of cotton seed coming from the cotton delivered by all of said growers, and dividing it among all of the growers on a pro rata basis; that all of said ginning process took place out of the presence of the growers; that in violation of section 1299.19 of the Agricultural Code the defendants did not weigh said cotton seed before it was intermingled with that of other growers, and made or kept no record of the weight of the cotton seed delivered by any one of said growers; that the defendants not only intermingled the cotton seed of each grower at each gin but mingled the seed from several gins into a large mass of cotton seed at central places of storage and processing; that during each year the defendants issued gin statements to each grower purporting to show the weight of the cotton seed delivered by him; that these reported weights were inaccurate and erroneous, and consistently less than the actual weight of the cotton seed delivered by said growers; that the defendants knew this at all times and knew that the cotton seed was not weighed before it was intermingled; that said growers had had no knowledge of and no way of ascertaining whether or not the weight of cotton seed as set out in the gin statements given them by the defendants were correct; that each of said growers delivered his cotton to the defendants as his agent for the purpose of ginning it and selling said lint and cotton seed on his behalf, and the defendants so received it; that the defendants ginned said cotton and sold both lint and cotton seed on behalf of said growers or purchased it for their own interest; that the defendants paid the growers only for the weight of the cotton seed as set out in said gin statements, and kept all excess over such amounts; that the defendants were thus unjustly enriched at the expense of said growers, and they hold said overage or excess amounts of cotton seed as the constructive trustee of said growers; that the weight of cotton seed delivered by said growers exceeded by 10% the amount of cotton seed set out in the gin statements; that the defendants have thus retained 30,000 tons of cotton seed, or the proceeds thereof, as a constructive trustee for said growers; and that the reasonable value of the cotton seed thus retained by the defendants is $2,200,000. The prayer is that the defendants be declared constructive trustees of said mass of intermingled cotton seed for the benefit of the plaintiffs insofar as said "overage" is concerned; that the defendants be ordered to restore said excess or the reasonable value thereof to the plaintiffs or to a receiver, to be distributed to the plaintiffs in accordance with their respective interests; and that a receiver be appointed to take charge of said cotton seed or its reasonable value, to notify all members of said class of the judgment, to ascertain the pro rata interest of each of the plaintiffs and said growers in said cotton seed or the money received in lieu thereof, and to distribute the same among the growers according to their interests therein.

The appellants contend that this is a proper class action; that the identity of each member of the class is known and ascertainable; that each has a community interest in the common questions of law and fact which affect the rights of each of them; that the only real issue is as to whether or not there is any such overage for which the growers have not been paid; that it requires proof of a common set of facts to prove the basic fact and to establish the pro rata share of each grower; that individual suits would be too costly to be justified and if a class action is not permitted the entire amount will be lost to these growers, to whom it rightfully belongs; that there is no misjoinder of parties plaintiff; that only one cause of action has been stated; that the gravamen of the action is a breach of a fiduciary duty imposed by law, and not one dependent upon contract; and that once the common questions of law and fact are determined in such a class action the members of the class who wish to participate can, after notice, file their claim and the defendants may then assert and have determined any defense they may have as to the claim of any particular grower.

The respondents first contend that the special demurrer was properly sustained on the three grounds mentioned, because the complaint contains several causes of action which are not separately stated. It is argued (1) that in alleging a commingling of the cotton seed there is an attempt to plead an action for replevin or one for conversion; (2) that in alleging a constructive trust based on a violation of section 1299.19 of the Agricultural Code there is an attempt to allege a cause of action for breach of contract for purchase and sale; (3) that in alleging misrepresentations there is an attempt to allege an action in tort for fraud; (4) that in alleging the violation of a fiduciary relationship arising from agency there is an attempt to allege an action on quasi-contract; and (5) that some of the allegations are appropriate to an accounting action. In brief, it is contended that an effort is made to combine a tort action for fraud, a tort action for conversion, a replevin action, a contractual action, a quasi-contractual action and an accounting action, without separately stating them.

It is next contended that the special demurrer was properly sustained on the three grounds, since this is not a proper class action. In this connection it is argued (1) that there was no community of interest in the questions of law and fact between these parties because the facts necessary to prove their individual right to a recovery would vary with respect to their rights under separate contracts, their knowledge of and reliance on statements made, and whether or not they had consented to the acts of the defendants; (2) that there is not the required ascertainable class since the rights of each grower are dependent upon facts applicable only to him; (3) that the rule established by such cases as Barber v. California Employment Stabilization Comm., 130 Cal.App.2d 7, 278 P.2d 762; Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514; Watson v. Santa Carmelita Mut. Water Co., 58 Cal.App.2d 709, 137 P.2d 757; and Carey v. Brown, 58 Cal. 180 is that a class action will lie if a defendant by his acts simultaneously creates rights in a group of other people, but that such an action will not lie if such rights are created through separate transactions between a defendant and the members of such a group, even though such transactions are similar in type and nature; and (4) that the class of growers here in question were not united in a desire to prosecute this action, as shown by the affidavit of one Jackson.

Finally, the respondents argue that the court erred in failing to sustain the special demurrer on the grounds of uncertainty, ambiguity, unintelligibility, statutes of limitation, and the failure to allege whether the contracts were written or oral.

It clearly appears that the special demurrer was sustained in three respects on the theory that this was not a proper class action, and that each grower's cause of action should be separately stated. Since the basic facts, which were common to all growers, would thus have to be realleged hundreds of times this would have been as cumbersome as it is illogical, and it would have increased rather than lessened the time and work difficulties of which the court expressed fear. In practical effect, that very situation constitutes a good reason why a class action should be permitted. The grounds of demurrer that were sustained would not be sustainable if this be a class action. The same is true of the failure to "separately state causes of action" in the sense it was taken and passed upon by the court.

[1–5] This complaint does not contain several distinct causes of action not separately stated, as the respondents contend. As stated in 1 Cal.Jur.2d 650, "If an action is brought to enforce a single right violated by the defendant, the complaint states but a single cause of action, regardless of the number of types of relief sought." As well recognized, there is a marked difference between a cause of action and the legal theory or theories upon which a recovery might well be based. The statement of a set of facts disclosing a primary right in a plaintiff and a primary duty which the defendant has breached constitutes but one cause of action, regardless of the fact that several legal theories would support a recovery by the plaintiff. The complaint here alleges a set of facts showing the existence of an agency between these growers and the defendants, with a corresponding duty upon the defendants to deal honestly with each of said growers and to make to each a full disclosure of all the facts; that this duty was breached by the failure to weigh or to account for all of the cotton seed of each grower, and by the failure to disclose to the growers that part of this cotton seed was being taken by the defendants; and that the defendants thus made a secret profit, or acquired property entrusted to them, without disclosing the real facts to the growers. The only real issue is as to whether such an overage actually exists for which no account has been rendered and for which the growers have not been paid. Only one cause of action is alleged, this being for a breach of a fiduciary duty imposed upon an agent by law and giving rise to a constructive trust. A class action lies to enforce a constructive trust. Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441. The complaint may not properly be construed as attempting to combine tort actions with various forms of contractual and other actions.

[6] The controlling question here is whether or not this action could properly be prosecuted as a class action. There can be no question that there was a sufficient community of interest in questions of law and fact between these parties, and that there was an ascertainable class, as required by Weaver v. Pasadena Tournament of Roses, supra, Barber v. California Employment Stabilization Co., supra, and other cases. The basic facts necessary to establish liability on the part of the defendants were all exactly the same with respect to each grower, and would have to be established by each grower if he sued separately. Since the cotton seed was mingled, with no records kept as to the weights applicable to any particular grower, a recovery by any grower would have to be on a pro rata basis, the main foundation for which would also be applicable to each and every grower. While the recovery of each grower would have to correspond with the weight of the cotton delivered by him to the gin, that is a matter of record and the amount of each grower's recovery could easily be ascertained by mere mathematical computation. See Adams v. Albany, 124 Cal.App.2d 639, 269 P.2d 142. If, as the respondents suggest, the defendant might have a defense as to a particular grower, such as the fact that he actually knew of and consented to the method by which he had been partially paid for his cotton seed, that situation could well be cared for in this action with fairness to both parties.

[7, 8] We are unable to agree with respondents' contention that the Barber case, the Weaver case, and the other cases cited have established a rule that a class action will lie only where a defendant by one set of acts has simultaneously created rights in a group of other people. Those cases and other cases have established that the basic requirements of a class suit are: that there must exist a well defined community of interest in questions of law and fact between those bringing the suit and those claimed to be represented, and that it is brought in behalf of a definite ascertained or ascertainable class. Those requirements are met here. In the Weaver case, 32 Cal.2d at page 839, 198 P.2d at page 518, the court listed a number of typical cases in which a class suit had been held proper. The essential element in such cases would seem to be the existence of a trust fund, a common fund of some sort, or a common property interest in which all of the parties were in-

terested, and not whether such rights or interests came into existence through, or were conferred by, one simultaneous set of acts instead of through a series of acts creating a common interest in all members of a group. This case involves not a series of different acts as affecting each grower, but a series of exactly similar acts affecting all of the growers. Whether the primary wrong for which redress is sought is the result of one act simultaneously affecting all of the growers, or whether it results from a series of similar acts which affect such persons in the same way, is not the controlling element. In either case, the result is the same insofar as the interest of each grower is concerned and with respect to his right to relief. No good reason appears why the fact that the common fund here in question came into existence through several transactions rather than through one transaction simultaneously affecting all of the growers should, in itself, defeat the right to a class action where the other necessary elements are present. The allegations of the complaint, which must be taken as true, clearly show that there was an intermingling of this cotton seed so that it was impossible to segregate the interests of the various growers therein, and that there was a common ownership by this class of growers in the common fund or property which was withheld by the defendants. It has frequently been held that a suit by one or some of the beneficiaries of a fund or of property, established or existing for the benefit of many beneficiaries and based on their common interest, is a proper class action. Farmers' & Merchants' Nat. Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 55 P.2d 867; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423; Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441; Mitchell v. Pacific Greyhound Lines, 33 Cal.App.2d 53, 91 P.2d 176; Peterson v. Donelley, 33 Cal.App.2d 133, 91 P.2d 123; Baumann v. Harrison, 46 Cal.App.2d 84, 115 P.2d 530. Under the general principles applied in these and other cases, the courts should not be powerless to protect this large class of growers because the situation disclosed does not involve one simultaneous act affecting all of these growers but, on the other hand, discloses a systematic course of dealing in exactly the same manner which affects each of the growers in the same way as it affects the others, and which has resulted in the withholding of a common fund in which all are interested.

[9] There is no merit in respondents' contention that a class action would not lie here since it appears from the affidavit of one Jackson that at least one-third of the farmers who did business with the defendants have signed affidavits stating that they did not wish to be a part of the class which the named plaintiffs purport to represent. This affidavit by Jackson, who is an officer of the defendant corporation, states that the corporation has secured affidavits from 175 growers, being about one-third of all growers who delivered cotton to the corporation during the year 1955, stating that they "know" that a formula was used to determine the weight of their cotton seed and that this was not an exact weight; and that they do not "claim any fraud in regard to the use of this formula by Coberly-West Company." This leaves 350 growers for that season who did not sign such an affidavit, and presumably others for other seasons. In any event, the statement of these growers that they now know that a formula was used, and that they do not claim fraud in the use thereof, does not show that they waived their other rights, that they do not want to be paid, or that they are unwilling to be a part of the class for the benefit of which the suit was brought. If they do not want to be paid they need not claim their share of any recovery which may result, but they may not thus defeat the right of the remaining growers to maintain a class action the members of which would still be definitely ascertainable.

[10, 11] Little need be said with respect to the respondents' contention that the special demurrer should have been sustained

on other grounds. No appeal has been taken by these respondents. A demurrer for uncertainty will not lie where the ambiguous or uncertain facts alleged are presumably within the knowledge of the demurring party. Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 202 P.2d 748; Schessler v. Keck, 125 Cal. App.2d 827, 271 P.2d 588. It clearly appears that no statute of limitations was a bar to the entire action, and if any such statute was applicable to any part of the claim of any individual grower, that matter may be cared for at the proper time. The failure to allege whether a contract was written or oral is not a ground for demurrer where, as here, the action is not founded upon a contract. Code Civ.Proc. sec. 430, subd. 10.

This is not a tort action involving separate torts as to different persons, and it is not a case where the right of each member of a class to recover is dependent upon facts which are applicable only to him. All basic facts necessary to establish liability are the same, each grower would have to show what happened to all other growers in order to recover for himself, and the amount that may be due to each member of the class can be determined as easily as in any case involving numerous interests in a common trust fund. This case does not involve a series of acts each of which affected any one grower alone. It involves a series of acts each of which affected a large number of growers and which together affected all of the growers in this class. In practical effect, it involves the right of each and all of the members of this class to recover his proper share of one common fund which the defendants have wrongfully withheld from them all. There is a very distinct and clear-cut community of interest in the questions of law and fact involved and affecting all parties, including those to be represented; and the suit is in behalf of a common and joint interest of a definitely ascertainable class in the subject matter of the controversy. We therefore hold that this is a proper class action, and that the special demurrer was erroneously sustained in the respects noted.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SPENCE, J., dissenting.

Maylon COOTS, Plaintiff and Appellant,
v.
SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.
Civ. 9085.

District Court of Appeal, Third District, California.
May 28, 1957.
Rehearing Denied June 20, 1957.
Hearing Granted July 24, 1957.

Action under Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq, to recover damages for injuries due to dermatitis. The Superior Court, Sacramento County, Jay L. Henry, J., held that cause of action was barred by limitations and entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that since action was commenced more than three years after plaintiff knew that he had dermatitis and traced such condition to contact with chemical solutions during employment by defendant, cause of action was barred by limitations under section 6 of Federal Employers' Liability Act, 45 U.S.C.A. § 56.

Judgment affirmed.

1. Limitation of Actions 🔑95(1)

Rule that cause of action for disability due to silicosis accrues within three-year limitation provision of Federal Employers' Liability Act only when accumulated effects of inhalation of silica manifest themselves is applicable only where plaintiff, at time his interest is invaded, has no notice that he has been injured in any way. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

2. Limitation of Actions ⚿197(1)

Evidence adduced at trial on special issue as to whether action under Federal Employers' Liability Act to recover damages for injuries due to dermatitis was barred by limitations supported findings that in 1949 plaintiff knew he had dermatitis, traced such condition to contact with chemical solutions during employment by defendant and sought medical attention for dermatitis and that such condition continued without interruption until action was filed. West's Ann.Code Civ.Proc., § 597; Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

3. Limitation of Actions ⚿95(1)

That extent of damage was not immediately manifest did not postpone accrual of cause of action under Federal Employers' Liability Act for injuries due to dermatitis. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

4. Limitation of Actions ⚿55(4)

Action under Federal Employers' Liability Act to recover damages for injuries due to dermatitis, commenced more than three years after plaintiff knew he had dermatitis and had traced such condition to contact with chemical solutions during employment by defendant, was barred by limitations, though action was commenced within three years after occurrence of disability in the sense of no longer being able to work at job. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

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Perkins & Carr, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

WARNE, Justice pro tem.

Appellant filed a complaint on October 11, 1954, against the Southern Pacific Company under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.) to recover damages for personal injuries due to dermatitis. By separate defense in its answer, defendant pleaded that the action was barred by the provisions of section 56 of 45 U.S.C.A., which provides that no action shall be maintained under the Federal Employers' Liability Act unless commenced within three years from the day the cause of action accrued.

On the morning of the trial the defendant made a motion, pursuant to section 597 of the Code of Civil Procedure, that the Statute of Limitations issue be tried before trial of any other issue in the case. This motion was granted over plaintiff's objection. The parties having agreed that the issue was a legal one, the court, in the absence of the jury, took oral and documentary evidence on this special issue. The court ruled that plaintiff's cause of action was barred by the limitation provisions of the statute. Judgment was entered in favor of defendant, and this appeal followed.

There is no conflict in the evidence. It consisted of records of the Southern Pacific Hospital Department, plaintiff's testimony and portions of his deposition read into evidence.

Plaintiff testified that he started working in defendant's plating department in Sacramento sometime in mid 1947, and shortly thereafter around December of 1947 or January of 1948, he began working with a silver cyanide (plating) solution; that in the latter part of 1949 he was first bothered by a skin condition affecting his hands. This condition consisted of small pimples and blisters on his hands which were irritable and itched. The condition became "noticeably worse" a few weeks after he first noticed the small pimples and became "real worse" in May or June of 1953. After May or June of 1953 the condition spread to other parts of his body and became more severe, and by June of 1955, a Dr. Harris of the Southern Pacific Company ordered him to cease work.

The records of the Southern Pacific Hospital Department reveal that plaintiff reported at the Southern Pacific Emergency Hospital from the plating room in July of 1949 with a condition diagnosed as "Dermatitis, moderately severe, both hands." Above his signature on the "Surgeon's Final Injury Report," plaintiff stated the manner of injury as "Filtering cyanide solution which gets on hands causing dermatitis." He attributed his injury to "having hands in solution" and gave as witnesses "Fellow workmen."

Plaintiff contends that his cause of action did not accrue until disability, in the sense of no longer being able to work at his job, occurred, that is, June of 1955. Defendant contends, on the other hand, that it accrued at the time dermatitis manifested itself to plaintiff.

[1-4] Appellant relies upon Urie v. Thompson, 337 U.S. 163, 167, 69 S.Ct. 1018, 93 L.Ed. 1282. We do not regard this case as falling within the exceptional doctrine of the Urie case. It was there held that where defendant's negligence caused plaintiff to contract silicosis, plaintiff's cause of action did not accrue when his interest was invaded but only when the accumulated effects of inhalation of silica manifested themselves. The principle of the Urie case is confined to situations where at the time his interest is invaded plaintiff has no notice that he has been injured in any way. Brassard v. Boston & Marine Railroad, 1 Cir., 240 F.2d 138, 141. Here, the trial court found that in 1949, plaintiff knew he had dermatitis and knew its nature; and at that time plaintiff traced his condition to the chemical solutions with which he came in contact during his employment by the defendant; that he sought medical attention for dermatitis; and that said condition continued without interruption up to the time this action was filed. The evidence fully supports the court's findings. "The mere fact that the extent of the damage was not immediately manifest did not postpone the accrual of the action." Brassard v. Boston & Marine Railroad, supra, and cases cited. Plaintiff filed his complaint on October 11, 1954. He knew of his injury in 1949. Hence his action was outside the three-year statutory period.

The judgment is affirmed

PEEK and SCHOTTKY, JJ., concur.

151 Cal.App.2d 147

SUBSEQUENT INJURIES FUND, STATE OF CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION, Margot N. Monteverde, by her guardian ad litem and trustee, Henrietta G. Monteverde, California Highway Patrol, Division of Enforcement, and State Compensation Insurance Fund, Respondents.

Civ. 17418.

District Court of Appeal, First District, Division 2, California.

May 20, 1957.

Hearing Denied July 16, 1957.

Workmen's compensation case. The Commission made an award payable in part from the Subsequent Injuries Fund, and an appeal was taken. The District Court of Appeal, Dooling, J., held that Labor Code section, providing that workman's death shall not affect his employer's liability for compensation, insofar as its liability has accrued and become payable at date of death, has no application to awards against Subsequent Injuries Fund.

Award against Fund annulled.

1. Workmen's Compensation 🔑506

That no award had been made fixing amount of workman's disability prior to his death did not mean that liability had not "accrued" and become payable at time of his death, for purposes of Labor Code section providing that death of workman should not affect employer's liability for compensation, insofar as such liability had accrued and become payable at date of death. West's Ann.Labor Code, §§ 4700, 4751.

See publication Words and Phrases, for other judicial constructions and definitions of "Accrued".

2. Statutes ⚿223.5(4)

Use of identical language in subsequent Workmen's Compensation Act indicated legislative acquiescence in judicial construction of such language in prior act. West's Ann.Labor Code, §§ 4700, 4751.

3. Workmen's Compensation ⚿1030

The Labor Code must be strictly construed to effect its beneficent purposes; and this rule extends to construction of provisions relating to Subsequent Injuries Fund. West's Ann.Labor Code, §§ 4700, 4751.

4. Statutes ⚿235

Liberal construction does not justify writing into statute a provision which is not to be found therein even by most liberal reading of its terms.

5. Workmen's Compensation ⚿1030

Labor Code section, providing that workman's death shall not affect his employer's liability for compensation, insofar as its liability has accrued and become payable at date of death, has no application to awards against Subsequent Injuries Fund. West's Ann.Labor Code, §§ 4700, 4751.

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Edmund G. Brown, Atty. Gen., Gerald F. Carreras, Deputy Atty. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, Attys. for Industrial Acc. Comm., San Francisco, for respondents.

DOOLING, Justice.

The Industrial Accident Commission found that the decedent Monteverde, an employee of the State of California, had suffered an industrial injury which added to a preexisting disability, amounted to a total disability in excess of 70 percent. It made an award to decedent's minor child, as his sole dependent, against the employer, State of California, for the proportion of such disability accruing before his death, attributable to the injury incurred in the decedent's employment, and an award for the balance of the total disability against the Subsequent Injuries Fund. It is the latter award which is attacked in this proceeding.

The award was made in reliance upon Labor Code, section 4700, which reads:

> "The death of an injured employee does not affect the liability of the employer under Articles 2 and 3 of this chapter so far as such liability has accrued and become payable at the date of the death. Any accrued and unpaid compensation shall be paid to the dependents, or, if there are no dependents, to the personal representative of the deceased employee or heirs or other persons entitled thereto, without administration, but such death terminates the disability."

[1, 2] We may summarily dispose of petitioner's argument that the "liability had not accrued and become payable" at the time of decedent's death, within the meaning of this statute, because no award had been made fixing the amount of decedent's disability prior to decedent's death. This question was decided in the construction of section 9(b)(3) of the then existing Workmen's Compensation Act (Stats.1925, p. 643) in Fogarty v. Depart. of Indus. Relations, 206 Cal. 102, 273 P. 791. That provision gave the identical right to dependents of a deceased employee and used the identical language, "so far as such liability has accrued and become payable at the date of the death." In Forgarty the Supreme Court affirmed an award against the employer to a deceased employee's dependents for disability payments to which the employee would have been entitled up to the time of his death although no award had

been made therefor prior to such death. The subsequent enactment of section 4700 in identical language indicates a legislative acquiescence in this judicial construction. Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428; Summers v. Freeman, 128 Cal.App.2d 828, 832, 276 P.2d 131.

[3–5] The more serious question is raised by petitioner's argument that section 4700 has no application to awards against the Subsequent Injuries Fund, but is limited by its terms to awards against employers. Section 4700 is found in Article 4 of Division 4, Part 2 of the Labor Code. It is limited by its terms to "the liability *of the employer under Articles 2 and 3* of this chapter." Labor Code section 4751, which imposes the liability upon the Subsequent Injuries Fund, is found in the succeeding Article 5 of that Code and is limited by its terms to an award to the "employee." The Labor Code must be liberally construed to effect its beneficent purposes, and this rule extends to the construction of the provisions relating to the Subsequent Injuries Fund. Subsequent Injuries Fund v. Industrial Acc. Comm., 39 Cal.2d 83, 91, 244 P.2d 889. But liberal construction does not justify writing into the statute a provision which is not to be found therein even by the most liberal reading of its terms. By the express terms of section 4700 it applies only to "the liability of the employer under Articles 2 and 3." The Subsequent Injuries Fund is neither an "employer" nor is the liability fixed on it found in either Article 2 or 3. The conclusion is inescapable that the provisions of section 4700 have no application to the Subsequent Injuries Fund.

Respondents suggest that the right to these payments was vested in the deceased employee at the time of his death independently of section 4700. We need not decide this question. If the liability of the Subsequent Injuries Fund to deceased employee was a debt which survived his death it would be an asset of his estate and, under hornbook principles, could only be recovered by the executor or adminstrator of his estate.

The award against Subsequent Injuries Fund is annulled.

KAUFMAN, P. J., and BRAZIL, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

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151 Cal.App.2d 316

Guy N. STAFFORD, Plaintiff and Appellant,
v.
GENERAL PETROLEUM CORPORATION,
a corporation, et al., Defendants
and Respondents.
Civ. 22099.

District Court of Appeal, Second District,
Division 3, California.
May 27, 1957.
Rehearing Denied June 19, 1957.
Hearing Denied July 24, 1957.

Action for damages and for judgment declaring to be void two final judgments rendered in two prior actions to recover royalties under a community oil and gas lease. The Superior Court, Los Angeles County, Leon T. David, J., entered judgment of dismissal following the sustaining of general demurrers without leave to amend, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that action would not lie on claims which had been adjudicated in favor of defendants by judgments which had become final.

Judgments affirmed.

Judgment 🔑720

Action, which was for damages and for judgment declaring to be void two final judgments rendered in two prior actions to recover royalties under a community oil and gas lease, and which was based on claims which plaintiff sought to revive but which had been adjudicated in favor of defendants by judgments which had become final, would not lie.

Guy N. Stafford, in pro. per.

Martin J. Weil, Sims Hamilton, Los Angeles, for General Petroleum Corp.

Burke, Williams & Sorenson, Martin J. Weil, Los Angeles, for Joseph P. Cooney, as executor of the estate of R. P. Cooney, deceased.

John W. Brooks, Long Beach, for Security-First Nat. Bank, and Security-First Nat. Bank of Los Angeles as executor of the estate of Jack Herley, deceased.

Louis A. Audet, Los Angeles, for Wayne H. Fisher, as trustee for Walter H. Fisher Corporation, a dissolved corporation.

SHINN, Presiding Justice.

Plaintiff appeals from judgments of dismissal following the sustaining of general demurrers without leave to amend in an action for damages and for a judgment declaring to be void two final judgments, described in the complaint, that were rendered in two prior actions to recover royalties under a community oil and gas lease.

In one way or another, the claims which are the foundation of the present action, and which plaintiff seeks to revive, have been adjudicated in favor of the defendants herein by judgments that have long since become final. Howard v. General Petroleum Corp., 108 Cal.App.2d 25, 238 P.2d 145; Howard v. General Petroleum Corp., 114 Cal.App.2d 91, 249 P.2d 585; Howard v. General Petroleum Corp., 136 Cal.App.2d 168, 288 P.2d 308; Stafford v. Yerge, 129 Cal.App.2d 165, 276 P.2d 649; Stafford v. Yerge, 139 Cal.App.2d 851, 294 P.2d 721. It would be a waste of time and effort to retrace the monotonous course of the litigation. Anyone who is interested in its history will acquire complete information by reading the opinions in the cases we have cited. No facts are alleged in the complaint which cast doubt upon the validity of the former judgments or their conclusive effect. Anything we might add on the subject would not render any more secure the position of the defendants, and it would be wasted upon Mr. Stafford. He is convinced that the Howards had meritorious claims in 1948, which he acquired by assignment, and is apparently unable to comprehend the effect of the many judgments that have been rendered adverse to his contentions. We have said to him before, and say again, and in his own interest, that he has spent enough of his lifetime, to say nothing of prodigious efforts, in quest of a pot of gold at the end of a rainbow. This should be the end of his search.

The judgments are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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151 Cal.App.2d 196

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Bueral GARCIA, Defendant and Appellant.
Cr. 2696.

District Court of Appeal, Third District, California.
May 21, 1957.

Hearing Denied July 16, 1957.

Defendant was convicted of burglary. The Superior Court, San Joaquin County, M. G. Woodward, J., rendered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that the weight of the evidence adduced in support of charge was a question for jury.

Judgment affirmed.

1. Burglary 🔑45

The weight of the evidence adduced in support of charge of burglary was a question for jury.

2. Criminal Law ⚿696(2), 698(1)

Admitting hearsay evidence elicited by defendant on cross-examination of police officer was not error depriving defendant of right to a fair trial and to confront his accusers, where defendant made no objection to such evidence or motion to strike it at time it was introduced.

3. Criminal Law ⚿698(1)

Hearsay evidence which is not objected to is competent and relevant and may be considered in support of conviction.

4. Criminal Law ⚿1169(3, 5)

Information that defendant had previously been arrested, volunteered by police officer while testifying for state in prosecution for burglary, was not prejudicial to defendant in view of instructions and subsequent testimony of defendant as to his criminal record, including several felony convictions, and did not entitle defendant to declaration of a mistrial, in absence of showing that prosecution improperly attempted to present evidence that defendant had committed any crime other than that for which he was on trial.

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John L. Briscoe, Public Defender, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., Sacramento, for respondent.

SCHOTTKY, Justice.

Defendant above-named was charged by information with the crime of burglary. The information charged that on the 23rd day of February, 1956, the defendant entered a motor vehicle, to wit, a panel truck, with intent to commit theft. The truck was the property of one Henry L. Simmons, and the doors of said truck were locked.

The defendant entered a plea of not guilty and at the conclusion of the trial was found guilty by the jury. Probation was denied and judgment was pronounced sentencing defendant to imprisonment in the state prison for the term prescribed by law. No motion for a new trial appears to have been made but defendant's notice of appeal states that the appeal is from the judgment and from the order denying appellant's motion for a new trial.

The record shows that on the evening of February 23, 1956, at about 11:00 p.m., Mr. Henry Simmons parked his GMC delivery truck near a small restaurant located on East Market Street in Stockton, San Joaquin County, California. Mr. Simmons, who was in the business of renting and servicing cigarette vending machines and juke boxes, went into the restaurant after locking the truck. In the truck were cigarettes, phonograph records, tools, flashlight, personal checks and other items. Shortly after entering the restaurant, a stranger entered and stated that he had found a check lying on the ground outside the restaurant. Mr. Simmons noticed that the check was one belonging to him, and upon going outside to the truck observed that the left front wing had been opened. He noticed a number of items were missing from the truck, including cigarettes, phonograph records, a flashlight and other items. Mr. Simmons then returned to the restaurant for the purpose of calling the police, at which time he observed the appellant, Mr. Garcia with the flashlight in his hand. Mr. Simmons asked the appellant where he got the flashlight and Mr. Garcia stated, "It is mine." Garcia then changed his story, stating that he had found it outside. Mr. Simmons and Mr. Garcia then went to a spot where Garcia claimed to have found the flashlight, and upon failing to find other items which were taken from the truck, Mr. Simmons suggested that the flashlight be turned over to the police for the purpose of taking fingerprints from it. Mr. Garcia thereupon rubbed the flashlight on his clothing.

Mr. Simmons again returned to the restaurant where he called the police. Mr. Garcia and an unidentified third person walked away together.

Later that same night Officer Nagel of the Stockton Police Department examined the truck, and after returning to the police station and ascertaining the address of Mr. Garcia, went in company with two other officers to 3608 East Weber Avenue, Stockton, where the appellant was found seated in an automobile near this address. In the automobile with him were a Mr. Robertson and a Mr. Daniels.

Upon being questioned, the appellant stated that he lived in the front house at 3608 East Weber Avenue, but upon inquiring at this address the occupant thereof informed the police officers that Mr. Garcia did not live there. In fact, Garcia had never lived there at any time, but lived in a house to the rear. The officers and the appellant then went to the rear house and upon being admitted by a Mr. Bremby, located the cigarettes and phonograph records which were identified by Mr. Simmons as those which were taken from his truck.

Earlier that evening Mr. Clyde Bremby had been asked by the appellant to help carry the cigarettes and records into the house. The appellant asked Bremby, who also lived in the house, where he could get rid of the stuff. Mr. Bremby told Mr. Garcia that he thought he knew of a place where he could dispose of the articles and proceeded toward town. It was at this time that appellant alighted from the car and walked toward the restaurant where he was met by Mr. Simmons and events occurred as previously related.

Appellant does not contend that the evidence is insufficient to support the judgment but contends that his guilt was established by:

(1) Unsatisfactory testimony relating to the doors of the automobile.

(2) An unsatisfactory conclusion drawn from appellant's possession of the lantern or flashlight.

(3) The testimony of a convicted felon on parole in whose possession stolen articles were found.

(4) Appellant's past criminal record.

(5) Testimony relating to an "eye-witness," not produced as a witness during the trial.

[1] Appellant then proceeds to argue that the evidence is unsatisfactory and unworthy of belief but his argument in this regard is merely one as to the weight of the evidence, and it was for the jury to pass upon the question of the weight of the evidence.

[2] Appellant contends also that the court erred in admitting hearsay testimony in evidence. During the cross-examination of a prosecution witness, Police Officer Gregory, counsel for the appellant brought out the fact that Mr. Bremby, who lived with the appellant, was not involved in the burglary. The appellant's counsel then asked the witness if he got such information from talking to Mr. Bremby himself. The witness replied that he did not, but that "it came from an eyewitness to the robbery, or the burglary." No objection was made to the answer and there was no motion to strike. Not only did counsel for the appellant fail to object to this hearsay testimony which was brought out during his own examination of the witness, but it further appears that counsel pursued the subject matter further and by his examination elicited further hearsay testimony upon this same subject.

The appellant now contends that this hearsay testimony denied him his right to a fair trial by reason of the fact that such incompetent testimony was admitted in evidence and that the appellant was denied the right to confront his accusers. By "accusers" he means the unidentified eyewitness referred to by Officer Gregory.

The appellant also complains of the fact that during his argument to the jury the deputy district attorney referred to this testimony and that his reference to such inadmissible and incompetent hearsay testimony was prejudicially erroneous.

[3] The rule is well settled in California and in most other jurisdictions that hearsay evidence which is not objected to is competent and relevant.

In the case of People v. Wade, 138 Cal. App.2d 531, 292 P.2d 303, above cited, a police officer testified as to certain facts related to him by a third person who was a participant in the crime under consideration. The appellate court stated as follows, 138 Cal.App.2d at page 533, 292 P.2d at page 304, with respect to the contention that the admission of such evidence was error:

> "This part of the Traphagen testimony was strictly hearsay but it was introduced without objection and thus became competent support for the conviction, People v. Murray, 135 Cal. App.2d 600, 603, 287 P.2d 775; People v. Ines, 90 Cal.App.2d 495, 500, 203 P. 2d 540; People v. Freer, 104 Cal.App. 39, 43, 285 P. 386, [387]."

Similarly, in People v. Murray, supra, the court stated [135 Cal.App.2d 600, 287 P.2d 777], "Hearsay evidence which is adduced without objection may properly be considered in support of a judgment of conviction. [Citing cases.]" See also People v. O'Brien, 122 Cal.App. 147, 156, 9 P.2d 902; People v. Bradford, 130 Cal.App. 2d 606, 279 P.2d 561.

Appellant also contends that prejudicial error resulted from the voluntary statement of a witness that he knew appellant had been previously arrested. During the direct examination of Officer Gregory, this witness was asked without objection to state the circumstances which took place and which brought the witness to the address at which appellant lived. The witness then volunteered the statment, "Knowing that he had been previously arrested—" at which time he was interrupted by appellant's counsel who asked him if the prosecutor had asked him to testify to that before taking the stand. The witness answered that he had not and that he had volunteered it. Counsel then objected that this was prejudicial misconduct and made a motion for a mistrial which the court denied. A motion to strike was not made, nor was the jury instructed to disregard this testimony. The court told the prosecutor to ask the witness direct questions rather than asking for a narrative statement.

[4] It is clear that the statement of the witness that he knew appellant had been arrested was volunteered and there is no showing that the prosecution improperly attempted to present to the jury evidence that the appellant had committed any other crime or crimes than that for which he was then on trial. The brief reference to the fact that the appellant had been previously arrested could not have been prejudicial in view of the instructions of the court to the jury that they were to base their decision solely upon the evidence adduced in this proceeding, and there was no inference in the statement of the witness concerning the nature of the prior arrest. Furthermore, the record shows that appellant testified later and gave a full account of his criminal record which included a number of felony convictions. It is therefore difficult to understand how appellant could have suffered prejudice from the mere statement of the officer: "Knowing that he had been previously arrested."

We conclude that the appellant received a fair trial, that the evidence in support of his conviction was very strong, and that no prejudicial error was committed.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

151 Cal.App.2d 339

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John HURLEY, Defendant and Appellant.

Cr. 3306.

District Court of Appeal, First District, Division 1, California.

May 28, 1957.

Defendant was convicted of robbery. From judgment rendered by the Superior Court, City and County of San Francisco, Orla St. Clair, J., defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained conviction.

Affirmed.

1. Robbery ⚿24(3)

In robbery prosecution, evidence identifying defendant as a participant was sufficient.

2. Criminal Law ⚿404(4)

In prosecution for robbery, the leading part in which was played by another who wielded a gun, the fact that defendant was not alleged to have carried gun did not render the gun inadmissible.

3. Criminal Law ⚿404(4)

For gun allegedly used in robbery to be admitted into evidence, it was not required that its identification be positive and certain.

4. Criminal Law ⚿438

In prosecution involving issue of identity of defendant as a participant in the crime, wherein state presented witnesses who had identified defendant as a perpetrator, shortly after commission, from pictures, and who, at trial identified defendant as perpetrator, it was proper for court to allow in evidence picture by which he had been identified, as a means of identification much closer in time to events than identification at trial.

5. Criminal Law ⚿406(1)

Statements, which were made by one arrested for robbery to officer taking him back from another state for prosecution, about "copping out" tended to show consciousness of guilt, and his statement that he understood that "it was a tavern" tended to show knowledge of circumstances of crime, and such statements were admissions which could be properly introduced in evidence against him. West's Ann. Code Civ.Proc. § 1870, subd. 2; West's Ann.Pen. Code, § 1102.

6. Criminal Law ⚿1036(1)

Objections to admission of testimony made for first time on appeal were too late.

7. Criminal Law ⚿351(1)

In prosecution for robbery the leading participant in which was another, against defendant who denied participation in the crime but who took an out-of-state trip with such other individual several days after the robbery, circumstances of the trip had probative value, under the circumstances, and were relevant as basis for inference that defendant had knowledge of crime when he started on the trip.

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Eugene C. Payne, Jr. (appointed by the court), San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin A. Christiansen, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of first degree robbery, defendant claims insufficiency of the evidence and errors of law during the trial.

[1] (1) *Is the evidence identifying defendant as a participant sufficient? Yes.*

The robbery took place in a tavern between 9 and 10 in the evening. It was perpetrated by one Murphy[1] who took the leading part, issuing the orders and wielding a gun, assisted by a person who picked up the money and was identified as defendant Hurley by two eye-witnesses, Maloney the bartender and Gately, one of the guests.

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[1] Murphy, already convicted of this offense, was called as a defense witness and testified freely as to his own part in the transaction and said that defendant Hurley had no part in it.

Concededly, defendant and Murphy had been friends for a good many years and a few days after the robbery he took an out-of-state trip with Murphy, remaining away until apprehended. These are circumstances suggestive of flight and consciousness of guilt.

Upon being told there were witnesses, defendant said to the officer who accompanied him back from Chicago, "Well, if you have witnesses and that they identify me, I guess I will have to cop out," which the officer said meant to plead guilty.

These were circumstances tending to support the eye-witness testimony.

There was evidence of a contrary character but the jury believed the prosecution's witnesses and resolved the conflict against the defendant.

(2) *Was evidence improperly admitted? No.*

A .32 Colt automatic was identified as the gun which Murphy carried and wielded during the robbery. Maloney, Gately and Murphy each testified that it was of the same type and looked like the gun that Murphy used upon that occasion. Defendant tendered no clearly expressed objection to its admission in evidence. His counsel merely asked: "May I ask for what purpose the gun is being introduced * * ? It is clear from the testimony that the person who was with Murphy didn't have any weapon or gun."

[2, 3] The fact that Murphy's confederate carried no gun did not render the gun inadmissible. People v. Jones, 114 Cal. App. 91, 92–93, 299 P. 559. Nor need identification of the gun be positive and certain. Concerning testimony that certain rings were similar to rings worn by a murder victim, our Supreme Court in People v. Cullen, 37 Cal.2d 614, 626, 234 P.2d 1, 8, said: "Certain and positive identification was not required. The evidence of similarity was sufficient to justify the admission in evidence of the rings and the other objects, the questions of weight and credibility being for the jury."

[4] Shortly after the robbery Maloney and Gately selected from a number of pictures those of Murphy and the defendant as the perpetrators of the crime. These pictures of these two were offered in evidence. Defendant's was admitted; Murphy's not. We perceive no error in the admission of defendant's picture. It was cumulative in a sense for the same witnesses identified defendant in person as Murphy's confederate. Proof of identification by means of the picture had a certain value in itself because made much closer in time to the events in issue than was identification at the time of the trial. In People v. Coley, 61 Cal.App. 2d 810, 814–815, 143 P.2d 755, the defendant was identified by means of pictures alone, shortly after the crime. At the time of trial, 2-1/2 years later the witnesses were unable to identify him. No more erroneous would it seem, to permit identification by both methods when available as in this case.

[5] Defendant claims that testimony concerning conversations he had with the officer who brought him back from Chicago was erroneously admitted. The court, after correctly defining admissions and confessions, instructed that these statements were not confessions and that it was for the jury to decide whether they constituted admissions. Defendant's theory is that, as a matter of law, they were not even admissions. He is mistaken. His statement about "copping out" tended to show consciousness of guilt. A statement that he understood "it was a tavern," tends to show knowledge of the circumstances of the crime, acquired as a participant. Admission of evidence thereof finds sanction in section 1870, Code of Civil Procedure, which allows evidence of the "act, declaration, or omission of a party, as evidence against such party" (subd. 2), made applicable to criminal actions by section 1102 of the Penal Code. This principle

was applied in People v. McKay, 107 Cal. App.2d 519, 237 P.2d 345, as sanctioning the admission of evidence of quite similar acts, declarations and omissions of a defendant.

We find, also, no error in the instruction given on this subject. We observe that besides defining "admissions" the court appropriately admonished the jury to view with caution any evidence that purports to relate to an oral admission of the defendant.

On direct examination defendant testified that though he was not with Murphy between 9 and 10 on the evening of the robbery he had seen Murphy earlier that day and again in the morning of the next day, when Murphy came to defendant's hotel, informed defendant that he "pulled a score last night" and loaned defendant $50. In the cross-examination which followed, defendant was asked, without objection, a number of questions concerning his acquaintance and contacts with Murphy, both before and after the robbery.

[6] His objection comes too late when, as here, it is for the first time made upon appeal. After a good deal of this evidence had gone in, defendant's counsel said merely, "I think we are going a little far afield here." Later, after virtually all of this testimony had gone in, defendant's counsel made his objection more specific. He objected to "conversations" between defendant and Murphy after they left San Francisco, and was sustained.

[7] Moreover, the circumstances of their out-of-state trip (even though they started several days after the robbery) had probative value (in the light of defendant's testimony, on direct, concerning his acquaintance and dealings with Murphy), a basis for an inference that he had knowledge of the crime when he started on his journey with Murphy. See People v. Bennett, 122 Cal.App.2d 244, 252, 264 P.2d 664.

The judgment is affirmed.

PETERS, P. J., concurs.

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151 Cal.App.2d 117

Manly L. BEACH, Petitioner and Appellant,

v.

CONTRACTORS STATE LICENSE BOARD, etc., et al., Respondents.

Civ. 22057.

District Court of Appeal, Second District, Division 1, California.

May 17, 1957.

Hearing Denied July 10, 1957.

Building contractor brought mandamus proceedings against the Contractors State License Board and the members thereof to compel them to set aside order revoking contractor's general contracting license and to reinstate contractor as a licensed contractor. The Superior Court of Los Angeles County entered judgment denying the petition, and the contractor appealed. The District Court of Appeal, Doran, J., held that evidence sustained determination that contractor violated provisions of the Business and Professions Code subjecting license to disciplinary proceedings.

Judgment affirmed.

1. Mandamus ⚷174

In mandamus proceeding to review decision of administrative agency having statewide jurisdiction, trial court is authorized to exercise its independent judgment on the evidence.

2. Mandamus ⚷187(9)

On appeal from judgment of trial court in mandamus proceeding to review decision of administrative agency having statewide jurisdiction, province of reviewing court, with respect to sufficiency of the evidence, is whether there is any substantial evidence which will support the judgment.

3. Mandamus ⚷168(4)

In mandamus proceeding by contractor to compel Contractor's State License Board and the members thereof to set aside order revoking contractor's general contracting license and to reinstate contractor as a licensed contractor, evidence sustained determination that contractor had violated provisions of the Business and Professions Code subjecting license to disciplinary proceedings. West's Ann.Bus. & Prof.Code, §§ 7107, 7112, 7113, 7120.

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Willard D. Decker, Azusa, for appellant.

Edmund G. Brown, Atty. Gen., Arthur Louis Martin, Deputy Atty. Gen., for respondents.

DORAN, Justice.

On November 3, 1955, the Contractors State License Board found that appellant, Manly L. Beach, a building contractor, had violated Sections 7107, 7112, 7113 and 7120 of the Business and Professions Code, and revoked appellant's general contracting license. Thereafter, Beach filed in the Superior Court a petition for a writ of mandate to compel the respondent Board and its members to set aside the order of revocation and reinstate appellant as a licensed contractor.

On March 2 and 5, 1956, the Superior Court heard the matter and found that the weight of the evidence supported the findings of the respondent Board, that appellant had received a fair trial before the hearing officer, and that there had been no abuse of discretion. The peremptory writ of mandate was denied and the alternative writ discharged. This appeal followed.

The sections of the Business and Professions Code which appellant was found to have violated included Section 7107, "Abandonment without legal excuse of any construction project"; Section 7112, relating to "Misrepresentation of a material fact by an applicant in obtaining a license"; Section 7113, "Failure in a material respect * * * to complete any construction project or operation for the price stated", etc.; and Section 7120, "Wilful or deliberate failure * * * to pay any moneys, when due for any materials or services".

It is appellant's contention that "The weight of the evidence does not support the findings of the hearing officer"; that "There is no substantial evidence to support the findings of the trial court"; and that "There was a prejudicial abuse of discretion of the trial court".

The record discloses evidence to the effect that in November, 1953, appellant commenced work on a residence in La Crescenta under a written contract with Mr. and Mrs. E. E. Hall, at a total price of $11,500. The house was to be "completed in not more than one-hundred and fifty days", which would bring the completion date in April, 1954.

In early 1954, after having been informed by Mr. Hall of the danger, appellant permitted rain and moisture to enter the open structure, resulting in damage to cabinets, walls and ceilings. In April, 1954, the appellant sent Hall an "invoice" for "extras", totaling more than $900. The house was still incomplete and Hall had already paid Manly $11,459.30, but then agreed to pay an additional $474 for the so-called extras, plus $196 as an inducement to appellant to complete the construction.

There was testimony that appellant had informed Hall that the project would not be completed unless the "extras" were paid for. Some of the "extras" were items called for in the original specifications. After this payment, appellant insisted that Hall pay further sums for items listed in the original contract, and again informed Hall that otherwise the house would not be completed.

Appellant left the project in May, 1954, the same being incomplete in respect to various items such as a garbage disposal unit, etc. Other items were not completed in accordance with specifications, and certain doors were installed in a damaged condition. The appellant failed to make payment to certain subcontractors and material men although Hall had never failed to make payments due to appellant; in some instances these payments had not been made at the date of hearing. Mr. Hall finally completed the structure after appellant had ceased to work thereon. In November, 1954, following a meeting between appellant, Hall and investigators, appellant caused some further work to be done.

In January, 1955, appellant and one Hardin filed a license application with the Contractors State License Board as a partnership doing business as Allied Sanitation. To a question "Are there now any unpaid past due bills or claims for labor, materials, or services, outstanding and unsatisfied, as a result of the operations of any person listed under 'Personel of Applicant' or any construction organization in which any such person was a member of the personel?", appellant answered "No". At that time there were actually several due and unpaid bills.

[1, 2] As said in Ashdown v. State of California, 135 Cal.App.2d 291, 299, 287 P.2d 176, 181, "In a mandamus proceeding in a trial court, wherein a decision of an adminstrative agency having statewide jurisdiction is reviewed, the trial court is authorized to exercise its independent judgment on the evidence, Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; but upon an appeal from the judgment of the trial court in such a proceeding the province of the appellate court, with respect to the sufficiency of the evidence, is whether there is any substantial evidence which will support the judgment."

[3] Applying the above rule to the instant case, appellant's contentions in respect to the evidence must be overruled. In effect, appellant's brief seeks a reconsideration and evaluation of the evidence, or a retrial of the issues. Such is not the function of a reviewing court. That the record discloses substantial evidence in support of the judgment rendered cannot be doubted. Under the rule hereinbefore stated, any conflicts in the evidence may be disregarded. The evidence herein epitomized amply supports the determination that appellant had violated provisions of the Business and Professions Code subjecting the contractor's license in question to disciplinary proceedings.

The record fails to support any of the appellant's contentions. On the contrary it seems apparent that appellant has received a fair and impartial trial of all the issues, both at the original hearing and in the Superior Court. There appears to have been no abuse of discretion, nor reversible error at any point in the proceedings, and the revocation of appellant's license cannot be deemed an unreasonable penalty. The appellant's argument that Mr. Hall suffered no injury is untenable.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

151 Cal.App.2d 112

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Louis Villareal GONZALES, Defendant
and Appellant.
Cr. 3265.

District Court of Appeal, First District,
Division 1, California.
May 17, 1957.

Defendant was convicted in the Superior Court, Santa Clara County, M. G. Del Mutolo, J., of illegal sale of narcotics, and he appealed. The District Court of Appeal, Bray, J., held that, on record presented, defendant, who had been told on arraignment that lawyer would be appointed for him and had stated that he wanted to get his own lawyer but had failed to do so in the two months between his arrest and trial, could not claim denial of constitutional right to counsel, notwithstanding trial judge's denial of further continuance for purpose of procuring counsel and his statement that the defendant was going to have to represent himself.

Affirmed.

1. Criminal Law ⚷641(1)

On record presented, in prosecution for sale of narcotics, defendant, who had been told on arraignment that lawyer would be appointed for him and had stated that he wanted to get his own lawyer but had failed to do so in the two months between his arrest and trial, could not claim denial of constitutional right to counsel, notwithstanding trial judge's denial of further continuance for purpose of procuring counsel and his statement that the defendant was going to have to represent himself. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⚷586

Matter of granting continuance rests primarily in discretion of trial court, and, in absence of abuse of discretion, there is no denial of constitutional rights of defendant in court's refusal of continuance.

3. Criminal Law ⚷641(1)

Right of accused to counsel will be protected, but it is a right which may be waived.

4. Criminal Law ⚷641(1)

Right to assistance of counsel, guaranteed by constitutional and statutory provisions, may, like any other legal right, be invoked only in course of orderly procedure.

5. Criminal Law ⚷641(1)

Implied waiver of right to counsel may be sufficient.

6. Criminal Law ⚷720(5)

Prosecutor had right to comment upon credibility of witness.

7. Criminal Law ⚷713, 1037(1)

Prosecutor's reference, in argument, to "a Freudian slip" on part of defendant in arguing case as counsel for himself, was within bounds of proper comment; but, in any event, defendant, who had failed to take objection thereto or ask court for admonition with regard thereto, could not complain on appeal.

8. Criminal Law ⚷1037(2)

Unless harmful results of misconduct of district attorney could not have been obviated by appropriate instructions of trial court, error cannot be predicated in reviewing court on such alleged misconduct, in absence of assignment of such misconduct as error and request for trial court to instruct jury to disregard it.

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Sanford N. Diller, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a judgment of conviction, after jury trial and after denial of probation, of violation of section 11500, Health and Safety Code (sale of narcotics), and from order denying new trial.[1]

Questions Presented.

1. Was defendant denied his constitutional right to counsel?

2. Alleged misconduct of district attorney.

Record.

As defendant does not question the sufficiency of the evidence to sustain the conviction (he hardly could, as the evidence shows that defendant sold four bindles of heroin to a police officer, although defendant contended it was a case of mistaken identity and attempted to prove an alibi), it is unnecessary to detail the evidence.

March 9, 1956, on arraignment defendant was informed of his right to counsel and stated he would have his own counsel. The time to plead was continued to March 16th. At that time he was represented by

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[1] The record fails to show any motion for new trial or order denying new trial. At argument defendant conceded no such motion was made.

Attorney Feeley and pleaded not guilty, denying four priors charged against him (unlawful sale and use of narcotics). Trial was set for May 8th. When defendant appeared with his counsel, Attorney Machado, Machado made a motion to withdraw as counsel. "Counsel and defendant are now heard." The court granted the motion. The court ordered defendant to be ready for trial at 1:30 p. m. "if represented by counsel or not. Thereupon the defendant with Edward J. Nelson, Esq. acting on behalf of Manny Gomez, Esq. as counsel for the defendant" moved for a continuance of the trial date one week. The motion was granted. May 15th, in chambers, Attorney Gomez stated that he had been retained by defendant solely for the purpose of seeking the continuance on May 8th and not for the trial of the case, and that defendant had informed him defendant was going to act as his own counsel and desired to admit the priors. Attorney Gomez moved to be discharged as attorney for defendant. The motion was granted. The court then asked if defendant was willing to represent himself. He stated that he was. When asked if he wanted to go ahead with the trial he stated: "Well, I didn't want to. I wanted Mr. Gomez to represent me, but I'm short of funds at the present moment, so they didn't give me no continuance, I haven't asked for any, I asked for one last week and I didn't get one, but if I could get a two-week continuance I could probably raise the money." In a colloquy with the court defendant stated that he could probably raise the money for counsel fees "if they give me a little time." The court reminded him that he had been given a continuance of a week to get a lawyer. Defendant stated that he had paid $500 for a bail bond so he did not have any money for counsel fees. The court then reminded him that he had had a lawyer, Attorney Machado, but as the court understood it defendant would not let Machado conduct the case, and only wanted Machado to sit with him in court. Defendant said that the understanding was that as he did not have any money Machado was to sit with him, but if he could raise enough money Machado would "represent me all the way through." Defendant did not get the money so Machado withdrew. The court stated it did not know how long it would take defendant to raise the money to pay a lawyer, "and you had one week's time, and if you didn't have the money to pay a lawyer, the Court could have appointed a lawyer for you. It looks to me like you want to represent yourself and you just don't want a lawyer, so we have the jury here today, we have all the witnesses, and everything is ready to go. You're just going to have to represent yourself." After some talk about defendant having received the continuance he had asked for previously the court asked defendant how much time he wanted. Defendant replied that he could not raise $4,000 or $5,000 in a week's time. The court then pointed out that defendant had had from the 4th of March when he was arrested to May 15th, over two months, in which to get a lawyer. Of that time defendant was only in jail 18 days. The court asked if the judge on arraignment had not told defendant the judge would appoint a lawyer for him but that defendant wanted to get his own lawyer. Defendant admitted this. The court then denied defendant's request for a continuance and asked if defendant wanted to change his plea as to the priors. Defendant then admitted the priors. The court then stated that the trial would proceed and asked defendant if he was ready. Defendant stated that he was. After the prosecution rested defendant called two alibi witnesses and examined them. The court advised defendant that he did not have to testify but that if he did he could be cross-examined by the district attorney, and asked defendant, "You've talked to attorneys, have you not, about this case?" Defendant replied in the affirmative. Defendant did not take the stand, although in his argument to the jury he succeeded, although occasionally stopped by the objections of the district attorney, in getting his defense before the jury equally as well, if not better, than if he had testified.

At the time of sentence the judge asked defendant if he had not told the court theretofore that he could try his own case. Defendant replied that he did. On being asked if he had any legal cause to show why judgment should not then be pronounced against him, he replied in the negative.

No Denial of Right to Attorney.

[1–5] The record clearly shows that defendant was not denied any constitutional right. The court gave defendant a reasonable time to procure an attorney. It appeared to the court that defendant's plans for getting an attorney were so nebulous that he would not have procured one within any reasonable time. As to suggesting that the court now appoint an attorney to represent defendant, there was no necessity for this as defendant had theretofore been informed that the court would do so if desired. Moreover, defendant did nothing to overcome the court's expressed conclusion that the defendant preferred to act as his own attorney. It should be remembered, too, that defendant was no novice in court procedure. He had already been in four separate trials, as evidenced by his four prior convictions. The matter of granting continuances rests primarily in the discretion of the trial court and in the absence of an abuse of that discretion (People v. Jewett, 84 Cal.App.2d 276, 281, 190 P.2d 330; People v. Dorman, 28 Cal.2d 846, 172 P.2d 686), there is no denial of the constitutional rights of a defendant in the court's refusal of a continuance.

"* * * while the right of an accused to counsel will be protected, it is a right which may be waived." In re Connor, 16 Cal.2d 701, 706, 108 P.2d 10, 13. "The right to the assistance of counsel guaranteed by the constitutional and statutory provisions, like any other legal right, may be invoked only in the course of orderly procedure." 16 Cal.2d at page 709, 108 P.2d at page 15. Here defendant's actions were equivalent to a waiver of his right to counsel. "It is true that there was no express waiver, but the authorities clearly indicate that an implied waiver is sufficient. [Citations.]" In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12, 14. See People v. O'Neill, 78 Cal.App.2d 888, at page 891, 179 P.2d 10 at page 12, where the defendant dismissed the public defender appointed to represent him and the court said: "Appellant did not ask for a continuance for the purpose of obtaining counsel and if he had done so the trial court would not have erred in the circumstances existing here in refusing to grant the request. People v. Russell, 156 Cal. 450, 455, 105 P. 416." We find no error in the trial court's actions.

Conduct of District Attorney.

[6–8] There was no misconduct in the criticized statements of the prosecuting attorney. Defendant had called Jesse Hernandez as an alibi witness. In commenting on his testimony, the district attorney asked the jury "How much then of the testimony of Jesse Hernandez can we believe? None," and "the testimony of Hernandez, that is absolutely false * * *" This was comment upon the credibility of the witness well within the prosecutor's rights. Concerning defendant's argument the district attorney said: "I'm sure that some of you caught it, and I know that I did, during the argument of Mr. Gonzales, and that is what—I will borrow a phrase from the now famous Abbott trial, a Freudian slip, when he mentioned the names of two people who were in the house on the 27th. We didn't know who they were until he told us." This was within the bounds of proper comment on defendant's argument. Moreover, defendant at no time objected to any of these remarks nor asked the court for an admonition concerning them. "The rule is established that unless the harmful results of misconduct of the district attorney cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error; and (b) a request to the trial court to instruct the jury to disregard it." People v. Hampton, 47 Cal.2d 239, 302 P.2d 300, 301. If misconduct, and we hold that they were not, the remarks of the district attorney could have been obviated by instructions of the court.

The appeal from an alleged denial of new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

151 Cal.App.2d 50

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert LINYARD, Defendant and Appellant.

Cr. 3322.

District Court of Appeal, First District, Division 1, California.

May 16, 1957.

Defendant was convicted in the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., of illegal possession of heroin, and he appealed. he District Court of Appeal, Peters, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Poisons 🔑9

Conviction for illegal possession of heroin was sustained by evidence. West's Ann.Health & Safety Code, § 11500.

2. Witnesses 🔑337(5)

Where defendant testifies on his own behalf, prosecution may impeach by showing prior felony convictions, even though such "priors" were admitted on arraignment. West's Ann.Code Civ.Proc., § 2051.

3. Witnesses 🔑350

Statute permitting showing of prior felony conviction by examination of witness "or" the record of the judgment does not limit prosecution to impeachment by introduction into evidence of record of conviction; but cross-examination on prior convictions must be conducted in good faith. West's Ann.Code Civ.Proc., § 2051.

4. Criminal Law 🔑370

Even evidence of misdemeanor convictions is admissible to show knowledge of narcotic nature of drug defendant is charged with illegally possessing. West's Ann.Code Civ.Proc., § 2051; West's Ann. Health & Safety Code, §§ 11500, 11721.

5. Criminal Law 🔑1170½(1)

Where questioning was not prolonged, jury was admonished, and evidence of guilt was clear and convincing, cross-examination of defendant on prior convictions could not have been prejudicial, even if erroneous. West's Ann.Health & Safety Code, § 11712; West's Ann.Pen.Code, § 17.

6. Witnesses 🔑387

Any fact may be called out on cross-examination which jury might deem inconsistent with direct testimony of witness; and defendant testifying in his own behalf is, in this respect, put upon same plane with other witnesses. West's Ann.Code Civ. Proc., § 2051.

7. Criminal Law 🔑1170½(5)
Witnesses 🔑277(4)

Where defendant, charged with illegal possession of heroin, testified, on direct examination, that his presence in rooming house where he was apprehended had been for purpose of seeing his wife and two children, who lived in building, cross-examination with regard to defendant's separation from his wife and as to whether he had been jailed for non-support was appropriate; but even if such questions should not have been asked on cross-examination, asking thereof could not have been prejudicial, in view of clear and convincing evidence of guilt. West's Ann.Code Civ.Proc., § 2051.

8. Criminal Law ⚷719(3)

In prosecution for illegal possession of heroin, it was within realm of permissible argument for prosecutor to refer to narcotics as social evil and to tell jury that, based on evidence introduced, prosecutor believed defendant guilty.

9. Criminal Law ⚷723(1), 1171(1)

In prosecution for illegal possession of heroin, prosecuting attorney went too far when, referring to co-indictee, he stated that the female co-defendants always take the "rap" in narcotics and other cases; but in view of the clear and convincing evidence of defendant's guilt and the non-flagrant character of the statement, defendant could not have been prejudiced.

◆

Edward T. Mancuso, Public Defender, City and County of San Francisco, Claude D. Perasso, Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Robert Linyard and two others, a man and a woman, were charged with illegal possession of heroin in violation of section 11500 of the Health and Safety Code. Linyard, prior to trial, admitted to three prior narcotic convictions. All three pleaded not guilty. Prior to trial the female defendant changed her plea to guilty. The two remaining accused were jointly tried before a jury. Linyard was found guilty and his co-defendant not guilty. Linyard appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] The evidence is amply sufficient to sustain the finding of guilt. The three defendants were arrested in room 11 of a rooming house on Sutter Street, in San Francisco, on April 25, 1956. The evidence as to whether defendant resided in the rooming house prior to the arrest was conflicting, but a police inspector testified that there was clothing of defendant in the room. The police were informed that an offense was occurring in room 11 by a person who lived in the building adjoining that in which defendants were arrested and whose bathroom was on the same level and about 8 feet distant from room 11. He could see from his bathroom window into room 11. On several occasions he saw several people, including appellant but not including his co-defendant, bind their arms with a bandana, withdraw something from a spoon with a needle, and inject the needle into their arms. About April 20, 1956, he reported the matter to the police. They called at his apartment several times, observed what was happening in room 11, and made the arrests on April 25, 1956.

One of the officers testified that he "saw different people entering the place, female and male, sitting down on the chairs, one and two at a time, wrapping tourniquets around their arms, and injecting some type of fluid into their arms." On the night of April 25th he saw two men and a woman in room 11. One of the men was wearing a brown sport coat and a brown hat, and was seen heating a spoon over some matches. This officer and his associate left their observation spot and proceeded immediately next door to room 11. The officers forced their way into the room and arrested the three occupants. These were defendant, his co-defendant and the woman who subsequently pleaded guilty.

The other officer corroborated the first officer and also testified that he observed the man dressed in brown tie a rag around his left arm and insert a needle into his flesh.

It took the officers about three minutes to go from the neighbor's apartment to room 11. When the officers broke in, appellant was the only person present dressed in brown and wearing a hat, and was observed kneeling on the floor and withdrawing a needle from his arm. This he threw under the bed when the officers broke in. His arm was bleeding.

The police found a bindle containing 3 grains of heroin and assorted narcotic paraphernalia in the room. Appellant admitted to the officers that in the past he had used heroin, and, upon arraignment, admitted several prior narcotic convictions. At the trial he denied any knowledge that narcotics or narcotic equipment were in room 11 prior to his arrest.

On the evidence the case is not a close one. The evidence is substantial and convincing to support the implied finding that appellant at the time and place involved was knowingly in the possession of heroin. People v. Williams, 121 Cal.App.2d 679, 263 P.2d 853; People v. Bock Leung Chew, 142 Cal.App.2d 400, 298 P.2d 118; People v. Denne, 141 Cal.App.2d 499, 297 P.2d 451.

[2] The major contentions of appellant center around claimed misconduct on the part of the district attorney. It is first urged that the district attorney improperly attempted to impeach appellant in connection with his prior convictions. Defendant testified on his own behalf. In such event the prosecution may impeach by showing prior felony convictions, even where such priors are admitted on arraignment. When a defendant takes the stand he becomes subject to the same rules for testing his credibility as any other witness, including impeachment as provided in section 2051 of the Code of Civil Procedure. People v. Cobb, 45 Cal.2d 158, 287 P.2d 752; People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Romer, 218 Cal. 449, 23 P.2d 749; People v. Arnold, 116 Cal. 682, 48 P. 803; People v. Hickman, 113 Cal. 80, 45 P. 175. Appellant concedes that this is the rule, but contends that prejudicial error was committed during the following portions of his cross-examination:

> "Q. Have you ever been convicted of a felony, Mr. Linyard? A. No.
>
> "Q. Weren't you convicted of possession of heroin, a felony? A. Well, I did county time. It was [a] misdemeanor.
>
> "Q. Weren't you given probation on condition of county time? A. I don't know how—I couldn't recall what the deal was.
>
> "Q. Of course, you did time more than once, on possession?
>
> "Mr. Perasso: Your Honor, I am going to object to this line of questioning. If the district attorney disbelieves his statement that he was never convicted of a felony, there's other methods of proving it.
>
> "The Court: I will sustain an objection. That was for the purpose of proving knowledge. I think you have proven that—
>
> "Mr. Campbell: All right, your Honor.
>
> "The Court: —by his testimony."

[3, 4] It is appellant's contention that, upon a defendant denying having been convicted of a felony, for impeachment purposes the prosecution is limited by section 2051 of the Code of Civil Procedure to the introduction into evidence of the record of conviction. That section contains no such limitation. It permits the showing of a prior felony conviction "by the examination of the witness, *or* the record of the judgment." While the most frequently used method of impeachment in case of a denial of the prior is by the introduction of the record of conviction (People v. Williams, 32 Cal.2d 78, 195 P.2d 393), the prosecution has as an alternative a limited right to cross-examine on the prior convictions. People v. Chenault, 74 Cal.App.2d 487, 169 P.2d 29; People v. Bauweraerts, 164 Cal. 696, 130 P. 717; People v. Harvey, 22 Cal.App.2d 532, 71 P.2d 841; People v. Kepford, 52 Cal. App. 508, 199 P. 64. Such cross-examination is limited by the requirement that it must be conducted in good faith. In the instant case the appellant had admitted that he had been convicted in the superior court of two prior violations of section 11500 of

the Health and Safety Code, and had been convicted in the municipal court of a prior violation of section 11721 of the same code. The prosecutor was entitled to believe that at least one of those convictions was a felony conviction because section 11712 of the Health and Safety Code provides that in the event "any" prior narcotic conviction is charged and found to be true, the defendant "shall be imprisoned in the state prison," which, of course, makes the offense a felony. § 17 of the Penal Code. Moreover, the prosecution was required to show that defendant had knowledge of the narcotic nature of the drug he was charged with possessing. Even evidence of misdemeanor convictions is admissible to show such knowledge. People v. Spencer, 140 Cal. App.2d 97, 294 P.2d 997.

[5] It will be noted that the questioning was not prolonged, the jury was admonished, and the evidence of guilt was clear and convincing. Even if it be held that the quoted cross-examination were erroneous, it could not possibly have been prejudicial. People v. Bauweraerts, 164 Cal. 696, 130 P. 717; People v. Bigelow, 104 Cal.App.2d 380, 231 P.2d 881; People v. Elliott, 104 Cal.App. 107, 285 P. 401.

[6, 7] The appellant next contends that the prosecutor improperly and prejudicially attempted to impeach him on collateral matters. Immediately after the cross-examination above quoted the prosecuting attorney continued as follows:

> "Q. On this evening of April 25th, 1956, you were not at 1772 Sutter Street for the purpose of visiting your wife and children, were you? A. Yes, I was.
>
> "Q. Did you see them that evening? A. I saw them. I saw them every time I was there.
>
> "Q. You have been separated from your wife and children some time, haven't you? A. My daughter has just moved over to Frisco with her mother. She's been with me all the time.
>
> "Q. Didn't your wife just have you put in jail for not paying her support? A. She didn't have me put in jail.
>
> "Mr. Perasso: Your Honor, I am objecting to this line of questioning. I think it is time—the second time around on this type of questioning. I am going to have to make a motion for a mistrial, at this time, upon the conduct of—
>
> "The Court: I deny the motion for mistrial; I will sustain an objection to the question and I will instruct the Jury to draw no inference of any kind, whatsoever, from the questions of the district attorney as to the support of his family."

It is asserted that these questions about non-support were asked in bad faith for the sole purpose of degrading appellant on a collateral matter. The attorney general argues that the questions were proper for the reason that appellant had testified on direct examination that his presence in the rooming house was for the purpose of seeing his wife and two children who lived in the building. It is argued that the questioning objected to was proper in an attempt to discredit this explanation given by appellant for his presence. The case of People v. Dole, 122 Cal. 486, at page 491, 55 P. 581, at page 583, is relied on, where it is stated: "Any fact may be called out in cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses." See also People v. Zerillo, 36 Cal.2d 222, 223 P.2d 223. This reasoning seems correct. Moreover, even if the questions should not have been asked, in view of the clear and convincing evidence of guilt, their asking could not have been prejudicial.

[8, 9] Appellant next complains of alleged prejudicial remarks of the prosecuting attorney in his arguments to the jury. These remarks are three in number:

1. The prosecutor observed that where male and female defendants are involved

in narcotic, prostitution or pimping charges, the woman always comes forward and attempts to take the "rap" for her male codefendants. He continued: "* * * But, rest assured, ladies and gentlemen, that just because Arlene Laccetti says that that heroin was hers, it does not mean that it wasn't also jointly in the possession of the defendant."

2. The prosecutor also stated that narcotics were a great evil, that it was the number one crime problem, that there was nothing more vicious than the narcotic traffic; that all the things the jury may have heard about narcotics were not exaggerated; that once a person acquires a narcotic habit it costs him from $5 to $50 a day to supply the habit and "they have to turn to crime to afford it"; and that no doctor or hospital in the United States will prescribe heroin because it is so habit-forming.

3. In his concluding remarks the prosecutor stated that if "because of some feeling, that you think your verdict should be swayed by some pity or sympathy for these defendants or some feeling that [the] prosecution has not proved these two defendants guilty beyond every single doubt, instead of just beyond a reasonable doubt, if you have such a feeling as that, ladies and gentlemen, we might just as well wipe every law off the books, because, in the final analysis, all our laws are in your hands as jurors and, I ask you again, only to use your common sense in this case and you will come to the correct conclusion that these two defendants are guilty as charged."

Appellant argues that these remarks were in no way connected with the evidence introduced and were calculated to inflame the jury. He cites, in this connection, People v. Simms, 144 Cal.App.2d 189, 300 P.2d 898; People v. Ramirez, 143 Cal.App.2d 554, 300 P.2d 106, and People v. Ortez, 120 Cal.App.2d 469, 261 P.2d 325. In the Ramirez case, even though the prosecutor "went far beyond the limits of proper argument" (143 Cal.App.2d at page 557, 300 P.2d at page 109) the error was held not to be prejudicial and the judgment of conviction was affirmed. The Ortez case did not involve improper argument to the jury but involved claimed improper cross-examination of the defendant. The court found that the questions were asked in good faith, held the error to be nonprejudicial, and affirmed the conviction. The Simms case did involve "flagrant misconduct of the prosecuting attorney in his argument to the jury" (144 Cal.App.2d at page 194, 300 P.2d at page 902) in which he gave his personal opinion of the guilt of defendant. In addition, the trial court gave conflicting and misleading instructions. The judgment of conviction was reversed, the appellate court holding that, on the facts, the case was "a close one." 144 Cal.App.2d at page 196, 300 P.2d at page 903.

The prosecuting attorney undoubtedly went too far in stating that female codefendants always take the "rap" in narcotics and other cases. The other two matters discussed were within the realm of permissible argument. The reference to narcotics as a social evil simply called attention to a fact well within the common knowledge of all. People v. Head, 108 Cal.App.2d 734, 239 P.2d 506. The statements of the prosecutor contained in the last mentioned statement above was within the proper sphere of argument. It went no further than to tell the jury that, based on the evidence introduced, the prosecutor believed appellant was guilty. This was permissible argument. People v. Head, 108 Cal.App.2d 734, 239 P.2d 506. People v. Kirkes, 39 Cal.2d 719, 249 P.2d 1.

The error committed here could not possibly have been prejudicial. This is not a case like People v. Kirkes, 39 Cal.2d 719, 239 P.2d 1, which involved "flagrant misconduct" on the part of the prosecuting attorney and where, on the evidence, "the scales of justice [were] somewhat evenly balanced." 39 Cal.2d at page 727, 249 P.2d at page 6. Here the error was not flagrant and the evidence of guilt is clear and convincing. Here there was eyewitness testimony of two police officers and a neighbor, plus the uncontradicted fact that there were narcotics and narcotic equipment in the room where appellant was arrested.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

* * *

151 Cal.App.2d 6

PARLIER FRUIT COMPANY, a corporation, Plaintiff, Appellant and Respondent,

v.

FIREMAN'S FUND INSURANCE COMPANY, a corporation, Defendant and Appellant,

Pacific Indemnity Insurance Company, a corporation, and Home Fire and Marine Insurance Company, a corporation, Defendants, Appellants and Respondents,

Scottish Union and National Insurance Company, a corporation, Planet Insurance Company, a corporation, Boston Insurance Company, a corporation, and Insurance Company of North America, a corporation, Defendants and Respondents.

No. 17078.

District Court of Appeal, First District, Division 1, California.

May 15, 1957.

As Modified May 20, 1957.

Rehearing Denied June 19, 1957.

Hearing Denied July 10, 1957.

Fruit company's action on fire and use and occupancy policies, to recover for destruction of packing plant by fire, wherein defendants contended that fire was result of conspiracy to defraud them. From judgment rendered for plaintiff on the fire policies and adverse to plaintiff on the use and occupancy policies by the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., appeals were taken. The District Court of Appeal, Bray, J., held that evidence sustained trial court's finding that there had been no conspiracy to burn the premises but that trial court was incorrect in denying coverage on the use and occupancy policies.

Affirmed in part and reversed in part.

1. Insurance ⚷668(10)

In fruit company's suit against its fire insurers, to recover under policies for fire which consumed its packing house and contents thereof, evidence on insurer's contention that corporate president and others had allegedly entered into conspiracy to defraud insurers by falsely upping the value of property, insuring it, and then causing it to be burned, was for jury.

2. Evidence ⚷553(2)

Hypothetical questions which omit material undisputed evidence essential to fair opinion are improper.

3. Trial ⚷83(1)

If party believes that hypothetical questions propounded to expert witness omit essential facts, party must point such out, in objection, so that trial court may rule.

4. Witnesses ⚷389

Where first witness had denied making a statement to second witness, it was proper way of impeaching first witness to ask second witness if first witness had not made such a statement.

5. Appeal and Error ⚷1048(7)

Witnesses ⚷389

In fruit company's action on fire policies, wherein insurers contended that burned packing house was destroyed pursuant to conspiracy to defraud and wherein one of the company's employees denied having told second employee that he had set another packing house on fire, it was error to refuse to allow such other employee to be asked whether such statement had been made, for impeachment purposes, but, error was not prejudicial since record showed that court knew that insurers were contending that second employee claimed that other had set such fire.

6. Appeal and Error 🔑1071(6)

In insured's action on fire policies, wherein insurers contended that building had been burned pursuant to conspiracy between insured's president and another, in view of court's finding that it had not been burned as a result of such conspiracy, its failure to find that such other was employee was harmless.

7. Insurance 🔑129

Where general agent had authority to bind insurers, general agent's representative could issue binders pending visit from special agent to work out best form of policy.

8. Insurance 🔑131(1), 144(1), 145(1)

Insurers may enter into binding parol agreements to issue new policies, to renew existing policies or to transfer existing insurance from one location to another.

9. Insurance 🔑129

Agent possessing authority to bind company by contracts of insurance has authority to bind it by preliminary or temporary contract of insurance.

10. Insurance 🔑128(1)

To be binding as a contract of insurance, a preliminary contract must be one for present insurance and not merely an agreement to insure in future.

11. Insurance 🔑131(1)

A valid temporary or preliminary contract of present insurance may be made orally, or partly by parol and partly in writing.

12. Insurance 🔑148

Where express language as to terms and conditions is not employed in temporary contract of insurance, it is construed as being subject to terms and conditions of the policy to be issued.

13. Insurance 🔑148

Where preliminary oral contract or binding slip does not specify the terms and conditions, general rule is that parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases rather than highest form of coverage which could be obtained.

14. Insurance 🔑128(1)

Where insured and insurer's general agent entered into parol agreement for preliminary contract for present use and occupancy insurance, fact that they had not agreed upon percentage of contributions, affecting the length of time of suspension for which loss could be claimed, would not make contract too indefinite to be enforced, but it would be considered that parties contemplated a reasonable percentage as applied to insured's business operations.

15. Insurance 🔑128(1)

A preliminary contract of insurance could not be avoided for indefiniteness merely because no time period had been specified therein, as period would be considered as that between making of the agreement and time policy would be received or rejected.

16. Insurance 🔑180

Under a preliminary contract for insurance, there is implied agreement to pay usual premium.

17. Insurance 🔑128(1)

Where insured, entering into agreement with insurers' general agent for use and occupancy insurance agreed to accept total insurance of stated value, impliedly agreeing to accept from each insurer involved the amount allocated to it by general agent and each insurer in turn agreed to accept coverage in particular sum, binding preliminary contracts were made.

18. Insurance 🔑128(1)

In alleged insured's action for coverage under temporary contracts of use and occupancy insurance, wherein court found that general agent agreed to place binding coverage, its omission of the word "immediate" did not make finding one for some future indefinite coverage.

19. Appeal and Error ⚷1035

In insured's action against insurers to recover for fire damage under preliminary contracts for use and occupancy insurance wherein insured contended that letters from insurers and certain of their entries in "daily" constituted valid agreements in writing, record revealed no prejudicial error to insurers resulting from insured's allegedly changing theory of case from written agreements to oral ones.

20. Appeal and Error ⚷329

Where, in unsuccessful action against insurers, findings of fact and conclusions of law stated that all insurers should have judgment against plaintiff but, by clerical error in the judgment, two of such insurers were not mentioned but after appeal had been taken order nunc pro tunc was entered to include them in judgment, plaintiffs filed notice of appeal to include them, and, on oral argument, record was supplemented to include such proceedings, judgment in favor of such insurers was properly before reviewing court.

21. Insurance ⚷129

Notice from insurer to agent's office, declining coverage, uncommunicated to insured, was ineffective to release insurer from binder.

22. Insurance ⚷129

A general agent's authority to bind insurer was authority to bind it for an increased amount when another insurer declined partial coverage.

Winston Churchill Black, San Francisco, for Parlier Fruit Co.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for Fireman's Fund Ins. Co.

BRAY, Justice.

In an action for losses under policies of fire insurance, plaintiff recovered judgment against defendant Pacific Indemnity Insurance Company for $43,279.95 with interest from November 29, 1952, against defendant Home Fire and Marine Insurance Company of California for $25,296, together with interest from the same date, and against defendant Fireman's Fund Insurance Company for $8,467.73 with like interest. All said defendants appeal. In its action for losses under claimed use and occupancy insurance coverages judgment went against plaintiff and in favor of the defendants attempted to be charged.[1] Plaintiff appeals therefrom.

Questions Presented.

Defendants' Appeal.

1. Sufficiency of the evidence to support the finding that Orlandella and others did not enter into a conspiracy to defraud defendants by falsely upping the value of the property, insuring it, and then causing it to be burned.

2. Alleged error in admission and exclusion of evidence.

3. Failure to find that Fite was an employee.

Plaintiff's Appeal.

1. Were coverages for loss of use and occupancy sufficiently certain to be enforceable?

2. Did plaintiff change its theory?

3. Appeal against Pacific and Home.

4. Was Home released?

5. Was Boston's liability increased?

Defendants' Appeal.

[1] 1. Sufficiency of Evidence.

This litigation resulted from a fire on the night of July 31, 1952, which completely destroyed plaintiff's packing house and contents at Parlier. Defendants contend that the fire was the result of a conspiracy between Vito Orlandella, plaintiff's president, and others to cause the building to be burned.[2] Vito was one of two stockholders of Vito Fruit Company which owns a packing house in Lodi and also rents one there. That company owns and rents other packing houses. Vito also rents packing houses.

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[1] These are Planet Insurance Company, Insurance Company of North America, Boston Insurance Company, Scottish Union and National Insurance Company, Pacific Indemnity Insurance Company, and Home Fire and Marine Insurance Company.

Vito and one Goldberg had a partnership doing business under the name of Parlier Fruit Company. They were going to form a corporation but Goldberg drew out. Goldberg had introduced Vito to Max Nudel. Vito hired Nudel at $60 per week to repair the packing shed of the partnership. When the corporation was formed, Vito offered Nudel $100 per week as salary during shipping season, plus 25 per cent of the net profits for 1952. Nudel was to have 25 per cent of the corporation stock to be paid for out of his share of the profits. Vito was president, Nudel vice president, of the corporation. Five hundred shares were issued to Nudel, 1500 to Vito. After the fire Nudel paid $5,000 for his 500 shares from a loan by Vito to him in that amount. Vito held a contract to purchase the packing shed which he assigned to the corporation. The day of the fire, the shed was owned by plaintiff corporation. Nudel, under Vito's control, supervised the packing operations at the plant. Nudel, who had known Fite for about ten years, employed Fite for plaintiff to work with him in getting the packing shed ready and to handle the picking and hauling of the grapes to be packed. Vito first met Fite at the plant about a month before the fire. He told Fite that whatever Nudel had agreed with Fite was all right with him. Both Nudel and Fite had keys to the offices of the packing shed.

July 22, 23, 29, and 30, telephone calls were completed between Vito Fruit Company at Lodi and Parlier (apparently to Fite). The day of the fire (July 31) Nudel phoned Fite five or six times. Shortly before the fire started Fite attempted to reach Nudel by phone. That day, shortly before noon, Vito and Nudel arrived at Parlier. At 6:30 p. m. they went to Nudel's home, arriving about 6:45. Staying about 45 minutes, they left for Bakersfield where they arrived about 10 p. m. Nudel registered for them at the Inn. (The Inn records show this to have been between 11:15 and 11:45 p. m.) Vito went to Goldberg's room about 11:00 and 15 to 45 minutes later Nudel came in. About midnight Vito's brother phoned him from Lodi about the fire at Parlier. Vito and Nudel arrived at Parlier about 4:30 a. m. They found the shed completely demolished. They then drove to Fite's house. Fite told them he left the shed 15 minutes before the fire started. About 10 a. m. Vito again talked to Fite who told him that in talking to an investigator Fite had forgotten to mention seeing a young man at the shed. Vito told him to tell the investigator about it. The following day Vito talked to Fite saying that Nudel had persuaded Vito not to have the district attorney pick Fite up. Fite said "I will fix you" and then left in a huff. Vito has not seen Fite since. After the fire plaintiff corporation ceased operating. Nudel's salary was discontinued. He received $8,000 as his percentage on a deal with Vito and Goldberg. Nudel has not worked for Vito since the fire, although Vito on two occasions thereafter loaned Nudel $500.

Nudel previously worked with Fite for Goldberg at Youngstown. There was a fire there. Nudel denied saying to Fite that he, Nudel, had done a bad job in setting it. On the morning of the Parlier fire, Nudel called Fite but only talked to his wife as Fite had not returned from Oregon. He did not contact Fite that day. On August 1 Nudel talked to Fite who said he knew what had happened. Fite stated that if he did not receive $4,000 he would fix them. Vito and Nudel informed the district attorney of this conversation.

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[2] Defendant fire insurance companies do not question the court's findings that their respective policies were in force at the time of the fire nor that they exceeded the amounts awarded against them respectively, nor do they attack the sufficiency of the evidence to support the amounts awarded plaintiff.

Fite arrived home from Oregon, where he had been on personal business for over a week, between 7:00 and 7:30 p. m. He went to Parlier to make some business calls. He did not know whether he turned on the light in the office while phoning. He tried unsuccessfully to contact Nudel. He went to the west end of the shed to look at some machinery, but did not turn on any lights. On leaving Parlier for home he met a young man in the shed who said that he was looking for an athletic coach of Reedley. Fite left the shed about 8 p. m. Shortly after arriving home he heard the fire alarm and saw a blaze in the shed's direction. He got in his car, drove by the shed, did not stop, but returned home. From there he called Nudel's home and was told he was in Bakersfield. He called the Inn there and kept his call until midnight. He talked to Goldberg who told him he had not seen Nudel for several days. He told him to try Lodi. Fite reached Vito's brother in Lodi and told him of the fire. Fite did not recall in which conversation he told Vito about the young man at the shed. Fite talked to Nudel that evening and told him that he, Nudel, was not where he was supposed to have been the previous night. He also told Nudel that he felt Nudel had double-crossed him and that he was not going to get by with it. He denied asking for $4,000. Nudel told him to keep his mouth shut and Vito would make things right with him. At a conversation with Vito the latter told him that if he did not keep quiet, the district attorney would be sent for him. Two days later Nudel phoned Fite saying Vito would do as he said if Fite did not shut up.

At Nudel's suggestion no lights were on in the shed the night of the fire, although prior thereto one or two small lights had been kept lighted. There had been some paint thinner used in the shed but Fite could not say whether there was any in there the night of the fire.

One Galloway was the young man encountered by Fite in the shed. He heard a telephone ringing in the office before Fite came out. He saw nothing to indicate that there would be a fire. The fire occurred about an hour afterwards.

One Doi while standing across the street saw a fire burning about floor level of the shed. Five to ten seconds later he noticed it was burning close to the ceiling. In a short period everything was burned down.

One Scroggins saw the fire. It was in a pile of boxes in the center of the shed about midway to the ceiling. He ran into his house to tell his parents. When he came out in about five seconds the fire had spread to practically the whole shed.

One Alfors came out of his house after the second blast of the fire siren. He saw the fire start at the northwest area midway between the floor and the eaves. In a short while the entire structure was on fire.

The Chief of Police said he first saw the fire in the northwest corner about two minutes after he heard the fire signal. Then it gushed out of the east end to a height of 25 feet with black smoke. It looked to him like someone had set the shed on fire. There was no wind that night.

When the Fire Chief arrived the shed was completely enveloped in flames. He examined the debris the day after the fire. He found a gasoline can, but could not determine its contents. Gasoline was not kept on the premises. The can was in the northwest corner of the premises where he stated there was the most intense area of heat. He could not account for the heat being more intense here. A fire originated under the double floor of the shed, and in his opinion was an incendiary fire. His opinion was based (1) on the fact that there were apparently three independent origins of fire,[3] (2) evidence that a volatile petroleum liquid was involved, (3) the absence of any basis for accidental origin or source of acceleration, and (4) the unnatural and unusual rapidity of the spread of the fire.

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[3] Defendants' expert, the fire chief, gave as his opinion that there was a third place of the start of the fire, namely, under the floor. None of the witnesses who saw the fire saw any fire there in the beginning.

One Wolfe who had been Fire Chief of a Navy base and who had been in the Arson Bureau of the Los Angeles Fire Department for over ten years was of the opinion that there was nothing to indicate incendiarism. He testified that the rapid spread of the fire was attributable to the type of structure (open on the sides, covered with a metallic roof which he stated would cause a fire to spread more rapidly than in an enclosed building) and to the many lug boxes and the excelsior packing materials.

Six months before the fire Vito had bought the building for $12,500, one half of which had been paid at the time of the fire. Vito assigned his rights under the purchase contract to plaintiff. $3,510.10 had been spent in improvements. The value of the shed on plaintiff's books was $16,010.30, the same figure shown as loss on plaintiff's tax returns. Plaintiff had authorized Vito to obtain fire insurance on the shed in the sum of $60,000. This was done. Neither Vito, Fite nor Nudel knew how the fire started.

Defendants contend that Vito had a motive for burning down the packing shed, namely, the recovery of insurance for property worth less than the insured value. As against this, the evidence (defendants offered none to the contrary, although they claimed that the equipment had been moved out and was not in the shed at the time of the fire, a matter heretofore discussed) showed that Vito's reasonably expected profits from the operation of the packing house would far exceed any possible gain from the fire. Likewise Nudel had more to gain financially from the operation of the plant than from a fire.

The court found that Vito had not entered into a conspiracy to defraud the insurers, or caused the building and its contents to be burned. It then gave judgment against Pacific Indemnity for $43,279.95 under a fire policy on the shed of $45,000, and against Home Fire for $14,426.65 under a similar policy of $15,000;[4] for $5,654.72 under an endorsement covering box shook and packing materials of $10,000; for $5,214.63 under an endorsement covering equipment for $11,200; and against Fireman's Fund for $8,467.73 under a policy of $12,000 covering lug boxes.

We cannot say as a matter of law that the foregoing evidence proves a conspiracy upon the part of Vito together with Nudel and Fite to burn down the shed, nor even that it was burned by an incendiary.

2. Admission and Exclusion of Evidence. (a) Paul Wolfe.

[2, 3] He was the expert called by plaintiff who testified that in his opinion the fire was not of incendiary origin. Defendants contend that Wolfe's opinions were inadmissible because not based upon all the essential facts. Hypothetical questions which omit material undisputed evidence essential to a fair opinion by an expert are improper. Lawrence v. Butler, 79 Cal.App. 436, 249 P. 840. Plaintiff's questions assumed a rapid spread of the fire. The two elements which defendants contend were omitted from the evidence were (1) presence of inflammable liquids and (2) two or more different places without communication between them. We doubt that the evidence compels the conclusion that either of these elements were present. Whether the 25 foot flame and black smoke coming through the roof, considering the roofing, conveyor belts and other materials in the building, proves that there were inflammable liquids upon the premises, was a matter for the determination of the trial court. The same is true as to the question of the fire starting in more than one place. The viewpoint of the various witnesses was different and they could have been seeing the same fire from a different angle. For example, Doi first thought the fire was across the street from the shed. No witness testified to see-

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[4] The court found the actual value of the building at the time of its destruction to be $57,706.60.

ing two fires at the same time. Most of Wolfe's testimony was on the question of how particular materials would burn and was based upon the photographs of the progress of the fire taken by the witness Alfors. Defendants contend that his testimony that the fire shown therein under the floor could have started on top is based upon his assumption that there was a single floor. Wolfe saw the photographs which were taken of the fire as it progressed. The evidence is not clear as to whether the witness knew or did not know of the double floor. Defendants' only objection to questions asking Wolfe's opinion as to the nature of the fire was that no foundation was laid for the question. At no time did defendants complain that any question omitted any claimed necessary fact or that the witness did not have before him any necessary fact. Defendants should have pointed out the specific defects, if any, so that the court could have ruled upon them. Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 42 P. 983. If an objection is that the question omits essential facts, those facts should have been pointed out in the objection. Dameron v. Ansbro, 39 Cal.App. 289, 178 P. 874.

(b) Denial of Cross-Examination of Fite.

[4, 5] Defendants contend that they were entitled to cross-examine Fite under Code of Civil Procedure section 2055 because he was an employee of plaintiff. The court sustained plaintiff's objections to some of the questions asked by defendants of Fite under cross-examination under section 2055, Code of Civil Procedure, apparently upon the ground that Fite's testimony showed that he was favorable and not hostile to defendants. Section 2055[5] provides that an employee of an adverse party may be examined as if under cross-examination. Whether this section may be applied to the examination of an employee of an adverse party who shows himself, as did Fite here at times, favorable to the party examining him, has not been determined in California. Apparently in other jurisdictions it has been held that under similar statutes an employee of an adverse party who is not hostile to the party examining him may not be cross-examined. See 38 A.L.R.2d 952, 954; III Wigmore on Evidence, 3d ed., § 773, p. 131. We deem it unnecessary to determine that question here for two reasons: First, while at times Fite evidently was testifying adversely to his former employer, his attitude was not consistent and at times he appeared hostile towards the defendants. Secondly, for all practical purposes the testimony sought to be obtained by the questions to which objections were sustained, was actually adduced during other portions of Fite's testimony. There is one exception to this. Nudel had been asked by defendants if he had not told Fite that he, Nudel, had set fire to the Youngstown packing house. Nudel denied making such statement. Defendants, using the exact words of the question asked of Nudel, asked Fite if Nudel had not made such statement. The court sustained an objection to this as "leading." It was a proper way of impeaching Nudel and hence the court erred in sustaining the objection. McLaughlin v. Los Angeles Ry. Corp., 180 Cal. 527, 182 P. 44. However, the error was not prejudicial as a reading of the record shows that the court could not help but know that defendants were contending that Fite claimed that Nudel had informed him that he had set such a fire and that because of the many contradictions in Fite's testimony, his apparent bias against Nudel and Vito and all the circumstances of the case, the court would not have believed Fite had he testified that Nudel did make such statement.

3. Failure to Find That Fite was an Employee.

[6] The court made no finding on this subject other than that no infidelity of an employee caused the loss. Fite had been

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[5] Prior to 1951 this section permitted only the cross-examination of an adverse party, his directors, officers, superintendent or managing agent. In that year the section was amended to include "member, agent, employee."

an employee of plaintiff's prior to his leaving for Oregon a week or ten days before the fire. There was evidence from which it could be concluded that his employment then terminated and that he was now waiting for the plant to be started in operation when he would be an independent contractor for labor and hauling. Also the evidence would have supported a finding that he was still an employee. The finding made is subject to three interpretations, any one of which is supported by substantial evidence: (1) That Fite neither was an employee nor set the fire. (2) That Fite was an employee but did not set the fire. (3) That Fite was not an employee but did set the fire. In view of the court's finding that there was no conspiracy between Vito and Fite, under none of the possible interpretations would such finding be a defense. Nor if the court were to make a direct finding that Fite was an employee would defendants be entitled to a judgment. This action was based upon a complaint alleging that Vito conspired with Nudel and Fite to cause the fire. The court expressly found, and the evidence supports the finding, that this allegation was not true.

Plaintiff's Appeal. Coverages.

In 1952 John Babish was a licensed solicitor employed by William Rebholtz, doing business as J. S. Montgomery Company, a general agent for all the defendants in this cause of action, and as such authorized to issue binders and cover notes on said companies. He had worked for Rebholtz for 27 months during which he handled all of Vito's insurance, the latter having been assigned to him because Rebholtz was ill. Babish was authorized to represent Rebholtz and on his behalf to issue binders and cover notes for plaintiff on behalf of defendants. About two months before the fire, Babish spoke to Vito about use and occupancy insurance. July 22 Babish told Vito that he had no knowledge of the requirements of the insurance companies for this type of coverage but that he would bind Vito until a representative arrived to determine the best insurance for the type of business. One hundred thousand dollars was the amount agreed upon. Babish returned to his office and told the secretary to write defendant Planet for $100,000 coverage binder to await a special agent's visit to Lodi to work out the best form of use and occupancy for the insured. Planet wired Babish "must request reduce binder immediately to not exceeding $7,500" and endorsed on Babish's letter to it and their "daily," "Bound for $7,500.00." Babish then wrote to the other defendants requesting coverage from each which would aggregate $75,000, pending a visit from a special agent to work out the best form.[6] Babish told Vito that plaintiff was covered for use and occupancy for $75,000 and Vito stated that was sufficient. No writing of any kind was given Vito or plaintiff, nor was any writing received by Babish before the fire from any of the defendants other than Planet, indicating acceptance of coverage. Prior to the fire Pacific National Fire Insurance Company (not a defendant here) telephoned Babish's office that it would not accept coverage, Babish having theretofore requested coverage in the sum of $10,000. August 4 (after the fire) Boston wrote Babish that it could not accept the additional $10,000 binding coverage requested. July 31 (the day of the fire) Home left a message at Babish's office that it could not accept the coverage requested. Babish received this notice August 1. July 29 defendant Insurance Company of North America wrote Babish that it held $10,000 binding coverage for loss of use and occupancy to plaintiff. August 1 defendant Scottish Union and National Insurance Company in a letter to Babish stated that it had checked its correspondence and found that it was bound to plaintiff for $10,000 on use and occupancy pending a decision as to which form of policy would be issued.

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[6] $7,500 coverage by defendant Planet Insurance Company, $10,000 by defendant Scottish Union and National Insurance: $15,000 by defendant Pacific Indemnity; $10,000 by defendant Home Fire and Marine; $12,500 by Boston, and $10,000 by Insurance Company of North America. Babish later requested Boston to increase its binding coverage to $22,500.

The court found the foregoing facts to be true and that plaintiff would have made a profit of $70,675 from the use and occupancy of the building had it not been destroyed. Thus the court found that Rebholtz had authority to bind the defendants to plaintiff for binder coverages for use and occupancy in the amounts which Babish had requested coverage from defendants respectively, except that the court found that Home Fire and Marine's coverage was cancelled by its notice to Babish's office on July 31 prior to the fire and that Babish's attempt on July 30 to increase the Boston coverage from $12,500 to $22,500 was not effective. The court, however, gave judgment for defendants on the sole ground that the binding coverages were each "too uncertain and indefinite as to the amount of insurance, type of insurance to be issued or the terms thereof, and premium to be paid, to be enforceable; and that it is essential for a binding coverage to be enforceable that the terms of the policy to be selected be agreed upon when the binder is issued."

1. Was the Coverage Indefinite and Uncertain?

[7] In connection with the court's finding that Rebholtz had authority to bind defendants by an oral coverage and that Babish was authorized to represent both Rebholtz and defendants in this respect, defendants contend that Babish had no authority to bind them, claiming that he was merely a solicitor and not their agent, and that a solicitor may not bind an insurance company. See Browne v. Commercial Union Assur. Co., 30 Cal.App. 547, 554, 158 P. 765. This contention overlooks the fact that Rebholtz was the general agent of defendants with full power to bind them, and that Babish was the representative of Rebholtz authorized to act for Rebholtz. Moreover, the defendants acknowledged Babish's right to act for Rebholtz when they respectively answered his request for coverage by agreeing to the coverages above mentioned.

[8] The most serious question is whether because the exact terms of the insurance to be issued under the coverages were not agreed upon the coverages were too uncertain and indefinite to be enforced. "It is now settled law that insurance companies may enter into binding parol contracts to issue new policies, to renew existing policies or to transfer existing insurance from one location to another. * * * The reason underlying the decisions is graphically expressed in Eames v. Home Ins. Co., 94 U.S. 621, 627, 24 L.Ed. 298, where the court said: 'If parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in a different state, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable. As said by Mr. Justice Field, in the case of Ins. Co. v. Colt, 20 Wall. 560, 567, 22 L.Ed. 423, 425, "It would be impracticable" (for a company) "to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. * * * If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted." ' " Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng. Co., 7 Cir., 177 F.2d 305, 308.

[9–12] "For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the company or until the policy can be properly issued. (2) The final contract or policy itself.

This preliminary contract is of the greatest importance, for if the applicant could not be made secure until all the formal documents were executed and delivered, the beneficial effect of the insurance system would be greatly impaired. * * * An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance * * *." 44 C.J.S. Insurance § 230, p. 957. This preliminary contract is sometimes called "cover note" or "binder." "To be binding as a contract of insurance, a preliminary contract must be one for present insurance and not merely an agreement to insure at some future time * * *. A preliminary contract of insurance is necessarily of the most informal character, for it would be impracticable for a company to carry on its business at a distance if such preliminary arrangements required for their validity and efficacy the formalities required for the executed contract. * * * A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing * *. Even where such express language is not employed, the contract is construed as being subject to the terms and conditions of the policy to be issued or of the policy ordinarily used by the company, or, if there is a standard policy in the jurisdiction, according to the terms and conditions of that policy, and it is presumed that the parties contemplated such a policy, containing such conditions and limitations. * * * The intention of the parties is the fundamental issue in interpreting a binding receipt issued by insurer at the time of the application for the policy, and where such a receipt is clearly established as a temporary contract of insurance it is favorably regarded by the courts. * * * It is a common practice pending delivery of a policy to issue to the person contracting for fire insurance some sort of a receipt or memorandum, which is sometimes called a 'binding slip,' evidencing the making of the contract, and such memorandum is evidence of a present contract of insurance, affording temporary protection to the applicant pending the issuance of a policy, or consideration of the application and its acceptance or rejection." 44 C.J.S. Insurance § 230, pp. 958, 959, 960, 964.

With these rules of construction in mind, let us examine the contract here. It is clear that Babish, certain of the defendants and Vito believed that plaintiff was temporarily covered by use and occupancy insurance until the exact terms of a policy could be worked out. Certainly those defendants knew what they had in mind when they considered themselves bound for a particular sum for use and occupancy insurance. No one concerned doubted that the coverage had taken immediate effect. Had there been no fire, plaintiff would have had to pay defendants for premiums for that coverage in the event that no policy was ultimately issued. If issued, the premiums would have related back to the date when Babish told Vito plaintiff was covered. The policy must be "specific, either by express terms or by implication, as to the subject matter, period, rate, and amount of insurance." 44 C.J.S. Insurance § 230, p. 963.

[13] *Subject matter.* It was use and occupancy insurance on plaintiff's packing shed operation at Parlier. Defendants contend that there are five types of use and occupancy insurance, and therefore the subject matter was indefinite as neither Vito nor Babish knew of the best type available to plaintiff. But such fact did not invalidate the oral binder. The accepting defendants must have known the type when they accepted Babish's request for coverage. It necessarily would be the type and form usually issued to an insured in the same type and class of business as plaintiff. "Where, however, the preliminary oral contract or binding slip does not specify the terms and conditions, it is a general rule that the parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases," 44 C.J.S. Insurance § 230, p. 965, not the highest form of coverage which could be

obtained but one reasonably suited to plaintiff's situation. To hold otherwise would mean that parol binders although recognized by law to be valid, are only valid if the insurance company wants to consider them so. Thus, when the permanent policy is issued and the insured charged a premium for the period covered in the binder, a fraud would be consummated, as the insured would be charged the back premium, even though he really had no protection during the period charged for.

[14] An exhibit in the case is "Business Interruption Form No. 8," a form of use and occupancy insurance. This form contains a blank for insertion of the length of time of suspension for which loss may be claimed which shall not exceed the per cent inserted in the contribution clause which is likewise in blank. Thus this percentage was a matter still to be agreed upon at the time the policy would be issued. Defendants contend, in effect, that although plaintiff, Babish and the accepting defendants all considered plaintiff to have been covered for use and occupancy insurance, plaintiff could not be so covered because this percentage had not been agreed upon. However, this term or condition is one which it is presumed the parties contemplated to be a reasonable percentage as applied to the plaintiff's business operation. To hold otherwise would be to disregard said defendants' own acts in considering themselves bound to plaintiff to the extent they agreed with Babish to be bound.

The letter written August 1 (after the fire) by Scottish to Babish shows the proper interpretation as to terms of the coverage. After stating that Scottish was bound for $10,000 on "U. and O." it stated that there should be cooperation among the various companies as to what form the policy should be written on. The same is true of North America's letter of July 29th. It showed that it considered itself bound in the amount of $10,000, business interruption coverage, and then interpreted the binder as requiring "the ultimate Use of Occupancy form best suited and applicable to this risk * * *" It further asked Babish when he desired North America "to put this coverage on a permanent basis, kindly signify the type of form your office desires."

Planet in its letter to Babish of July 24 requested him to inform it if Babish had exercised the authorization given to "reduce our binder to not exceeding $7500" and further set forth: "The information we developed on this risk" describing plaintiff's building and contents.

Thus the accepting insurance companies themselves did not consider the binder as being indefinite, but interpreted it as requiring the policy form best suited applicable to plaintiff's business.

[15] *Period.* Obviously the period here was the time between the making of the oral binder agreement and the time when the policy would be agreed upon and received, or rejected. 44 C.J.S. Insurance § 230, p. 964, supra.

[16] *Rate.* The premium rate would necessarily be the company's rate for the coverage received. There is implied an agreement to pay the usual premium. 44 C.J.S. Insurance § 230, p. 959. See Globe & Rutgers Fire Ins. Co. v. Liberty Bell Ins. Co., 16 Cal.App.2d 76, 60 P.2d 200: "The law seems to be well settled that a 'binder' contract or 'keep covered' contract need not express any consideration, there being an implied agreement to pay the usual premium." 16 Cal.App.2d at page 79, 60 P.2d at page 202.

[17] *Amount of insurance.* Here, plaintiff expressly agreed to accept a total insurance amount up to $75,000 and impliedly agreed to accept from each company the amount allocated to it by Babish, provided only that the total from all companies did not exceed $75,000. Each defendant agreed to coverage in a particular sum. All the elements required to make a binding contract were present.

While fire insurance policies are generally in standard form and differ from the situation in use and occupancy policies, the principle enunciated in Shumway v. Home

Fire & Marine Ins. Co. of Cal., 1938, 301 Mass. 391, 17 N.E.2d 212, dealing with fire insurance coverage, is somewhat in point. There the plaintiff told the defendant's agent to cover for $4,000 a house he had just bought. The agent told him he was covered. The building was burned about a week later and before a policy was issued. The court held that a binding oral preliminary agreement of insurance had been entered into. The defendant contended the agreement was indefinite as neither the plaintiff nor the agent knew what the premium rate was to be, and the agent did not know how to describe the building. In holding the agreement to be a valid one, the court said "An oral agreement for insurance is not rendered invalid because more information must be had before a policy can be written." 17 N.E.2d at page 214.

In Bankers Indemnity Ins. Co. v. Pinkerton, 9 Cir., 89 F.2d 194, the court found that there was an oral coverage for public liability insurance, although the agent denied that there was. The court held further that it is not essential to the oral contract of insurance that "every detail should be agreed upon, but that an implied agreement concerning essentials is as good as an express agreement, and where no express agreement was reached as to the term risk the parol contract will not be invalid for uncertainty in that particular if the parties' intent as to its duration can be gathered from the facts and circumstances in evidence." At page 197.

A somewhat similar situation to ours existed in Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng. Co., supra, 7 Cir., 177 F.2d 305. There one Collins was the common agent of three insurance companies, Lumbermen, Firemen and Citizens. Collins had solicited Slide Rule for fire insurance on inventories. Slide Rule had not determined the amount or type of policy. Collins suggested a monthly reporting type. Slide Rule said it would consider the matter and advise Collins of the definite amount of coverage. Collins said he would cover the risk as soon as advised by Slide Rule. The latter wrote Collins stating it desired $75,000 insurance on monthly basis type suggested by Collins and asked that the insurance be made effective at once. Collins immediately took steps to place such insurance with the three companies. He did not advise Slide Rule the names of the companies with which he had placed the insurance. "The evidence clearly disclosed an intention upon the part of Collins to bind each of the companies when and as they were designated by him." At page 307. (The same thing is true as to the intention of Babish in our case.) The court held that the insurance companies were bound by its agent's acts. As to the contention that the parties' minds did not meet upon the names of the companies to be bound (the same contention is made in our case) the court said (at page 309): "When the agent represents several companies and selects certain of them to be bound by the risk, he is contracting for undisclosed principals. Each of the companies he represents has intrusted him with the agency, and must be held to have given him authority as such agent to select it as the one to bear the risk. Such authority springs inevitably from his authority to make insurance contracts. The insured can not be permitted to suffer because the agent fails to disclose at the time of making the contract which of several principals he binds."[7]

Concerning the fact that, as in our case, the parol contract was to be followed by certain policies, the court said that that fact did not make the contract any less binding or effective. The court quoted from Cottingham v. National Mutual Church Ins. Co., 290 Ill. 26, 124 N.E. 822,

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[7] Kleis v. Niagara Fire Ins. Co., 1898, 117 Mich. 469, 76 N.W. 155, and Kitchen v. Yorkshire Ins. Co., 1924, 226 Ky. 376, 10 S.W.2d 1074, seem to hold to the contrary. It appears to us that the Slide Rule case, supra, is better reasoned and more realistic of the present methods of insurance business.

825 (177 F.2d at page 310): "'* * * It is sufficient if one of the parties to such a contract proposes to be insured and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance are ascertained or understood, and the premium paid, if demanded. * * *'"

In American Can Co. v. Agricultural Ins. Co., 1909, 12 Cal.App. 133, at page 135, 106 P. 720, at page 721, in which the facts are entirely different from those in our case, including the fact that no binder was made, the court said: "A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing." Law v. Northern Assurance Co., 1913, 165 Cal. 394, 400–401, 132 P. 590, is to the same effect. While it may have been true that in 1909 and 1913, parol contracts of insurance were rarely made, such statement is no longer true. Oral binders are now a common and necessary part of the insurance business. The evidence here is clear and convincing as there is no contradiction of the testimony of Vito and Babish upon the subject of the coverage. Gandelman v. Mercantile Ins. Co. of America, 9 Cir., 187 F.2d 654, is not in point as the court held that the alleged agent of the insurance company had no authority to bind the companies. The court stated that at the time the agent told the plaintiff "'You are covered'" he was "not acting specifically in behalf of appellees here and his answer obviously did not purport to bind these appellees. * * *" At page 656. Western Indemnity Co. v. Industrial Acc. Comm., 182 Cal. 709, 190 P. 27, is not in point for the reason that it was held that there was no evidence showing that the agent of the insurance company had authority to bind it by parol. The same is true of Cranston v. California Ins. Co., 1919, 94 Or. 369, 185 P. 292.

[18] The court found that on July 22nd Babish on behalf of Rebholtz "agreed with plaintiff to place an immediate binding coverage" for a maximum of $100,000 and on July 24, upon instructions of plaintiff "agreed to place binding coverage at the reduced maximum of $75,000.00 * * *" Defendants contend that the omission of the word "immediate" in the finding as to July 24, was in effect a finding that at some indefinite time in the future Babish would obtain the coverage. Taking the finding with the evidence, and the fact that Babish did immediately place the coverage with defendants, plus the fact that the court found a "binding coverage" except for its claimed indefiniteness, there can be no question that the lack of the word "immediate" is unimportant.

2. Theory.

[19] Plaintiff alleged that each of the defendants agreed in writing to bind coverage on use and occupancy insurance in the amounts specified. Defendants contend plaintiff has changed its theory from agreements in writing to oral agreements. Plaintiff contends that the letters of the defendants, the entries in the "dailies" of three of the defendants and the entries in Rebholtz's record, constitute the agreements in writing referred to in the complaint. "A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing, or * * * it may be, and frequently is, evidenced by a binder or binding slip, a covering note, *a binding receipt, a binding memorandum entered on the books of the agent,* or other memoranda." 44 C.J.S. Insurance § 230, p. 959; emphasis added.

Whether plaintiff is correct in this respect is unimportant. Throughout, the case was tried upon the theory that these writings combined with Babish's oral coverage on behalf of defendants constituted the agreements upon which plaintiff was relying. If necessary as a matter of pleading the complaint could be amended to conform to the proof. Defendants were fully aware of the issues upon which the case was being tried and defended upon those issues.

3. Appeals Against Pacific and Home.[8]

[20] A most unusual situation developed upon this appeal concerning defendants Pacific and Home. The findings of fact and conclusions of law found that all defendants charged for use and occupancy insurance should have judgment against plaintiff. In the judgment, however, Pacific and Home were not mentioned. Plaintiff's notice of appeal, evidently following the language of the judgment, was directed to the attorneys for these defendants omitting Pacific and Home and stated that plaintiff appealed from that portion of the judgment in favor of the named defendants, again omitting Pacific and Home. On this appeal, the attorneys who had represented all the defendants including Pacific and Home in the trial court filed briefs on behalf of all defendants except Pacific and Home. However, they devoted about four pages of their brief to the claim that this appeal could not affect the rights of Pacific and Home. Obviously the failure to include these two defendants in the judgment and in the subsequent notice of appeal were inadvertent clerical errors. On January 17, 1957, pursuant to motion alleging such clerical error in the judgment, an order amending judgment was entered by the trial court which included Pacific and Home in the judgment against plaintiff. This order was entered nunc pro tunc as of the date of the original judgment. Plaintiff then filed notice of appeal to include in its appeal the portion of the judgment as amended in favor of said Pacific and Home. On oral argument the record was augmented to include these subsequent proceedings, so that the judgment in favor of Pacific and Home as well as all other defendants is properly before us.

4. Was Home Released?

[21] Additional to the defenses heretofore discussed, Home claims that it had released itself from any coverage to plaintiff. On July 31st, about 9:30 a. m. (the fire occurred that night) Parry, a special agent for Home, left a note on Babish's desk (he was away from the office all that day) declining to cover plaintiff for use and occupancy. Babish did not personally receive the note until August 1st. The trial court found, in effect, that this note constituted an additional reason why Home was not bound. As we have heretofore shown, Home was bound. Therefore, the question is whether the notice to the agent's office uncommunicated to plaintiff released the insurance company from its binder. Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng. Co., supra, 7 Cir., 177 F.2d 305, holds that where there is a binding parol contract to issue a policy of insurance notice to the agent of withdrawal by the company is ineffective until communicated to the insured, so as to give the insured an opportunity of getting the insurance elsewhere. Cases like Lucas v. Metropolitan Life Ins. Co., 14 Cal.App.2d 676, 58 P.2d 934, holding that where an application for insurance is made, silence or delay by the company in acting on it does not result in a contract, nor does the rejection of the application by the company have to be communicated to the applicant, are not in point. Here Babish had authority to, and did, bind the company. To withdraw from such binder the insured must be notified. This not having been done before the fire, the company was bound.

5. Boston's Increased Coverage.

[22] The day before the fire Babish in a letter instructed Boston to increase its binding coverage of $12,500 to $22,500. This was due to the fact that Pacific stated it did not want the risk requested by Babish. August 4th, Boston notified Babish that it could not accept the additional $10,000. This, of course, was after the fire. The evidence disclosed no limitation on Rebholtz's authority as agent of Boston to bind it by a coverage. The same authority which he had to bind Boston for $10,-

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[8] It will be noted that plaintiff recovered judgment against both Home and Pacific for fire insurance. We are dealing here with the question of their liability for use and occupancy insurance only.

000, which authority Boston fully recognized, authorized him to bind it in the increased amount.

Judgment in favor of plaintiff on the fire insurance policies and against Pacific, Home and Fireman's Fund is affirmed. Judgment against plaintiff on the use and occupancy binder coverages is reversed as to Pacific Indemnity, Planet, North America, Boston, Scottish and Home.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; McCOMB, J., dissenting.

Julian LEIN, Plaintiff and Appellant,

v.

Roy PARKIN, Defendant and Respondent.*

Civ. 21881.

District Court of Appeal, Second District, Division 3, California.

May 22, 1957.

Rehearing Denied June 19, 1957.

Hearing Granted July 16, 1957.

Plaintiff brought action for injuries sustained when defendant's automobile, in back seat of which plaintiff was sleeping, and which was being driven by defendant, left highway during cross-country trip. The Superior Court of Los Angeles County, Frederick F. Houser, J., entered judgment for defendant and an order denying plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that there was an assumption of risk on part of plaintiff, and that where plaintiff's evidence, which showed assumption of risk on part of plaintiff, was not elicited by plaintiff for a limited purpose, it was duty of Superior Court to consider such evidence for all purposes, and that plaintiff could not at a later time object to consideration of such evidence as relevant to assumption of risk, though defendant did not plead assumption of risk, and that under the circumstances defendant was not required to plead assumption of risk.

Judgment affirmed, and purported appeals from order denying motion for new trial dismissed.

1. Negligence 🔑116

Generally, assumption of risk by plaintiff must be specially pleaded by defendant in order that defendant may rely on such defense, but if plaintiff's assumption of risk appears from allegations of his complaint, or from evidence introduced in his behalf, plea of assumption of risk is available to the defendant though not pleaded in the answer.

2. Automobiles 🔑242(2)

Where plaintiff was asleep in back seat of defendant's automobile, which was being driven by defendant, when accident occurred, and defendant was the only witness with respect to the operation of the automobile immediately preceding the accident, res ipsa loquitur doctrine was applicable in personal injury action, and there was an inference of negligence on part of defendant.

3. Trial 🔑76

In action for injuries sustained by plaintiff when defendant's automobile, in back seat of which plaintiff was sleeping, and which was being driven by defendant, left highway during cross-country trip, trial court had duty to consider for all purposes evidence which was developed by plaintiff as to manner in which defendant had driven on the day before the accident and protests registered by plaintiff, and which was not elicited by plaintiff for a limited purpose, and plaintiff could not at a later time object to consideration of the evidence as relevant to assumption of risk by plaintiff, though defendant did not plead assumption of risk in answer.

4. Automobiles 🔑239(2)

In action for injuries sustained by plaintiff when defendant's automobile, in back seat of which plaintiff was sleeping, and which was being driven by defendant, left highway during cross-country trip, wherein evidence of plaintiff established defense of assumption of risk, and wherein plaintiff made no objection that assumption of risk was not an issue prior to motion for new trial, though trial court, while reviewing evidence at close of trial, stated that defendant had proved affirmative defense of assumption of risk on part of plaintiff, defendant was not required to plead assumption of risk.

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* Opinion vacated 318 P.2d 1.

5. Automobiles ⚷244(56)

In action for injuries sustained by plaintiff when defendant's automobile, in back seat of which plaintiff was sleeping, and which was being driven by defendant, left highway during cross-country trip, evidence established assumption of risk on part of plaintiff.

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Pestana & Kidwell, Hollywood, and Hugh R. Manes, Los Angeles, for appellant.

Hill, Farrer & Burrill, Kenneth J. Murphy and Henry E. Kappler, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained when defendant's automobile, which was driven by defendant and in which plaintiff was riding, went off the highway. In a nonjury trial, judgment was for defendant. Plaintiff appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the court erred in finding that there was an assumption of risk by plaintiff which barred his recovery in the action. He argues that since defendant did not plead that there was an assumption of risk by plaintiff such purported defense was not an issue in the case. He argues further that if such purported defense was an issue in the case the evidence was not sufficient to support the finding.

The complaint alleged that plaintiff was riding as a passenger in defendant's automobile; that the defendant was negligent in the operation of the automobile; that as a proximate result of defendant's negligence plaintiff was thrown from the automobile and injured. The answer denied that plaintiff was a passenger; denied that defendant was negligent; alleged that plaintiff was a guest, and that the accident was unavoidable.

Plaintiff and defendant became acquainted in the first part of June, 1953. At that time plaintiff desired to go to New York by automobile or bus to visit a relative and to seek employment; and defendant had planned to drive to New York in his automobile for a vacation. They agreed that they would drive to New York in defendant's automobile; that plaintiff would pay his own expenses and one-half the car expenses; and that plaintiff would drive one-half the time. On June 20, about 9:30 p. m., they left Los Angeles for New York in defendant's 1950 Studebaker automobile. They drove all night and arrived in Albuquerque, New Mexico, late the following afternoon. They remained in Albuquerque until approximately 4 o'clock the following morning when they resumed their trip. About 7:30 a. m., while defendant was driving and when they were approximately 10 miles from Tucumcari, the automobile went off the highway, and plaintiff and defendant were thrown from the automobile and injured. Plaintiff was asleep in the back seat of the automobile at the time the accident occurred.

Defendant testified that the accident occurred under the following circumstances: it was daylight and there was good visibility; there was little or no traffic; there were two lanes on the highway; the highway was fairly straight and was five to ten feet higher than the adjoining land; defendant was driving about 55 miles an hour; the right front wheel hit sand which was on the highway, and the automobile skidded, went off the highway, over a fence, and came to rest right side up. He testified further that he did not see the sand before the automobile hit it.

Plaintiff testified, on direct examination, that he did not remember the accident; that while he and defendant were in the hospital, defendant told him that defendant was driving "around 80 miles an hour" when the automobile hit the sand. Plaintiff also testified, on direct examination, that defendant was "always in a hurry"; defendant told plaintiff that he wanted to get to New York in "about three to four days"; when plaintiff was driving, defendant said: "We got to get there. We can't waste time. We want to get there as fast as we can"; when plaintiff drove slowly, by reason of road conditions, defendant said, "For God's sake, come on, let's go"; on one occasion when plaintiff was driving about 45 miles an hour, the automobile skidded; there was sand on the highway; plaintiff drove at an average speed of 45 to 60 miles an hour; defendant drove 75 to 80 miles an hour, and on those occasions plaintiff said, "For God's sake, we'll get there, let's make sure we get there; let's slow down"; on two occasions prior to the accident, the automobile skidded when defendant was driving; defendant would "slow down" when plaintiff requested him to do so; on the last driving "shift" before they arrived in Albuquerque, defendant drove at an average speed of 75 miles an hour; when they were arriving in Albuquerque, defendant said that he was going over 80 miles an hour. On cross-examination, plaintiff testified, without objection, that on more than one occasion before they arrived in Albuquerque plaintiff complained about defendant's manner of operating the automobile; and plaintiff told defendant that defendant was driving too fast.

Defendant testified further on direct and cross-examination, without objection, regarding the following matters: the speed of the automobile when he was driving and when plaintiff was driving; conversations with plaintiff as to speed; conditions of the highway; skidding of the automobile prior to the accident; and the various stops which they made and the time consumed when they stopped.

The court found that plaintiff was riding as a passenger in defendant's automobile; at a point on Highway 66 near Tucumcari, New Mexico, defendant negligently operated his automobile; plaintiff was "not guilty of any negligence which proximately caused the accident"; there was an assumption of risk on the part of plaintiff which barred his recovery in the action.

As stated above, plaintiff argues that since defendant did not plead that there was an assumption of risk by plaintiff such purported defense was not an issue in the case. It is true that defendant did not plead assumption of risk by plaintiff. As above shown, however, plaintiff introduced evidence relevant to the issue of assumption of risk—that is, plaintiff testified that defendant drove at a high speed before they arrived in Albuquerque, that he (plaintiff) made several protests regarding the high speed, and that at various times defendant made statements to the effect that he was in a hurry to get to New York. It thus appears that plaintiff presented evidence to the effect that he was apprehensive of his safety in riding in the automobile while defendant was driving. Defendant testified that he drove at an average speed of 55 miles an hour. On cross-examination, plaintiff asked defendant if, on several occasions, he asked plaintiff to drive faster. Defendant replied that he did ask plaintiff to drive faster, and that plaintiff said that he thought he was going fast enough. Also on cross-examination, defendant said that plaintiff drove at an average speed of 30 miles an hour. Other questions by plaintiff on cross-examination of defendant were intended, apparently, to elicit testimony that on the day previous to the accident defendant was driving much faster than 55 miles an hour, and that plaintiff had made protests as to the manner in which defendant was driving. It thus appears that on cross-examination of defendant, plaintiff sought to prove that defendant was in a hurry to get to New York and that defendant's manner of driving was hazardous. As above stated, the court found that defendant was negligent, and there was an assumption of risk by plaintiff.

[1] The rule with reference to pleading assumption of risk is similar to the rule with reference to pleading contributory negligence. In Gerfers v. San Diego Transit System, 126 Cal.App.2d 733, at page 735, 272 P.2d 930, 931, it was said: "'As a general rule, the contributory negligence of plaintiff must be specially pleaded by defendant in order that he may rely on such defense, but where plaintiff's contributory negligence appears from the allegations of his complaint, or from evidence introduced in his behalf, the plea of contributory negligence is available to the defense, although not pleaded in the answer.'" Also in that case the court said in 126 Cal.App.2d at page 737, 272 P.2d at page 932: "It is apparent from plaintiff's evidence alone that the jury might well have found plaintiff to have been guilty of contributory negligence in attempting to change her position at the rail to a vacant seat on a moving bus without taking the precaution of engaging the use of handles on the bus seats for support."

In Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, at page 614, 300 P. 487, at page 489, it was said: "Although contributory negligence be not pleaded as a defense—which was the case here—if it appears from the evidence introduced by the plaintiff that he was guilty of such negligence, the defense may be availed of though not pleaded."

In 19 California Jurisprudence, page 681, section 104, it was said: "Of course, if it appears from the allegations of the plaintiff's complaint or from the evidence introduced by him that he has been guilty of contributory negligence, the defense may be availed of, even though not set up by defendant."

[2-5] Plaintiff introduced evidence from which it could be inferred that there was an assumption of risk by plaintiff. Plaintiff argues further, however, that the evidence introduced by plaintiff, which was relevant to the issue of assumption of risk, was also relevant to the issue of defendant's negligence, and that under such circumstances it cannot be deemed that plaintiff, by the introduction of such evidence, consented that assumption of risk was an issue even though not pleaded. As stated by the trial judge, at the close of the trial, the doctrine of res ipsa loquitur was applicable herein. Plaintiff was asleep when the accident occurred, and defendant, who was driving at the time of the accident, was the only witness with respect to the operation of the automobile immediately preceding the accident. Such evidence raised an inference of negligence on the part of defendant. See Scott v. Burke, 39 Cal.2d 388, 392, 398, 247 P.2d 313. The evidence developed by plaintiff as to the manner in which defendant had driven on the day before the accident and the protests registered by plaintiff was not elicited by plaintiff for a limited purpose. It was the duty of the court to consider it for all purposes and plaintiff could not at a later time object to its consideration as relevant to assumption of risk. At the close of the trial, while the judge was reviewing the evidence, he stated that the defendant had proved the affirmative defense of assumption of risk on the part of plaintiff. The first time the plaintiff raised an objection that assumption of risk was not an issue was upon his motion for a new trial. Under the circumstances here, defendant was not required to plead assumption of risk. The finding that there was an assumption of risk on the part of plaintiff is supported by the evidence.

The purported appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

151 Cal.App.2d 64

Ambrose J. MURPHY, Individually and in a representative capacity for and on behalf of Retail Clerks International Association, an unincorporated association, and Retail Clerks International Association Local No. 17, an unincorporated association, Plaintiffs and Appellants,

v.

FONG SHUCK and W. Shee Fong, Individually and as copartners, doing business as Park Grocery; Leland Lee and Jack Ng Wing, individually and as copartners doing business as Yuba Grocery; Hong Fay Wong and Gene Fong, individually and as copartners doing business as Linda Super Market; Yee Den, Lee Nam Kee, Lee Shew Nam, alias Sam Lee, Quong Lee Wah and Alvon Lee, individually and as copartners doing business as Sutter Super Market, also known as Sutter Market, Defendants and Respondents.

Civ. 8968.

District Court of Appeal, Third District, California.

May 16, 1957.

Action for violations of four separate collective bargaining agreements. The Superior Court, Sutter County, Arthur Coats, J., entered order granting nonsuits as to various causes of action but leaving three counts undetermined as to two defendants, and issues in such three counts were submitted to jury which returned verdict in favor of the defendants involved. On appeal, defendants moved to dismiss appeal on ground that orders entered were not appealable in absence of entry of formal judgment based on the nonsuits. The District Court of Appeal, Van Dyke, P. J., held that neither purported "judgment" nor order granting nonsuit constituted a "final judgment".

Appeal dismissed, and cause remanded with directions.

1. Appeal and Error 🔑105

If it disposes of the action, order, which grants a nonsuit, and which is duly entered in court's minutes, amounts to a judgment of nonsuit, and an appeal will lie therefrom.

2. Appeal and Error 🔑23

Question, before the District Court of Appeal, whether the judgment or order appealed from, or whether any judgment or order made, was a final judgment was jurisdictional. West's Ann.Code Civ.Proc., § 963.

3. Judgment 🔑217

Neither purported "judgment" nor order granting nonsuit constituted a "final judgment" since they were confined to only the three counts submitted to the jury and did not dispose of the other counts. West's Ann.Code Civ.Proc., § 963; West's Ann.Labor Code, §§ 223, 225, 226.

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James F. Galliano and C. Paul Paduck, Oakland, for appellants.

Hewitt & McBride, Yuba City, Manwell & Manwell, Marysville, Gilford G. Rowland and George E. Paras, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order of the trial court entered in its minutes granting nonsuits as to various causes of action in a case based upon alleged violations of four separate collective bargaining agreements entered into by Retail Clerks International Association, hereinafter called the union, the copartnerships doing business as Park Grocery (hereinafter called Park), Yuba Grocery (hereinafter called Yuba), Linda Super Market (hereinafter called Linda), and Sutter Super Market (hereinafter called Sutter). The granting of the nonsuits left but three counts undetermined as to two defendants. The issues in these three counts were submitted to a jury, who returned verdicts in favor of the defendants involved.

When the appeal was called on the calendar of this court for argument, counsel for respondents orally moved the court to dismiss the appeal upon the ground that the orders entered in the clerk's minutes from which the appeal was specifically taken were not appealable orders, it appearing that no formal judgment based upon nonsuits had ever been entered in the cause.

[1, 2] As to the ground for dismissal urged upon the court, respondents' contentions cannot be sustained. An order granting a nonsuit duly entered in the minutes of the court, if it disposes of the action, amounts to a judgment of nonsuit from which an appeal will lie. Wulfjen v. Dolton, 24 Cal.2d 878, 879–880, 151 P.2d 840; Nicholson v. Henderson, 25 Cal.2d 375, 378, 153 P.2d 945. However, our review of the record has suggested the fundamental question whether the judgment or order appealed from or any judgment or order made is a final judgment within the meaning of the rule set forth in Code of Civil Procedure, Section 963, which provides that appeals may be taken only from final judgments and from certain other specific orders and decrees with none of which we are here concerned. The final judgment rule on appeals is a matter of statute in California, and our courts have consistently applied it. Since the issue is jurisdictional, it is incumbent upon this court to determine whether or not we have a final judgment in the case from which an appeal may be taken. This necessitates a review of the pleadings and of pertinent parts of the record.

The complaint contained twelve counts. Generally, it was alleged that the union is an unincorporated labor organization affiliated with the American Federation of Labor, which charters several hundred local unions in the United States and Canada, having a total membership of about 300,000; that Retail Clerks International Association Local No. 17, likewise an unincorporated association, is chartered by the union and acts as agent for the union in the counties of Sutter, Yuba, Butte, Glenn and Nevada; that members of the local are by virtue of that membership also members of the union; that plaintiff Ambrose J. Murphy is the financial secretary-treasurer of the local and is a member of the union by virtue of his membership in the local; that he brings the action in a representative capacity because the persons equally interested are numerous and it is impractical to bring them all before the court; that Park, Yuba, Linda and Sutter are partnerships, the individual defendants being members of one or more of the partnerships; that four separate collective bargaining agreements were executed between the union and the several partnerships, all of which run food stores in Yuba and Sutter Counties; that these written contracts were negotiated by the union with the several partnerships as bargaining agent for their union employees and provide a wage scale for each and all of the employees of the partnerships, who by the agreement undertook to pay the agreed wages and to grant other benefits to the employees covered; that the agreements were entered into for the benefit of the members of the union, particularly of those who were also members of the local union; that generally, and especially as to wages, hours and working conditions, the agreements were replicas of each other and also of a great number of other collective bargaining agreements entered into between the union and many competing employers operating food stores in the said counties; that each of the partnerships entered into its agreement with no intention of performing the same in respect to provisions for wages, hours and working conditions contained therein, but on the contrary each partnership intended to secretly and unlawfully pay their employees covered by the agreements a lesser remuneration than agreed, and to thereby defraud the employees and the union and other employers in the retail food industry in said counties who were parties to other collective bargaining contracts with the union providing for the same hours, wages and working conditions; that the partnerships having so contracted wilfully, maliciously and unlawfully put into effect and continued in effect a general and continuing agreement, scheme, conspiracy and combination amongst themselves, the substantial terms of which were to wilfully and unlawfully deprive their said employees of the benefits secured to them by the agreements; that in pursuance of said conspiracy, the partnerships induced, coerced and compelled their employees as a condition of employment to work overtime without receiving the agreed rate therefor and to lodge and board with the partnerships while submitting to arbitrary deductions therefor; that in further pursuance of said conspiracy, the partnerships instructed and required their employees under threat of discharge not to discuss with the representatives of the union their actual hours of work and actual wages received, and that the partnerships threatened their employees with discharge from employment and with blacklisting for employment by other Chinese merchants if they reported or complained to the union or to any governmental agency in respect to their wages and their working conditions; that the actions of the partnerships in coercing and compelling their employees to work for less wages than those arrived at through collective bargaining had imposed upon them terms and conditions of labor not from voluntary agreement but based upon the helplessness of the employees to exercise actual liberty of contract; that by their conduct the partnerships were enabled to and did withhold from their employees wages due them under the collective bargaining agreements and obtained for themselves an unfair and fraudulent advantage over their competitors operating under like agreements; that these actions of the partnerships and the concerted acts of all of them violated the provisions of Sections 223 and 226 of the Labor Code and constituted criminal offenses under Section 225 thereof; that the acts constituted deceitful practice and fraud in respect to the union and its members; that the direct and proximate result of the conduct of the partnerships and of their fraud, deceit and conspiracy caused damage to the union and to the members thereof, as follows: That each and all of the members of the union who performed work for the partnerships under the agreements were deprived of the benefits of collective bargaining and had suffered financial loss and damage in that they had not been fully paid; that the damage thus suffered was unknown to plaintiff, but he alleged on information and belief that wages had been withheld by the partnerships in the gross sum of $264,430.80, segregated as follows: To Park, $41,625; to Yuba, $63,000; to Linda, $97,800; to Sutter, $62,004.80; that the union itself had been damaged in that it had been and would be hampered in and prevented from properly and adequately carrying on its function and business of collective bargaining agent for food clerks in said counties in which the local functioned, and prohibited from maintaining and establishing future standards of wages, hours and working conditions with competitors of the partnerships; that the union and its members had suffered loss and damage of good will, and hindrance and frustration in its objects and purposes of establishing better wages and working conditions for such clerks in said counties; that these general damages to the union amounted to the sum of $100,000, and that because of the fraud and oppression practiced upon the union and its members exemplary damages in the sum of $100,000 ought to be assessed. All of the foregoing was pleaded in the first count or cause of action.

The second count realleged everything in the first save the allegations as to the specific amounts of damages suffered. Generally, on the subject of damages it was alleged that the union, and its members who had performed work for the partnerships, had been deprived of the benefits of collective bargaining and had suffered therefrom great financial loss and damage, and that each of the partnerships had, from the inception, breached its collective bargaining agreement with the union, was continuing to breach the same and would so continue unless restrained; that the conduct of the partnerships was affecting and undermining the collective bargaining status of the union, causing a loss of the benefits of collective bargaining to the members and destroying the ability of the union to bargain with persons employing union members in said counties with the result that all of the collective bargaining agreements, and the union's capacity to require the continuance of the same, had been and was being seriously impaired and weakened; that for such injuries there was no plain, speedy or adequate remedy at law.

The third to the twelfth causes of action, treated collectively, were based on allegations of assignments to plaintiff of the claims of a number of individuals who were members of the union and of the local and who were employed by the partnerships. It was alleged that these individuals had assigned to plaintiff their claims for payments withheld from them for work done, and judgment was prayed as to each for the amount withheld from each. The prayer of the complaint as to the first count was for judgment in the gross sum of $364,430.80 and the further sum of $100,000 as exemplary damages against each and all of the defendants. As to the second cause, the prayer was for injunctive relief to restrain the alleged violations of the agreements.

Demurrers were overruled by the court, answers were filed and the cause proceeded to trial. At the close of plaintiff's evidence, motions for nonsuits were addressed to each count and were granted by the court, save as to three of the counts resting on assignment to plaintiff of claims of employees for unpaid wages. The minute entry is as follows: "The trial of this action was resumed this 10 o'clock A.M. with all parties present as of yesterday. Fong Shuck resumed the witness stand. * * * Plaintiffs rest. In the absence of the Jury, counsel for defendants made a motion for a nonsuit. The matter was argued to the Court by counsel for respective parties, and by the Court nonsuit was denied as to Jack Lim, Bill Hoo and Harold Hock Wong. Nonsuit was granted as to Tong Wing, Jack Mon Toy, Jerry Wong, Gene Yee, Ja You Hong, Yuen Yel Hom and Dea Suey Leang. Nonsuit was granted as to Park Grocery, Yuba Market, Linda Market and Sutter Super Market, except as to third, fifth and tenth causes of action. * * * Dated July 11th, 1955. By Order of the Court, * * *" Trial continued as to the three remaining counts, and the jury returned verdicts in favor of the defendants involved. Thereafter, there was filed a document entitled "Judgment" which reads as follows: "This action came on regularly for trial. * * * A jury of twelve persons was regularly impaneled and sworn to try said action. * * * After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider their verdicts, and subsequently returned into court, with the verdicts signed by the foreman, and being called, answered to their names, and say: 'We, the jury in the above entitled action, find for the Park Grocery Defendants and against the Plaintiff, upon the Third cause of action.' 'We, the jury in the above entitled action, find for the Sutter Super Market Defendants and against the Plaintiff, upon the Fifth Cause of Action.' 'We, the jury in the above entitled action, find for the Sutter Super Market Defendants and against the Plaintiff, upon the Tenth Cause of Action.' Dated: July 13, 1955."

The document entitled "Judgment" and filed July 13, 1955, is not a final judgment. It did not purport to embrace a final disposition of the entire cause. By its express terms, it was confined to the three counts that had been submitted to the jury. It erroneously failed to include a recital with respect to the disposition of the other counts as to which nonsuits had been granted. Being so expressly confined to mere recitals of the jury action upon the three counts submitted to the jury and not purporting to make disposition of the counts that had been subject to nonsuit, it cannot be held to have affected those counts. Greenfield v. Mather, 14 Cal.2d 228, 233, 93 P.2d 100. In Bank of America Nat. Trust and Savings Ass'n v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357, 360, the court stated:

> "'* * * The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166, quoting

> from Stockton [Combined Harvester & Agricultural] Works v. Glens Falls Ins. Co., 98 Cal. 577, 33 P. 633: "There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversey." '" See, also, Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104; and Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 512, 20 P.2d 129.

What we have said concerning the purported "Judgment" following the jury verdicts applies to the order granting nonsuit as entered in the clerk's minute book, for it, too, does not purport to be a final judgment nor did it end the suit in the court in which it was entered. As said in Greenfield v. Mather, supra [14 Cal.2d 228, 93 P.2d 102]:

> " 'It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments. It is at once apparent that no *final* judgment was entered in the action until March 14, 1935. The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of Section 963 of the Code of Civil Procedure, or otherwise. Our conclusion is fully supported by the leading case of Gunder v. Gunder, 208 Cal. 559, 282 P. 794, and the many cases which follow it, * * *.' "

After citing the foregoing quotation from Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174, the court in Greenfield v. Mather continued:

> "Although the above quotation refers to the judgment of March 14th as a 'final judgment', that judgment was not under review, and the remark is pure dictum."

As before noted, the court decided that neither of the purported judgments was final and that the case remained undisposed of. In Bank of America Nat. Trust and Savings Ass'n v. Superior Court, supra, where the question as to piecemeal determination of a case pleaded in several counts arose, the court said at page 701 of 20 Cal. 2d, at page 360 of 128 P.2d:

> "These arguments are all predicated upon a fundamental fallacy. They assume that there can be a piecemeal disposition of the several counts of a complaint. * * * That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains. (Citing cases, including Mather v. Mather, supra.]"

[3] In the instant case the first two counts pleaded against each of the four partnerships a cause in contract seeking damages for breach and restraint from further breaches, a cause in tort based on fraudulent procurement and execution of the same contracts, and, jointly and severally against all, a cause of action in tort based upon a conspiracy to fraudulently procure through false pretense the benefits of collective bargaining agreements identical to those used in the said counties by the union and defendants' competitors with the secret intent, followed by common action, to obtain a competitive advantage to the four partnerships. Basic to every count in the complaint was the charge of breach of contract, and the gravamen of that charge was the failure to live up to the wage scale. Such a case cannot be determined in the manner here attempted. Neither the nonsuit orders nor the jury verdicts recited in the "Judgment" can be considered as final judgments. To do so would permit piecemeal disposition of the action, with multiple appeals, in violation of the rule of

final judgment on appeal as expressed in the statute.

For the reasons given, we hold there has been no final judgment in this action. The appeal is dismissed, and the cause is remanded with directions to the trial court to proceed further by action not inconsistent herewith.

PEEK and SCHOTTKY, JJ., concur.

PACIFIC PIPELINE CONSTRUCTION COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Appellant.

Civ. 21789.

District Court of Appeal, Second District, Division 1, California.

May 15, 1957.

On petition for rehearing after judgment in Cal.App., 309 P.2d 866.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, Deputy Attys. Gen., for appellant.

Thomas A. Wood and Larwill & Wolfe, Los Angeles, for respondent.

PER CURIAM.

In the petition for rehearing, respondent urges that this court in its opinion declares that [309 P.2d 867] "Upon substantial evidence, the court found: '* * * that said transfer of property, as provided for in said exchange agreement, was not a sale of property at retail such as is contemplated by and referred to in Section 6051 of the Revenue and Taxation Code, but was an occasional sale within the meaning of that term as used in Sections 6367 and 6006.5 of the Revenue and Taxation Code, and as contemplated by the pertinent law of California. * * * The distribution of said machinery and equipment was not a taxable transaction and the said tax thereon was unlawful, invalid and paid under protest by plaintiff'", and that, nevertheless, "* * * decides this litigation and reverses the judgment of the lower court which the court states was predicated upon substantial evidence".

We regard the portion of the findings above quoted that said exchange of equipment "'was an occasional sale within the meaning of that term used in Sections 6367 and 6006.5 of the Revenue and Taxation Code, and as contemplated by the pertinent law of California'" as an erroneous conclusion of law from the probative facts found.

The petition for rehearing is denied.

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151 Cal.App.2d 165

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Helen DEAN, Defendant and Appellant.

Cr. 5891.

District Court of Appeal, Second District, Division 2, California.

May 20, 1957.

Rehearing Denied June 3, 1957.

Hearing Denied July 16, 1957.

Defendant was convicted under counts charging possession of a derivative of opium and from a judgment of the Superior Court, Los Angeles County, Mark Brandler, J., the defendant appeals. The District Court of Appeal, Moore, P. J., held that, action of the officers in making an arrest of defendant's wife on strength of the information and obtaining a quantity of narcotics from her was not unlawful, though the officers had neither a warrant of arrest or a search warrant.

Judgment affirmed.

1. Arrest 🔑**63(4)**

An arrest may be made by police officers acting solely on advice of a reliable confidential informer.

2. Arrest 🔑**63(4)**

While information imparted to an officer by anonymous informer is not sufficient to justify an arrest, when the officer knows his informant and that the latter is reliable, he may act with the same diligence as if he were in possession of a warrant of arrest.

3. Arrest 🔑**63(4)**

Whether informant was reliable and whether officer relied on the information received in making arrest is determinable by the trial court so long as it acts within sound discretion.

4. Arrest 🔑**63(4)**

Information imparted to an officer in making an arrest is not evidence of guilt or innocence of the accused before either the court or jury, nor is the informant's credibility in issue, with respect to the reasonable grounds for making the arrest.

5. Arrest 🔑**63(4)**

Criminal Law 🔑**394**

Only the credibility of the officer making arrest on information from an informant is in issue before the trial court, and if it determines that the officer is not credible, the arrest and search are unauthorized, and the evidence acquired by the arrest and search should be excluded.

6. Arrest 🔑**63(4), 71**

Where informant volunteered information to officers that defendant was a big narcotic peddler and had narcotics in his home, and the informant was a reliable person and had never been convicted of crime, action of the officers in making an arrest of defendant's wife on strength of the information and obtaining a quantity of narcotics from her was not unlawful though the officers had neither a warrant of arrest nor a search warrant.

◆

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and John S. McInerny, Deputy Attys. Gen., for respondent.

MOORE, Presiding Justice.

Appellant and her husband were tried upon an information charging three separate counts of illegal possession of narcotics. (Health and Safety Code, § 11500.) The husband was acquitted of all charges but appellant was convicted of counts I and II charging possession of heroin and eukodal, a derivative of opium. Her motion for a new trial and probation having been denied, she was sentenced to State prison but the court suspended the sentence and granted probation on condition that she serve one year in the county jail and refrain perpetually from further illegal use of narcotics. She bases her demand for reversal solely upon the concept that the evidence introduced against her had been procured by a violation of the exclusionary rule, announced in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. A recital of the facts will disclose that such rule was not violated.

About 7:30 p.m. Officer Schmidt of the Los Angeles police was informed that Albert Dean was a peddler of narcotics and had a quantity in his home. Not knowing the address, the informant accompanied the officers to the home. Schmidt had previously received accurate information with respect to other crimes from the same informant; had twice acted upon such information and found it to be reliable. Acting pursuant to the information, Officers Schmidt and Petevich were directed to the Dean home by the informant. They had neither warrant of arrest nor search warrant. They entered, arrested the husband, searched the premises and obtained two bottles of benzedrine. After appellant denied that she had any other narcotics and the officers stated that a police matron would be summoned to search her, she announced that that would not be necessary and removed from her brassiere two bottles containing a large quantity of heroin. She declared that all narcotics in the house belonged to her; that she intended to sell them. The narcotics discovered by the search were found to be heroin, codeine, dihydrohydroxy and eukodal.

Not only did appellant present the drugs to the officers but also she took the stand to say that she had been in possession of the capsules of heroin, had purchased them from a man in downtown Los Angeles and that her husband knew nothing about her purchase or the presence of the drugs in the home.

[1–5] Despite her testimonial admissions she contends that her arrest was unlawful for the reasons that the officers had neither warrant for her arrest nor a search warrant and that they were not justified in acting upon information from a reliable informant. In this she is unmindful of the law that an arrest may be made by police officers acting solely on the advice of a reliable, confidential informant. People v. Guerrera, 149 Cal.App.2d 133, 307 P.2d 940, 942; People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24, 25; People v. Montes, 146 Cal. App.2d 530, 303 P.2d 1064, 1066. Appellant is obviously misled by those decisions where the information was received from anonymous informants. While the information imparted to the officer by that type of informer is not sufficient to justify an arrest, yet when the officer knows his informant and that the latter is reliable, he may and should act with the same diligence as if he were in possession of a warrant of arrest. Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36; People v. Holguin, 145 Cal.App.2d 614, 617; People v. Thymiakas, 140 Cal.App.2d 940, 942, 296 P. 2d 4. Whether the informant was reliable and whether the officer relied on the information received has first to be determined by the trial court so long as it acts with sound discretion. People v. Burke, 47 Cal. 2d 45, 301 P.2d 241; People v. Gonzales, 141 Cal.App.2d 604, 607, 297 P.2d 50; People v. Thymiakas, supra. The information imparted to the officer is not evidence of guilt or innocence of the accused, for either the court or jury. Neither is the informant's credibility is issue with respect to the reasonable grounds for making the arrest. Only the credibility of the officer is in issue before the trial court and if it should determine that the officer is not credible the arrest and the search would have been made in vain and the evidence acquired by the arrest and the search would have been excluded. After all, the reliability of the informant is not paramount. It is the officer's credibility and the soundness of his reasons for relying upon his informant that must impress the court before it can determine that the officer was authorized to make the arrest.

[6] In the instant action the informant was paid nothing for his information. He was not under arrest; was an employed working man. He did not personally know appellant's husband, Albert Dean. He was not connected with the police department. He was not a user of narcotics; had never been convicted of a crime. He called on Officers Schmidt and Petevitch and volunteered the information that Albert Dean was a big narcotic peddler and had narcotics in his home. He did not know Dean's address but directed the officers to his home. By such recital and by the bearing and manner of Officer Schmidt, the court found that he was a credible witness and that his informant was a reliable person.

The action of the police in making the arrest of appellant on the strength of the information imparted to the police is to be commended as that of a diligent and valiant officer.

Judgment affirmed.

ASHBURN, J., and RICHARDS, Justice pro tem., concur.

151 Cal.App.2d 428

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Marshall Bane BROYLES, Stephen D. Gully et al., Defendant and Appellants.

Cr. 1098.

District Court of Appeal, Fourth District, California.

May 29, 1957.

Defendants were convicted of kidnapping. The Superior Court of San Diego County, Edgar B. Harvey, J. pro tem., rendered judgment, and one of the defendants appealed. The District Court of Appeal, Barnard, P. J., held that the evidence established crime of kidnapping and active participation of appellant therein.

Judgment affirmed.

Kidnapping ⟹5

Evidence established crime of kidnapping, committed by means of impersonation of officer and force, and that driver of automobile in which victim was transported actively participated in the kidnapping.

◆

Stephen D. Gully in pro. per.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants Broyles and Gully, with one Crabb, were charged in Count 1 of an information with kidnapping, it being alleged that on May 17, 1956 they wilfully, forcibly, etc. kidnaped and carried away one Virginia Jackson from a point in San Diego County to another part of said county. In a second count Broyles was charged with the crime of rape. The information also charged that Broyles and Gully had each suffered a prior conviction. They admitted the prior convictions and all three pleaded not guilty to the main charges. A jury found all three defendants guilty of kidnaping, and also found Broyles guilty of rape. Crabb was granted probation, and probation was denied to Broyles and Gully. All three defendants were ably represented at the trial by different attorneys. Broyles and Gully personally filed notices of appeal from the judgments entered. Broyles later abandoned his appeal, and only the appeal by Gully remains for consideration.

It appears from the evidence that on the night of May 17, 1956, Broyles, Gully and Crabb were riding together in an automobile in an isolated area in a hilly section of San Diego County. As they rode along they saw an automobile parked on a back road, which was occupied by a Mr. Waites and Virginia Jackson. They returned to this spot and Broyles and Gully went over to the Waites car. Broyles turned a flashlight into the Waites car and told the occupants that he was a special deputy sheriff patrolling the back roads, that what they were doing was wrong, and that he would have to take them in. He asked to see Waites' driving license, and when Waites got out of his car and handed his driver's license to Broyles he heard Broyles say "Keep 'em covered." Broyles told Gully to call in and see if Waites and Mrs. Jackson had a record and if the car was stolen. Gully went back to their automobile and then came back saying that there was no record against them and the car was not stolen. Broyles told Waites he would have to take Mrs. Jackson down to the station. When Waites tried to induce him to let him take her home he said this was against the rules and he could not do it. When Waites suggested that they take Mrs. Jackson home and let him follow, Gully replied "Well, maybe we could." They refused to let Waites take her home and ordered Mrs. Jackson into their car, which Gully drove. Mrs. Jackson got into their car believing that these were police officers. They told Waites to drive on ahead and they would follow, which was done. After proceeding several miles

Broyles told Gully to drive into a side road, which he did. When Waites discovered that they had turned off he circled back but was unable to locate them. He then proceeded to a police station, where he was told that no special police officer or special deputy sheriff was on duty in the kind of automobile in which the defendants were riding. An alarm was put out, and officers proceeded at once to that area to look for that car.

In the meantime Broyles told the driver of the car to stop in a secluded spot and then told Gully and Crabb to take a walk, which they did. Broyles then committed the rape in question. As Gully and Crabb were returning to the automobile they saw a car with officers in it approach and stop at the scene. Gully and Crabb then took off through the brush and went on home. Mrs. Jackson told the officers she was the woman they were looking for, and they arrested Broyles.

The next morning Gully made a statement to the officers which was taken down in shorthand and transcribed. In this statement he said that he had been riding with Broyles and Crabb; that when they stopped near the other car he and Broyles got out while Crabb stayed in the car; that before getting out they turned on the car radio so it would receive nothing but static, in order to sound like the crackling of a police radio; that they had a red plastic flashlight; that Broyles told the occupants of the other car that he was a special deputy sheriff and wanted to see their identification; that Broyles told him to go back to the car and check with the radio as to whether the other car was stolen; that he went back to their car, fooled around a few minutes and then returned and told Broyles "they are not wanted"; that they put the girl in the back seat of their car and followed Mr. Waites downhill; that as they were driving along he could hear crying in the back seat and could hear "somebody getting hit"; that Broyles told him to turn to the left on another road; that after he drove a while Crabb took the wheel, and they went down to a gravel pit; and that when they arrived at the gravel pit Broyles told him and Crabb to "get lost", and they left. At the trial, Gully first admitted that these statements were true and later said that certain parts of them were not quite accurate. He also stated that when they first approached the other car he and Broyles "decided on having a little fun and scaring these people"; and that when Waites got out of his car he thought Waites might start a fight and he went over to assist Broyles in the event Waites started anything.

The appellant's only contention is that the evidence is not sufficient to support the judgment of conviction. The only argument made is that everything that was done was done by Broyles; that the appellant took no part in it other than being present; and that when they saw the sheriff's car drive up he and Crabb started running for home because "We thought that Mr. Broyles had done something wrong and that we didn't want to get involved."

There was ample evidence that the victim, Mrs. Jackson, was induced to enter the car driven by the appellant by the representations made by these parties that they were police officers; that she believed these representations, and acted through fear; that they forced her into their car by giving orders which she felt compelled to obey; and that some force was used while she was being transported over a space of several miles. The evidence is sufficient to show the crime of kidnaping. People v. Trawick, 78 Cal.App. 2d 604, 178 P.2d 45; People v. Flores, 62 Cal.App.2d 700, 145 P.2d 318; People v. Rosa, 10 Cal.App.2d 668, 52 P.2d 542; People v. Brazil, 53 Cal.App.2d 596, 128 P.2d 204; People v. Harris, 67 Cal.App.2d 307, 154 P.2d 442. That the appellant took an active part in this kidnaping clearly appears. He assisted Broyles from the start; he took an active part in representing that they were officers; he pretended to make a radio call, and made a false report thereon, for that very purpose; he helped out by suggesting to the victim that they might take her home; and he then drove the car in which the victim was transported. The evidence was sufficient to show, beyond any reasonable doubt, that the appellant actively participated in this kidnaping.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

151 Cal.App.2d 228

Dorothy KELLEY, Plaintiff and Appellant,
v.
Howard KELLEY et al., Defendants.

Howard Kelley, Respondent.
Civ. 22165.

District Court of Appeal, Second District,
Division 2, California.
May 22, 1957.

Rehearing Denied June 13, 1957.
Hearing Denied July 16, 1957.

Proceeding for reduction of monthly support payments made to wife pursuant to property settlement agreement and divorce decree. From order of Superior Court, Los Angeles County, Arthur K. Marshall, J. pro tem., reducing monthly support payments, wife appealed. The District Court of Appeal, Ashburn, J., held that where support provisions of property settlement agreement incorporated by reference into the divorce decree provided that husband would pay $350 per month in discharge of his obligation to support wife and maintain policies with wife as beneficiary so long as wife was living and remained unmarried and monthly support payments were in addition to any and all other sums provided for to be paid to the wife, obligation of the husband to support the wife was severable from property division and support payments were subject to modification upon husband's showing of changed circumstances, and, in view of circumstances, trial court's reduction of support payments for $350 per month to $275 per month was not an abuse of discretion.

Order affirmed.

1. Divorce 🔑254

A property settlement agreement between the parties can be incorporated into the divorce decree by reference.

2. Divorce 🔑245(1, 2)

The court has no power to modify in instances where property and support provisions of a property settlement agreement are not severable since the provisions are parts of an integrated agreement covering adjustment of property rights, but if they are severable, the court may modify the support provisions upon showing of changed conditions.

3. Husband and Wife 🔑279(1)

In ascertaining the intent of the parties to an agreement for support and property settlement, the document is to be viewed from and within its four corners and where there is no extrinsic evidence, the question of its meaning is one of law

4. Divorce 🔑245(1, 2)

Where support provisions of property settlement agreement incorporated by reference into divorce decree provided that husband would pay $350 per month in discharge of his obligation to support wife and would maintain insurance policies with wife as beneficiary so long as wife was living and remained unmarried, and such payments were in addition to any and all other sums provided for to be paid to the wife, obligation of husband to support wife was severable from property division and support payments were subject to modification upon husband's showing change of circumstances since divorce decree.

5. Divorce 🔑245(3)

In proceeding for reduction of monthly support payments due under divorce decree, evidence was sufficient to sustain trial court's implied finding that husband's circumstances had changed since divorce decree and reduction of monthly support payments from $350 per month to $275 per month was not an abuse of discretion.

Leslie & Bernson, Beverly Hills, for appellant.

Epman & Friedman, Los Angeles, for respondent.

ASHBURN, Justice.

Wife's appeal from order reducing amount of monthly payments to be made to her by husband pursuant to property settlement agreement and decree of divorce. She claims the provision for such payments was an integral part of the property settlement and hence not subject to modification. Husband claims they are alimony payments and subject to alteration when circumstances change. The court upheld this latter contention and made a minute order reducing the agreed amount of $350 to $275 per month.

Plaintiff's complaint, based on extreme cruelty, alleged that: "All community property has been disposed of pursuant to the terms of a property settlement agreement between the parties dated February 14, 1955," and prayed *inter alia* "[t]hat the property settlement agreement entered into by the parties be approved by this court and that this court make its order binding the parties hereto in accordance with the terms and provisions of said property settlement agreement, and that said property settlement agreement be incorporated in the decree of divorce." Default decree of divorce was granted to her on February 18, 1955, containing this language: "It Is Further Adjudged that the property settlement agreement made and entered into between the plaintiff and the defendant, Howard Kelley on the 15th day of February, 1955 be and the same is hereby approved. Pursuant thereto, it is ordered, adjudged and decreed as follows: 1. That the defendant shall pay to the plaintiff commencing as of February 16, 1955, and continuing thereafter so long as the plaintiff is living and remains unmarried, the sum of Three Hundred Fifty Dollars ($350.00) per month which shall be paid in installments of One Hundred Seventy Five Dollars ($175.00) each on the 16th and 1st day of each and every month thereafter. 2. That the defendant shall pay all premiums now due or hereafter to become due on certain policies of insurance * * *; that the defendant shall retain the plaintiff as the sole beneficiary of said policies of insurance and shall not change the same except in the event of plaintiff's death or remarriage * * *."

[1] The agreement thus incorporated into the decree by reference (a method now recognized as proper and effective; Flynn v. Flynn, 42 Cal.2d 55, 59, 265 P.2d 865; Foust v. Foust, 47 Cal.2d 121, 302 P.2d 11) declares in Article One, subdivision (e): "The parties desire to arrange by this agreement for the division of all of their property, and for the making of periodic payments by Husband to Wife in discharge of his legal obligation to support and maintain Wife because of their marital relationship." The instrument then proceeds to handle the two subjects separately, the matter of support in Article Three and the division of property in Article Four.

Article Three starts with the declaration: "Husband and Wife in discharge of Husband's obligation to support and maintain Wife, and because of their marital relationship, hereby agree as provided in this Article Three." Subdivision (a) provides for incorporation of the agreement in any divorce decree, "and this agreement and particularly this Article Three hereof shall be deemed incident to such divorce." Subparagraph (b) says: "In addition to any and all other sums herein provided for to be paid by the Husband to the Wife, the Husband agrees to pay to the Wife, commencing as of February 16, 1955, and continuing thereafter so long as the Wife is living and remains unmarried, the sum of Three Hundred Fifty Dollars ($350.00) per month, which shall be paid in installments of One Hundred Seventy Five Dollars ($175.00) each on the 16th and 1st day of each and every month hereafter." That ends Article Three.

Article Four says: "Husband and Wife, in discharge of their obligations, each to the other in connection with their respective property interests in any and all property of every kind and nature whatsoever accumulated by them, or either of them, during their marriage, hereby agree as provided in this Article Four. (a) As an additional consideration for the payment by Husband to Wife of the sum or sums specifically provided for in this Article Four, the Wife does hereby renounce, relinquish, waive and forever discharge all of her rights, except as specifically in this agreement otherwise provided, in and to any and all community property of the parties. (b) The Husband agrees to pay to Wife at or before the execution of this agreement the sum of One Hundred Seventy Five Dollars ($175.00)." Then follow provisions (subparagraphs (c) to (k)) dividing the property, apparently community in nature.

Article Five pursues the same subject. It provides with respect to certain policies of insurance on the husband's life that the wife shall remain the sole beneficiary and the husband shall have no power to change the beneficiary "except in the event of wife's death or remarriage."

Article Eleven: "Except as herein to the contrary provided, the parties shall and do hereby mutually remise, release and forever discharge each other from any and all actions, suits, debts, claims, demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other, upon or by reason of any matter, cause or thing up to the date of the execution of this Agreement, it being the intention of the parties that henceforth there shall be, as between them, only such right and obligations as are specifically provided in this Agreement."

Article Twelve provides that the agreement shall operate as a renouncement and relinquishment of widow's allowance or "to participate in the division or sharing of the estate of such deceased party, except as a creditor under this Agreement, and the estate of such deceased party shall descend to the heirs at law of such deceased party, or to his or her devisees or legatees in the manner as though the parties hereto had never married."

[2] The controlling question of severability of provisions concerning support of the wife and division of property has been the subject of frequent discussion in the courts of review of this state. It is settled that there is no power to modify in instances where the provisions are not severable, being but parts of an integrated agreement covering adjustment of property rights; but if they are severable the court may modify the support provisions upon a showing of changed conditions just as if they were found in a decree rendered without the aid of any underlying agreement. Dexter v. Dexter, 42 Cal.2d 36, 40, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; Flynn v. Flynn, supra, 42 Cal.2d 55, 60–61, 265 P.2d 865; Finnegan v. Finnegan, 42 Cal.2d 762, 764, 269 P.2d 873; Messenger v. Messenger, 46 Cal.2d 619, 624, 297 P.2d 988; Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539; Herda v. Herda, 48 Cal.2d 228, 308 P.2d 705; Bradley v. Superior Court, 48 Cal.2d 509, 310 P.2d 634. The situation is not altered by incorporation of the agreement into a decree of court or by the merger resulting therefrom. Adams v. Adams, 29 Cal.2d 621, 624–625, 177 P.2d 265; Codorniz v. Codorniz, 34 Cal.2d 811, 814, 215 P.2d 32; Messenger v. Messenger, supra, 46 Cal.2d at page 624, 297 P.2d 988. The court looks through the decree to the agreement and determines the rights of the parties in this respect just as if there were no merger.

[3] There is no inflexible standard for measurement of the intent of the parties; the question is the same as in the interpretation of any other agreement,—an ascertainment of the intention of the parties as expressed through the language adopted by them. The document is to be viewed from and within its four corners and where, as here, there is no extrinsic evidence the question of its meaning is one of law. Fox v. Fox, supra, 42 Cal.2d 49, 52, 265 P.2d 881; Messenger v. Messenger, supra, 46 Cal.2d 619, 626, 297 P.2d 988; Bradley v.

Superior Court, supra, 48 Cal.2d 509, 310 P.2d 634. "No single factor can be relied upon in any given case to determine whether monthly payments are in the nature of property or alimony. The agreement must be taken as a whole and consideration given as to the circumstances under which it was made and the nature and value of the property being divided and its relation to the amount of the periodic payments." Pearman v. Pearman, 104 Cal.App.2d 250, 253, 231 P.2d 101, 103. While the labels used by the parties are not controlling (Fox v. Fox, supra, 42 Cal.2d at pages 52–53, 265 P.2d 881; Messenger v. Messenger, supra, 46 Cal.2d at page 625, 297 P.2d 988), they are entitled to consideration as indicative of the actual intention. Pearman v. Pearman, supra, 104 Cal.App.2d at page 253, 231 P.2d 101; Weedon v. Weedon, 92 Cal.App.2d 367, 369, 207 P.2d 78; Fields v. Fields, 94 Cal.App.2d 56, 59, 209 P.2d 977.

[4] One of the considerations emphasized in cases finding an integration of property and support provisions is the receipt by the wife of a heavy preponderance of the community property and a resulting implication of intention to relinquish or reduce her right of support in consideration of the disproportionate amount of property received by her. See Adams v. Adams, supra, 29 Cal.2d 621, 625, 177 P.2d 265; Helvern v. Helvern, 139 Cal.App.2d 819, 830, 294 P.2d 482. An analysis of the agreement at bar discloses no such intention, express or implied.

In the first place, it cannot be ascertained from the agreement (and there is no other evidence) what the relative values of properties received by the respective spouses were. On the face of the agreement it looks like the wife had received the more valuable properties but there is not sufficient basis for a definite conclusion upon the matter. This is a cruelty case and the court cannot know whether the wife received more than the trial judge would have awarded without an agreement, or whether the parties thought that such might be the case. More importantly, however, Article Four contains affirmative evidence that such was not the intent. It requires the husband to pay the wife at or before execution of the agreement the sum of $175. The wife, as "an additional consideration for the payment by Husband to Wife of the sum or sums specifically provided for in this Article Four," waives and relinquishes all her rights "in and to any and all community property of the parties." Plainly, the wife's acceptance of the property division provided by Article Four and her waiver of any other property rights was made in consideration of the specified payment of $175 and not any implied disproportion in that property division. This waiver is found in the article dividing the property and it extends only to property and not to right of support. The article *ex industria* declares that its scope is property, the "discharge of their obligations, each to the other in connection with their respective property interests."

In contrast, Article Three expressly declares that the obligations thereby imposed upon the husband are "in discharge of Husband's obligation to support and maintain Wife." This emphasizes the introductory declaration of purpose (Article One (e)) to arrange by agreement "for the division of all of their property," and "for the making of periodic payments by Husband to Wife in discharge of his legal obligation to support and maintain Wife because of their marital relationship,"—not in discharge of any property arrangement or agreement; the marital obligation is declared to be a living, surviving thing.

Article Three treats of no other subject. It specifies that the $350 monthly payments shall be made "in addition to any and all other sums herein provided for to be paid by the Husband to the Wife." These payments are to be made "so long as the Wife is living and remains unmarried;" this language is characteristic of an alimony award (see Pearman v. Pearman, supra, 104 Cal.App.2d 250, 254, 231 P.2d 101). This is likewise true of a provision for termination of payments upon the death or remarriage of the wife (Pearman v. Pearman, supra, 104 Cal.App.2d at page 254, 231 P.2d 101; Fields v. Fields, supra, 94 Cal. App.2d 56, 59, 209 P.2d 977; Weedon v. Weedon, supra, 92 Cal.App.2d 367, 369, 207 P.2d 78). The fact that the insurance obligation of Article Five terminates upon the wife's death or remarriage also evidences an intention that the husband's obligation to protect and support her shall not extend beyond the period during which alimony normally extends. Pearman v. Pearman, supra, 104 Cal.App.2d at page 255, 231 P. 2d 101.

Perhaps the intention of the parties would have been clarified by a declaration that the support provision is severable from the property division and not a part of the same. Short of that it is difficult to see how the draftsman could have expressed more clearly the intention that the obligation of the husband to support the wife should survive, not as part of a property division but "in discharge of his legal obligation to support and maintain Wife because of their marital relationship."

We hold that the provision of the agreement and the decree for payment of $350 a month to the wife is one for alimony, is severable from the division of property rights, and hence was subject to modification by the court upon a showing of changed circumstances.

[5] The evidence is sufficient to support that implied finding of the trial court. At the time of the decree defendant was general agent for Continental Assurance Company and was receiving a salary of $633 per month. He also had an expense account of $818 per month. The salary remained the same down to the time of the modification hearing but the expense account was reduced to $686 in October, 1955, and to $554 in January, 1956. Out of this allowance he paid the cost of running his office which was always in excess of $554 a month, in excess of $686 since October, 1955, and in January, 1956, was $779.18. His other earnings from the time of divorce to the time of modification aggregated $1,933.30, an average of $193 a month. His personal expenses as well as his salary have remained stationary. Though he had paid all installments of alimony prior to the hearing he had borrowed $1,500 from his mother and had not repaid any part of it. These figures seem to spell a total income of $1,644 per month at the time of the decree and an outgo of not less than $904, including alimony. The difference is $740 a month without reference to his living expenses. By the time of the hearing the income was down to $1,380 and the outgo up to $1,129, in addition to living expenses. The difference is $251 from which the last mentioned item must come. Defendant testified that his business expense exceeded his income by $200 for the last month before the hearing. Another important factor developed at the hearing; his contract as general agent was to be cancelled as of April 1, 1956. This bald fact appears in the record without objection or motion to strike, although other evidence on the same subject had been stricken previously.

The wife testified that her expenses were about the same at the time of the hearing as when the judgment was rendered, namely, $450 per month. She had qualified herself as a real estate agent and was working as a saleswoman, but her net income therefrom was practically nothing. She also testified that she was then in need of surgery.

The court was confronted with the familiar divorce court problem of cutting the pattern to fit the cloth. This the judge did in resolving a question of fact. We find that the evidence was sufficient to support his implied finding of fact and that there was no abuse of discretion.

Order affirmed.

MOORE, P. J., and RICHARDS, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.

Petition of HERALD PUBLISHING COMPANY, a California corporation, to Have the Standing of "Lynwood Herald American" As a Newspaper of General Circulation as Defined In Section 6000 of the Government Code of California, Ascertained and Established (two cases).

HERALD PUBLISHING COMPANY, a California corporation, Petitioner and Appellant,

v.

CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, Inc., a California corporation, Contestant and Respondent (two cases).*

Civ. 22183, 22184.

District Court of Appeal, Second District, Division 2, California.

May 20, 1957.

Rehearing Granted June 17, 1957.

For Opinion on Rehearing see 313 P.2d 584.

Newspaper corporation filed petitions seeking to have two newspapers it published declared newspaper of general circulation. The Superior Court, Los Angeles County, Frank C. Charvat, J., denied petitions, and newspaper corporation appealed. The District Court of Appeal, Moore, P. J., held that where newspapers bore names of cities other than that in which they were printed, but each had 40 to 50 paying subscribers in city in which they were printed, newspapers qualified as newspapers of general circulation in county in which they were printed, and were eligible to publish legal notices and publications of that county.

Reversed with instructions.

1. Newspapers ⚷3(5)

Where statute defining newspapers of general circulation does not specify how many subscribers there must be but merely requires a bona fide list thereof, the term "list of subscribers" means an actual, genuine subscription list which shall contain names of only those who are in good faith paying regularly for their subscriptions. West's Ann.Gov.Code, § 6000.

See publication Words and Phrases, for other judicial constructions and definitions of "List of Subscribers".

2. Newspapers ⚷3(5)

Whether a newspaper is one of general circulation is a matter of substance and not merely of size, and depends largely upon diversity of its subscribers rather than upon mere numbers. West's Ann.Gov. Code, § 6000.

3. Newspapers ⚷3(3)

Newspapers printed in one city and circulated in two other cities were not eligible for publication of purely local legal advertisements in two cities in which they were circulated. West's Ann.Gov.Code, §§ 6000, 6004, 6004.5.

4. Newspapers ⚷3(3)

Under statute, providing that for a newspaper to be published it shall have been issued from the place where it is printed and sold, the act of "publishing" can be accomplished in only one place, the place where printing is accomplished. West's Ann.Gov.Code, § 6004.

See publication Words and Phrases, for other judicial constructions and definitions of "Publishing".

5. Newspapers ⚷3(3, 5)

Under statute requiring that in order for newspaper to qualify as newspaper of general circulation it must be both printed and published in same town or city, there must be both printing and circulation in same town or city. West's Ann.Gov.Code, §§ 6004, 6004.5.

6. Newspapers ⚷3(5)

Where two newspapers bore the names of cities other than that in which they were printed, but had 40 to 50 paying subscribers in city in which they were printed, newspapers qualified as newspapers of general circulation in county in which they were printed and were eligible to publish legal notices and publications of that county. West's Ann.Gov.Code, §§ 6000 et seq., 6004, 6004.5.

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Butler & Hegner, James G. Butler, Los Angeles, for appellant.

Robert F. Tyler, Los Angeles, for respondent.

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* Opinion vacated 313 P.2d 584.

MOORE, Presiding Justice.

Appellant Herald Publishing Company is the owner and publisher of the newspapers "Lynwood Herald American" and "Lakewood Herald American," together with six companion newspapers. Pursuant to the provisions of section 6000[1] et seq. of the Government Code, appellant filed separate petitions seeking to have the Lynwood and Lakewood papers each declared a newspaper of general circulation. The petitions are identical. The petition for the Lakewood Herald American proceeds to allege that the publication has a bona fide subscription list of paying subscribers in Los Angeles County and in the area known as Lakewood; that it has been printed and published including typesetting and impressing type at regular intervals for, at least, one year preceding the date of the filing of this petition in Los Angeles County, and in the City of Compton. That for more than one year last past said newspaper has been published as a bi-weekly newspaper on Thursday and Sunday of each calendar week; that it is not now nor has it ever been devoted to the interest of or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination. That it is a newspaper of general circulation published for the dissemination of local and telegraphic news, and intelligence of a general character in Los Angeles County; that the business address of said newspaper is 5084 Faculty Avenue, Lakewood, California. The petition closes with the prayer that the court make its order ascertaining and establishing the Lakewood Herald American as a bi-weekly newspaper of general circulation, as defined in section 6000 of the Government Code, in and for the County of Los Angeles and the State of California and in the Lakewood area and that it is qualified to publish legal notices or publications including all official advertising required by the Charter and Ordinances of said County and the Codes and General Laws of California.

In each case respondent filed an answer consisting of a general denial and several separate defenses. The only one of such defenses that is material to these appeals is as follows: "That said newspaper is not issued or published from the same town or city within which it is printed as required by Section 6004.5 of the Government Code."

The cases having been consolidated for trial, it was found that all the allegations necessary to comply with section 6000, such as bona fide subscription lists and the dissemination of local news and intelligence of a general character in the County of Los Angeles were true. But it was determined also that each paper was printed wholly within the City of Compton and published in the respective cities of Lynwood and Lakewood; that because of this, the newspapers were not both printed and published within one and the same town or city as "required by Sections 6004 and 6004.5 of the Government Code."[2] Judgments were entered denying the petitions, and these appeals, consolidated for hearing in this court, followed.

Appellant contends that (1) each petitioner has established that it is a newspaper of general circulation published for the dissemination of local and telegraphic news in the County of Los Angeles under the ruling of In re Christensen, 104 Cal.App.2d 375, 231 P.2d 152; (2) section 6004.5 is violative of both the state and federal constitutions, and (3) there is evidence that petitioners come within the provisions of section 6004.5 of the Government Code.

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[1] Government Code, § 6000: "A 'newspaper of general circulation' is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement."

[2] Government Code, § 6004: "For a newspaper to be 'published,' it shall have been issued from the place where it is printed and sold to or circulated among the people and its subscribers during the whole of the one year period."

Government Code, § 6004.5: "In order to qualify as a newspaper of general circulation the newspaper, if either printed or published in a town or city, shall be both printed and published in one and the same town or city."

In the case of Christensen, supra, the "San Pablo Reporter" was circulated in the City of San Pablo, but printed in the cities of Richmond, Rodeo and Concord, all within Contra Costa County. It was held that the "San Pablo Reporter" was a newspaper of general circulation in and for the County of Contra Costa. That decision was published May 22, 1951. Section 6004.5 was added by the Statutes of 1951, chapter 937. It was approved by the Governor on June 9, 1951, and became effective September 22, 1951. Section 2 of the chaptered bill reads: "This act is declaratory of the existing law and does not make a substantive change therein."

Appellant argues that the existing law at the time of the enactment of section 6004.5 was that expressed in the Christensen case, supra, and therefore it controls, and petitioners are entitled to be declared newspapers of general circulation for the County of Los Angeles.

Respondent contends that section 6004.5 was enacted to settle and clarify an existing controversy (between In re Monrovia Post, 199 Cal. 263, 248 P. 1017, and In re Christensen, 104 Cal.App.2d 375, 231 P.2d 152), and to set forth exactly what the Legislature had determined the law always had been. Respondent also urges section 6004.5 is only an amplification of section 6004.

But it is not necessary to resolve the issue thus projected by the litigants. It is alleged and it was also stipulated that certain evidence is true. Such proof establishes that the petitioning newspapers are "both printed and published in one and the same town or city," to wit, the City of Compton. This is sufficient compliance with section 6004.5.

That such conclusion is correct appears from the proceedings below. The matters came on for hearing on January 23, 1956, when after due evidence and arguments, they were submitted. On March 8, 1956, the court made its minute order finding in favor of respondent, directed that it submit findings and judgment in accordance with memorandum of decision on file. On March 29, 1956, appellant filed objections to the proposed findings and conclusions, indicating that appellant is moving to set aside the submission and reopen the case for the taking of additional evidence. On April 2, 1956, the court made the following minute order: "Petitioner's motion to reopen granted and matter is continued for oral argument to April 16, 1956 at 10:00 a. m."

The reporter's transcript of the proceedings of April 2 shows the following: After the court granted the motion to reopen, counsel for appellant indicated his desire to introduce evidence that both the petitioning papers had paying subscribers in Compton and that much of the advertising material and news items that appeared in the Lynwood Herald American also appeared in the Compton Herald American. Whereupon counsel for respondent stated that if that was the type of evidence to be introduced, he would be willing to stipulate to its introduction. It was then stipulated that in the consolidated cases both the Lynwood Herald American and the Lakewood Herald American have a subscription and distribution within the City of Compton of approximately forty to fifty paying subscribers, and that there was certain news matter and advertising which appeared in all three papers.

It thus appears that by virtue of respondent's stipulation, there was uncontradicted evidence before the court that both petitioning newspapers had 40 to 50 paying subscribers in Compton and, to that extent at least, both were printed and published in the same city, as required by section 6004.5. The significance of section 6004.5 has not been previously determined by the appellate courts. Neither do the statutes set any minimum number of subscribers as constituting a "bona fide subscription list of paying subscribers" but the latter subject has been considered in several decisions.

In the case of In re Johnson, 1935, 4 Cal.App.2d 308, 40 P.2d 836, this court, without expressing its own opinion as to the efficacy of such a paper as a notice-carrying publication, held that the evidence sustained the finding and judgment that the petitioning newspaper qualified as one of general circulation. The only question considered was the matter of the bona fide subscription list. The newspaper had approximately 200 on its subscription list and 150 paying subscribers, 90 per cent of which paid circulation was within the San Fernando Valley section of the City of Los Angeles and 10 per cent outside the city. It was held that the petitioner was a newspaper of general circulation, printed, published and distributed in the City of Los Angeles.

[1, 2] The mere fact that a newspaper had a circulation of only about 180 in a city of 16,000 souls did not, of itself, exclude it from qualifying as a newspaper of general circulation. Baldwin v. Brown, 193 Cal. 345, 352, 224 P. 462. Where the statute itself does not specify how many subscribers there must be, but merely requires a "bona fide" list thereof, the term "list" used in this connection means an actual, genuine subscription list which shall contain the names of only those who are in good faith paying regularly for their subscriptions. In re Herman, 183 Cal. 153, 164, 191 P. 934. Whether a newspaper is one of general circulation is a matter of substance and not merely of size. In order to find it one of general circulation, the court must depend largely upon the diversity of its subscribers rather than upon the mere numbers. In re Green, 21 Cal.App. 138, 142, 144, 131 P. 91.

In the case at bar, there is such diversity. In Finding II the trial court determined: "That it is true that said newspaper has a bona fide subscription list of paying subscribers in the County of Los Angeles * * * and in the area known as Lakewood." It appears from the stipulation that there is a substantial number of paying subscribers in Compton as well as in Lakewood or in Lynwood.

[3] Appellant has consistently demanded only an adjudication that the Lynwood and Lakewood Heralds are newspapers of general circulation in the County of Los Angeles. In effect, appellant concedes that they do not qualify as newspapers of general circulation for the respective cities of Lakewood and Lynwood. Each paper knows that it is not both printed and published in its own city. In other words, if section 6004.5 is to be given a reasonable interpretation, the papers are not eligible for the publication of purely local legal advertisements, such as local ordinances, because they are not both printed and published in their respective cities.

It is apparently the position of respondent that in order to comply with section 6004.5, any newspaper that is printed in a town or city must be published *only* in such town or city. Obviously, this was not the intention of the Legislature. If this were true, even the Los Angeles Times, printed and published in Los Angeles but circulated throughout the entire state, would not qualify as a newspaper of general circulation. Respondent states: "The mere fact that the Los Angeles Times has subscribers in Nevada doesn't change the fact that it is published in the City of Los Angeles." True, but would respondent say also that because of the Nevada subscribers, the Los Angeles Times is also *published* in Nevada? Obviously not, yet this is the effect of the finding that the papers were published in Lynwood and Lakewood.

[4] The error in this position arises out of failure to differentiate between "publish" and "circulate." Section 6004 states that for a newspaper to be "published" it shall have been issued from the place where it is printed *and* sold to or circulated among the people and its subscribers. The statute requires both issuance from the printing plant and circulation among the subscribers. To use an example, when newspapers come off the press of the Los Angeles Times and are bundled and placed on

the Times' truck, there has been an "issuance." But if the trucks immediately deposit the papers in the city incinerator, there has been no "publishing" because there has been no "circulation" among the people or delivery to the subscribers. Conversely, if the truck should deposit the papers with the Times' distributor in Beaumont and if they should be delivered to the subscribers there, then there would have been "circulation." But the Times' papers would not have been "published" in Beaumont because they were not both *printed and issued* in Beaumont.

Similarly in the case at bar, the finding that the petitioning papers were "published" in Lakewood and in Lynwood is erroneous within the language of section 6004 because they were not "issued" from printing presses located in Lakewood and in Lynwood. Since both *issuance from the place where printed and circulation* are required by section 6004, it is clear that the act of "publishing" can be accomplished in only one place, the place where the printing is accomplished.

[5] But section 6004.5 says that for a newspaper to qualify as one of general circulation, it must be both printed and published in the same city or town. If this section is to be given any meaning at all in the light of section 6004, it must be construed to mean that there must be both printing and "circulation" in the same city or town.

[6] In the case at bar, there is stipulated evidence that the Lakewood Herald American and the Lynwood Herald American were not only printed and issued in Compton, but also "circulated" to subscribers in Compton. It follows that both these papers were "published" in Compton within the meaning of section 6004. They were therefore both printed and published in the same city within the meaning of section 6004.5, and are qualified to be declared newspapers of general circulation in the County of Los Angeles.

Both parties have extensively argued the constitutionality of section 6004.5. In view of our conclusion that appellant newspapers have complied with the provisions of that section, we pretermit the constitutional question.

The judgments are reversed with instruction to the trial court to amend its findings in accordance with the views herein expressed and to enter judgments accordingly.

ASHBURN, J., and RICHARDS, Justice pro tem., concur.

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151 Cal.App.2d 157

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Tandy Lee QUISENBERRY, Defendant
and Appellant.
Cr. 5851.

District Court of Appeal, Second District,
Division 2, California.
May 20, 1957.

Defendant was convicted of taking a motor vehicle without the owner's consent and from a judgment of the Superior Court, Ventura County, Charles F. Blackstock, J., the defendant appeals. The District Court of Appeal, Moore, P. J., held that the evidence established the corpus delicti and sustained conviction; that admitting evidence of defendant's escape from the Juvenile Hall was not error; that instruction with reference thereto was proper; and that there was no misconduct of the district attorney in his opening statement.

Judgment affirmed.

1. Larceny 🔑68(2)

Evidence of felonious intent of the defendant in taking the automobile of another without his consent was sufficient for the jury. West's Ann.Vehicle Code, § 503.

2. Criminal Law ⚷738

The question of felonious intent is generally for the trier of fact, and may be inferred from all the circumstances.

3. Larceny ⚷41

In prosecution for theft of an automobile where another asked defendant several times whether he owned the automobile and the defendant answered that he and his father owned it, jury justifiably inferred that the statement demonstrated the defendant's consciousness of guilt of theft of the car. West's Ann.Vehicle Code, § 503.

4. Larceny ⚷64(7)

While possession alone of a stolen automobile is not sufficient to support a conviction under the statute, where circumstances indicate the connection of accused with the theft of the car and he does not show that he honestly obtained its possession but admits that he had recently had it in his custody, facts are sufficient to establish guilt. West's Ann.Vehicle Code, § 503.

5. Larceny ⚷64(7)

In prosecution for theft of automobile, where evidence established defendant's possession of a stolen sedan and his travel in it over 300 miles, only slight corroborative evidence or other inculpatory circumstances will suffice to sustain conviction. West's Ann.Vehicle Code, § 503.

6. Criminal Law ⚷317

In determining the guilt of accused, the jury properly considered the fact that defendant did not testify at trial. West's Ann.Const. art. 1, § 13.

7. Larceny ⚷56

Only prima facie proof of the corpus delicti is required to sustain a conviction of driving or taking a motor vehicle without the owner's consent. West's Ann.Vehicle Code, § 503.

8. Larceny ⚷57

Where vehicle was driven by the defendant without its owner's consent, inference that the defendant intended to deprive the owner of possession, was supported by the fact that when recovered, the automobile had strange license plates on it, which were intended to conceal the car from officers and from the owner, by making identification difficult. West's Ann.Vehicle Code, § 503.

9. Larceny ⚷55

Where automobile was taken without the permission of the owner and was recovered two days later some distance from where it had been taken, bearing strange license plates, no further proof was required to sustain conviction of taking a motor vehicle without the owner's consent, except the defendant's connection with the crimes which was shown by the evidence. West's Ann.Vehicle Code, § 503.

10. Criminal Law ⚷369(2)

Except when an offer is to show merely a criminal disposition, relevant evidence is not to be excluded because it reveals the commission of an offense other than the one charged, and if it tends logically and by reasonable inference to establish a fact material to the issue or to overcome material matter sought to be proved by the defense, it is admissible even though embracing a commission of another crime, notwithstanding the other crime may not be similar in kind or form part of the original design.

11. Criminal Law ⚷369(2)

In prosecution for taking a motor vehicle without the owner's consent, where defendant took the automobile in perfecting his escape from detention at a Juvenile Hall, proof of the crime of escape from the Juvenile Hall was relevant and admissible even though it proved some other offense. West's Ann.Vehicle Code, § 503.

12. Criminal Law ⚷322

In prosecution for taking a motor vehicle without the owner's consent which was used by defendant in effectuating escape from detention in the Juvenile Hall, defendant was presumed to have been held lawfully by the prison in which he was confined. West's Ann.Code Civ.Proc., § 1963, subds. 1, 15, 33.

13. Criminal Law ⚷783(1)

In prosecution for taking a motor vehicle without the owner's consent, where the vehicle was used by the defendant in effectuating his escape from the Juvenile Hall, instruction merely explaining that the evidence concerning the escape was received for a limited purpose only and not to prove distinct offenses or continued criminality was proper. West's Ann.Vehicle Code, § 503; West's Ann.Code Civ.Proc., § 1963, subds. 1, 15, 33.

14. Criminal Law ⚷703

In prosecution for taking a motor vehicle without the owner's consent, where the vehicle was used by defendant in effectuating escape from the Juvenile Hall where the defendant was confined, district attorney's opening statement relating to facts about the escape of the defendant was not error. West's Ann.Vehicle Code, § 503.

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J. M. Lopes, Visalia, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty. of Ventura County, Elwood R. Walls, Deputy Dist. Atty., Ventura, for respondent.

MOORE, Presiding Justice.

Having been convicted on two counts of violating section 503 of the Vehicle Code, defendant, a youth of 18 years, was referred to the California Youth Authority for acceptance or rejection. He appealed from such judgment and from the order denying him a new trial, and now demands a reversal on the grounds that the evidence was not sufficient; the trial court erred in its rulings and in giving instructions and the district attorney was guilty of prejudicial misconduct.

Facts Are Sufficient

While contention is made that the corpus delicti was not established, a discussion of that claim will be deferred until evidence of appellant's guilt has been explored.

[1, 2] On August 4, 1956, appellant and his friend Celorie, were in detention at Juvenile Hall in the County of Ventura. After Mr. Hodgson, the group supervisor, had confined the other boys to their rooms about 9:00 p. m., appellant and Celorie demanded of Hodgson that they be released from custody. Following the rejection of their demand, they returned with makeshift weapons which they flourished in the face of the supervisor and impudently announced that they were going out of the hall and they demanded keys and menaced their keeper with a sharpened steel instrument. Thereupon he let them out at the back door. They climbed over a fence, proceeded some distance, stayed until 12:30 a. m. when they walked to Montalvo. There they saw a light green sedan, open and unlocked with keys in the ignition. About 3:00 a. m. they took the sedan without the consent of its owner, Mr. James B. Kearney, Jr. From the proof of such fact the jury reasonably inferred that appellant either took the sedan without the consent of its owner or assisted Celorie in doing so. The two boys had plotted their escape from the Juvenile Hall together and had on the afternoon of the fourth tried to break the screen loose in the boys' restroom. Also, it was a fair inference of the jury to conclude that their concerted action carried them from the escape from the hall to the point at Montalvo where they took possession of the green sedan. Their mutual efforts betrayed to the jury their motive for appropriating the car. Moreover, the boys knew that their reprehensible behavior in escaping from the hall would surely bring down upon them the wrathful efforts of all police agencies to effect their recapture and that their solitude would not be as conspicuous in a sedan on a highway as they would be afoot on a deserted road. Withal, a car could carry them quickly from their would-be captors. Their confinement in the hall, their escape by use of unlawful method, their eagerness to avoid arrest and to rest in friendly precincts—all concurred in giving appellant and his friend an intent to deprive the owner of the sedan of its possession and its

title. So compelling were the facts established by the evidence received that the inference of the jury that the taking of the sedan was with felonious intent was unavoidable. Vehicle Code, § 503; People v. Gibson, 63 Cal.App.2d 632, 635, 146 P.2d 971; People v. Zervas, 61 Cal.App.2d 381, 384, 142 P.2d 946. The question of felonious intent is generally for the trier of fact and may be inferred from all the circumstances. Ibid.; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631. Indeed, what should a jury conclude from facts showing that the escapees from a juvenile home attempting to avoid arrest at three o'clock in the morning, on a deserted street, find a sedan with keys in the ignition? They were zealous to avoid detection and knew that a sound motor car could remove them from possible arrest. To take a strange car and remove its identifying numbers and drive on was the natural thing for such fugitives to do. The finding that they intended to cheat the owner of his automobile is the logical result of sound reasoning. If further proof of their intention should be required, it is found in the fact that after substituting for the sedan's license plates those taken from another car, they visited Thousand Oaks and Oxnard where they were recognized by Mr. Flitt, Assistant Probation Officer who demanded that they surrender. Both boys thereupon ran, leaving the sedan where they had parked it and concealed themselves, first in a shed on South E Street in Oxnard and later in a residence until 9:30 p. m. August 5 when they hid in a schoolyard until 12:30 a. m. August 6.

Then they found another automobile in a driveway on Palm Drive. (Count II.) It was the two-door car of Abe Hartveld who testified that he did not give appellant permission to drive it. Its doors were unlocked and its keys in place. Without the consent of the owner, the wayward boys took the car and headed southward. Did not appellant participate in the flight with the two-door as his conveyor? Did he not have an additional motive to speed away? An officer had just demanded his surrender. The sleuths were on the search for the nocturnal adventurers who drove on into the night. Having reached Azusa, about 35 miles east from Los Angeles, they removed Hartveld's license plates from the automobile.

[3-5] Their felonious intent to steal the two-door was clearly inferable from the recited facts and by succeeding events. While they drove about Azusa discussing methods of obtaining money for their flight to Mexico, they contacted Raymond Carballo in San Bernadino whom Celorie told they were being sought by the police for car theft. After Carballo had asked appellant about six times whether he owned the two-door car, the latter answered that he and his father owned it. From such deceitful statement the jury justifiably inferred that it demonstrated appellant's consciousness of guilt. People v. Walker, 99 Cal.App.2d 238, 243, 221 P.2d 287; People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25. After Carballo refused to aid the boys in evading the officers, they decided to journey to Paso Robles. They arrived in Oxnard in the evening of August 6 and went to Carballo's home. Soon the police arrived. The boys escaped and hid in an empty garage where they were soon captured. At the police station appellant stated that keys to the sedan were in the pocket of trousers he had left in the two-door car. This was practically an admission he had recently been in possession of the stolen sedan. While possession alone of a stolen automobile is not sufficient to support a conviction under section 503, yet where the circumstances such as above recited indicate the connection of the accused with the theft of the car and he does not show that he had honestly obtained its possession but admits that he had recently had it in his custody, what facts further are required to prove his guilt? In People v. Wissenfeld it was held that despite the defendant's denial to the police that he stole the car in question, proof of the following was sufficient to establish his guilt: (1) his driving the machine when arrested; (2) his false state-

ments when questioned as to its ownership and his claim that if he was driving he must have been asleep; (3) his presence with a codefendant who claimed to have stolen the automobile and to have used it with Wissenfeld in the bookmaking business; (4) his need for a car in making his gambling collections; (5) his possession and failure to make any explanation in court of the suspicious circumstances. People v. Wissenfeld, 36 Cal.2d 758, 763, 227 P.2d 833. The facts established in the case at bar are equally convincing and appellant did not testify. In addition to appellant's possession of the sedan and his travel in it for over 300 miles, only slight corroborative evidence of other inculpatory circumstances will suffice. People v. Citrino, 46 Cal.2d 284, 288, 294 P.2d 32; People v. Holland, 82 Cal.App.2d 310, 312, 186 P.2d 58; People v. King, 122 Cal.App. 50, 53, 10 P.2d 89; People v. Swanson, 120 Cal.App. 173, 176, 7 P.2d 380.

But such argument and authorities are unnecessary. On August 7 appellant freely and fully admitted to Probation Officer Mitchell that on August 4th he and Celorie discussed in Juvenile Hall their plan to escape; stated that he had a screwdriver and would try to break a screen; that he took an iron puck from the shuffleboard and tried to break out; that after they made their escape, they walked to Montalvo, took the sedan, drove to Camarillo, then to Thousand Oaks, then to Oxnard, met Mr. Flitt, hid in the schoolyard, found the two-door car and took it, drove to Azusa, switched the license plates from another car to the one they drove, then proceeded to Calexico. There they turned north, decided to go to Paso Robles, but stopped at Oxnard where the police took them into custody.

Corpus Delicti was Established

[6] In determining the guilt of the accused, the jury properly considered the fact that appellant did not testify at the trial. Const. Art. I, § 13; People v. Renteria, 60 Cal.App.2d 463, 472, 141 P.2d 37.

[7, 8] In assembling the evidence of appellant's guilt, the "essential elements" of the crime or corpus delicti of auto theft under Count I have been included. Even after excluding the extrajudicial statements of appellant (People v. Cobb, 45 Cal.2d 158, 161, 287 P.2d 752), proofs of the corpus delicti have been generously cited in reporting the movements of appellant from the moment he first seized the sedan at Montalvo until the car was abandoned at Thousand Oaks. People v. Wiezel, 39 Cal. App.2d 657, 664, 104 P.2d 70. Only prima facie proof of the corpus delicti is required. People v. McGonigle, 29 Cal.2d 730, 738, 177 P.2d 745. In proof of Count I, the evidence shows that he took the automobile of another without the latter's consent to deprive the owner of his title to or possession thereof. Vehicle Code, § 503; People v. Neal, 40 Cal.App.2d 115, 117, 104 P.2d 555. From the fact that the vehicle was driven without its owner's consent, it is a reasonable inference that the taker intended to deprive the owner of possession. People v. Orona, 72 Cal.App.2d 478, 484, 164 P.2d 769. That inference was supported by the fact that when recovered it had strange license plates upon it. People v. Holland, 82 Cal.App.2d 310, 312, 186 P.2d 58. Such plates were intended to conceal the car from the officers and from its owner by making identification difficult. (Ibid.)

[9] Under Count II it was established that the two-door vehicle was taken without the permission of its owner. It was recovered two days later at some distance from where it had been taken, bearing strange license plates. With complete proofs of the essential elements of the crimes of auto theft (Vehicle Code, § 503), no further proof was required except appellant's connection with the crimes which has been shown above.

Rulings on Evidence

[10, 11] Appellant assigns as prejudicial error the court's allowing, over his objection, evidence of his escape from Juvenile Hall. Appellant bases his objection upon the ground that proof of evidence of a sepa-

rate crime (escape from Juvenile Hall) is distinctly different from that for which he was on trial. It is the law that, except when the offer is to show merely a criminal disposition, relevant evidence is not to be excluded because it reveals the commission of an offense other than that charged. If it tends logically and by reasonable inference to establish a fact material to the issue or to overcome material matter sought to be proved by the defense, it is admissible even though it embraces the commission of another crime, notwithstanding the other crime may not be similar in kind or not form part of a single design. People v. Peete, 28 Cal.2d 306, 314, 169 P.2d 924; People v. Citrino, supra, 46 Cal.2d 284, 288, 294 P.2d 32; People v. Riser, 47 Cal.2d 566, 305 P.2d 1. In People v. Neal, supra, 40 Cal.App.2d 115, 104 P.2d 555, it was contended that the admission of evidence tending to prove that after the defendant took the automobile without the owner's consent, he drove it to a remote area and stripped it of equipment, was erroneous. It was held that the overruling of the objection was not error; that under section 503 the law required proof that the defendant took the car with a specific intent to deprive the owner of his title to or possession of such vehicle and that such intent must be proved as a fact; that the mere taking and abandonment of the car did not necessarily establish that fact; that the removal of the car's equipment and dividing it with his companion tended to prove the intent of the defendant at the time of the taking. Thus it was relevant and was properly admissible even though it proved some other offense. Similar reason prevailed in People v. Renteria, supra, 60 Cal.App.2d 463, 141 P.2d 37. Over the protest of the defendant, the appellate court held that although in the prosecution for theft of an automobile the court admitted evidence that the defendant had visited a girl in a state reform school and urged her to run to his car when she was marching to mass, the court held that such evidence was admissible to prove the felonious motive of the defendant for stealing the car. The court followed the rule that the evidence of other offenses committed before the act charged is admissible if it tends to disclose that the defendant had a motive for the offense charged. See People v. Lisenba, 14 Cal.2d 403, 428, 94 P.2d 569; People v. Slater, 199 Cal. 357, 359, 249 P. 177; People v. O'Brand, 92 Cal.App.2d 752, 754, 207 P.2d 1083.

In the instant action, proof of appellant's escape logically tends by reasonable inferences to establish both motive and specific intent as to both counts. It was a natural inference that on August 4 defendant after having escaped from Juvenile Hall and while still fearing recapture should anxiously seek means whereby to be transported to a remote scene. It was night. He and his companion had escaped at 9:30 p. m., remained on a hilltop until 12:30 a. m., started walking toward Montalvo. When fearing apprehension they took the green sedan and changed its license plate. Also, after having abandoned that vehicle at Oxnard they sought other means of tranportation. It required no strain of the reasoning processes to infer that they together took the two-door car and drove southward, intending to deprive the owner of its title. What else would a jury think as to why the boys took that automobile after the preceding experiences of the wanderers? They feared to be caught; they had no money with which to buy transportation; they hoped to find security in Mexico; they found the car open, keys in the ignition. The penalty for taking the vehicle from its owner was not a sufficient restraint upon these night prowlers in search of safety.

Instructions

[12, 13] Complaint is made of the instruction with reference to evidence of the escape. It was a fair and favorable instruction. Appellant had objected to the evidence concerning his escape from Juvenile Hall on the ground that it was a totally different offense. Appellant is presumed to have been held lawfully by the prison in which he was confined. Code Civ.Proc., § 1963, subds. 1, 15, 33; People v. Citrino,

supra, 46 Cal.2d 284, 287, 294 P.2d 32. The presumption was sufficient, but also the "group supervisor" testified that appellant was at the time in his care. He was not cross examined and appellant did not testify. In such event, the inference is obvious that appellant knew his confinement was lawful. The instruction merely explained that the evidence concerning the escape was received for a limited purpose only and "not to prove distinct offenses or continued criminality."

Misconduct of District Attorney

[14] There was no error in the district attorney's relating the facts in his opening statement about the escape of appellant from Juvenile Hall. It was admissible evidence and served well to show the eagerness and zeal of appellant in seeking a rapid transportation (People v. Silva, 41 Cal.2d 778, 783, 264 P.2d 27; People v. Sturman, 56 Cal.App.2d 173, 182, 132 P.2d 504) from the vicinity of his escape.

Judgment affirmed.

ASHBURN, J., and RICHARDS, J. pro tem., concur.

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151 Cal.App.2d 205

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
George LAVENDERA, Defendant and Appellant.
Cr. 1307.

District Court of Appeal, Fourth District, California.
May 21, 1957.

Defendant pleaded guilty of uttering a fictitious check and denied alleged prior conviction of escape from Industrial Farm. The Superior Court of San Diego County, John A. Hewicker, J., rendered judgment sentencing defendant to state prison for term prescribed by law after term being served by him on prior conviction of forgery, and he appealed. The District Court of Appeal, Mussell, J., held that defendant was entitled to determination of question whether alleged escape was effected without force or violence, so as to preclude allegation of conviction thereof as prior felony conviction in information, and hence should be resentenced after hearing and finding on such question.

Judgment of conviction for uttering fictitious check affirmed, provision of judgment and commitment prescribing punishment reversed, and cause remanded for further hearing on and determination of issues presented by allegation of prior conviction.

1. Criminal Law 🔑1202(4)

Where defendant denies prior conviction, alleged in information, for another felony than that charged, question whether he suffered previous conviction must be tried by jury or by court, if jury is waived, and such conviction must be proved. West's Ann.Pen.Code, § 969½.

2. Criminal Law 🔑1202(7)

A defendant, pleading guilty of uttering fictitious check as charged in information, but denying alleged prior conviction for felony of escape from Industrial Farm, was entitled to determination of question whether escape was effected without violence, so as to preclude allegation of such conviction as prior felony conviction, and having been sentenced to state prison for term prescribed by law, without introduction of any evidence on such question, should be re-sentenced after hearing and finding thereon. West's Ann.Pen.Code, §§ 476, 969½, 4532.

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Buttermore & Lightner, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for the People.

MUSSELL, Justice.

On December 3, 1956, an information was filed in San Diego County charging that on or about the 12th day of June, 1956, the defendant, George Lavendera, did wilfully, fraudulently and feloniously make, utter, publish and pass a certain fictitious check (Pen.Code, sec. 476). The information also contained the following allegation:

> "Prior: That before the commission of the offense hereinbefore set forth in this information, said defendant George Lavendera was, in the Superior Court of the State of California, in and for the county of Los Angeles, convicted of the crime of Escape from Industrial Farm, a felony, and the judgment of said court against said defendant in said connection was, on or about the 27th day of June, 1951, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison, at San Quentin, California, as No. A-18324."

[1] The defendant, who is now serving a term of imprisonment in the state prison upon a conviction in Los Angeles county for forgery committed in 1954, was returned to San Diego for trial on the San Diego information under the provisions of section 1381 of the Penal Code. On December 5, 1956, defendant appeared in the superior court in San Diego and entered a plea of guilty to the crime of uttering a fictitious check, a violation of section 476 of the Penal Code, and upon being asked by the clerk of the court whether he admitted or denied "one prior conviction of felony", replied "Deny". Defendant's counsel then stated:

> "Your Honor, on that the reason I advised Mr. Lavendera to deny it is a mere technicality. This prior charge is the prior felony of escape and the facts as alleged in the prior are he was an inmate at a County Honor Camp or Industrial Farm and it was a misdemeanor at the time. In 1951 the law was that an escape from a confinement for a misdemeanor is a felony, but it subsequently has been changed and the section on that is 4532 and there is now an express provision that a conviction of violation of this subdivision not by force or violence should not be charged as a prior felony, so the only question would be whether or not this particular one comes within the provisions of the amendment of 4532."

After some further discussion between the court and counsel, the court said, "Well, I will find it to be a felony, then, having a prior conviction." The clerk then made the following statement to the defendant:

> "George Lavendera, you have heretofore been charged in an information filed by the District Attorney of this County charging you with one count of uttering a fictitious check and one prior conviction of felony, to which you have this date entered a plea of guilty to the one count and denied the prior. This being the time for arraignment for judgment, have you any legal cause to show why judgment should not be pronounced?"

Defendant's counsel then replied, "No legal cause," and the court pronounced sentence that the defendant be confined to the state prison of the State of California for the term prescribed by law and it was further ordered that the sentence run consecutive with the term "you are now serving in Chino." These proceedings were reported and the record thereof was certified by the official court reporter and the court and are set forth in full in the clerk's transcript. It is apparent therefrom that the defendant denied the prior conviction. Under such circumstances it was necessary that the question of whether or not he had suffered a previous conviction as alleged be tried by a jury or court unless a jury was waived. Pen.Code, sec. 969½. Where, as here, a prior conviction was denied by the defendant it was necessary to prove such conviction. This is usually done by the introduction in evidence of the records or copies of the records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records. Pen. Code, sec. 969b. There was no evidence introduced in the instant case upon which a finding could be made that the defendant had suffered a prior conviction as alleged.

[2] Section 4532 of the Penal Code provides that every person who escapes from an industrial farm is guilty of a felony and if such escape or attempt to escape was not by force or violence, is punishable by imprisonment in the state prison for not less than six months nor more than five years, regardless of any prior convictions, or in the county jail not exceeding one year; provided, however, that if such escape or attempt to escape is by force or violence, such person is guilty of a felony and is punishable by imprisonment in the state prison not exceeding 10 years, or in the county jail not exceeding one year; provided, that when said second term of imprisonment is to be served in the county jail it shall commence from the time such prisoner would otherwise have been discharged from said jail, and that a conviction of violation of this subdivision, not by force or violence, shall not be charged as a prior felony conviction in any subsequent prosecution for a public offense. The last paragraph of subdivsion (a) of said section, providing that a conviction of a violation of the subdivision, not by force or violence, shall not be charged as a prior conviction in any prosecution for a public offense was added by the legislature in 1955. Stats.1955, c. 585, p. 1079, sec. 1.

The prior conviction alleged herein was not an element of the substantive offense (Pen.Code, sec. 476) and the validity or finality of the judgment of conviction of the substantive offense is not here involved. In re McVickers, 29 Cal.2d 264, 270–271, 176 P.2d 40. The determination of whether the defendant was guilty of a prior conviction relates only to the length of the term of his imprisonment and the right to parole, and under the provisions of section 4532 of the Penal Code, the escape described in the information cannot be alleged therein if such escape was not by force or violence. We are here dealing with the punishment which can be imposed for the crime charged in the information and not with the penalty imposed in the escape case. No evidence was introduced in the instant action as to whether the escape charged was effected with or without force or violence and the defendant is entitled to a determination of this question. If it is established that said escape was not by force or violence, it follows that the prior conviction cannot be alleged in the information as a prior felony conviction.

The punishment imposed for a violation of Penal Code section 476 may be by imprisonment in the county jail for not more than one year or in the state prison for not more than 14 years. It therefore appears that the determination of whether the defendant can be charged with the prior conviction alleged may have some bearing on the question of the punishment to be prescribed for violation of Penal Code section 476. We therefore conclude that the defendant should be resentenced after a hearing had and findings made on the questions presented by the allegation in the information respecting his prior conviction. The cause is remanded to the superior court of San Diego county for a further hearing on and a determination of these issues and to determine the punishment to be prescribed for the violation of Penal Code section 476.

The judgment of conviction of a violation of section 476 of the Penal Code is affirmed and the provision of the judgment and commitment prescribing the punishment to be imposed on the defendant is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

151 Cal.App.2d 307

Harry S. KAISER, Plaintiff and Appellant,

v.

Robert EASTON, Elsa Easton, Morris Joelson and Harbor Bedding Products Corp., Defendants and Respondents.

Civ. 22065.

District Court of Appeal, Second District, Division 3, California.

May 27, 1957.

Rehearing Denied June 19, 1957.

Hearing Denied July 24, 1957.

Stockholder's derivative action. The Superior Court, Los Angeles County, Donald R. Wright, J., entered judgment for defendants, and entered an order directing plaintiff to post additional security for his appeal, and he appealed from such order as well as from the judgment. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that directors of corporation were not guilty of any misconduct in the management of corporate affairs.

Judgment and order affirmed.

1. Corporations ⚷452

Liability for money loaned or services rendered to a corporation for which it could legally contract cannot be repudiated for informality of corporate action authorizing the same.

2. Corporations ⚷452

Obligations of a closed corporation within the usual course of its business authorized informally by its directors and stockholders who have usually conducted its affairs are binding upon the corporation.

3. Corporations ⚷320(11)

In stockholder's derivative suit against corporation and officers, evidence sustained finding that directors of corporation were not guilty of any misconduct in the management of corporate affairs.

4. Corporations ⚷310(2)

Where corporate directors were not guilty of any mismanagement in direction of corporate affairs, corporation had no claim against them for breach of duty toward the corporation, and consequently a stockholder could have no claim.

5. Corporations ⚷294

A court will not remove corporate directors from office and bar them from holding office in the future where they have not been proved guilty of any mismanagement in direction of corporate affairs.

6. Appeal and Error ⚷111

An order requiring plaintiff in a stockholder's derivative suit to post security prior to trial along with a provision giving defendants resort to such security was appealable as part of a judgment in favor of defendants. West's Ann.Corp.Code, § 834.

7. Corporations ⚷320(12)

Purpose of section of Corporations Code requiring a plaintiff in a stockholder's derivative suit to post security is to impose conditions upon the prosecution of unfounded litigation by disgruntled stockholders against corporate directors. West's Ann.Corp.Code, § 834.

8. Corporations ⚷320(12)

Under sections of Corporations Code dealing with indemnity for litigation expense and posting of security in stockholder's derivative suits, right to indemnification is determined after the action has been tried, and it is ordered only in case where the court determines that those seeking indemnity, such as directors, have been successful in the litigation and are fairly and equitably entitled to have recourse against the surety. West's Ann.Corp.Code, §§ 830, 834.

9. Corporations ⚷320(12)

In stockholder's derivative suit, evidence sustained finding that defendant directors were entitled to recourse against security posted by plaintiff. West's Ann. Corp.Code, § 834.

10. Corporations ⚷320(12)

Trial court did not lose jurisdiction to order posting of additional security by plaintiff in a stockholder's derivative suit after he had taken an appeal from a judgment for defendants, in view of fact statute under which security was posted provided that court could from time to time order security increased or decreased upon a showing that it was inadequate or excessive. West's Ann.Corp.Code, § 834.

11. Corporations ⚷320(12)

Purpose of statute requiring plaintiff in a stockholder's derivative suit to post security, is to provide full indemnity for expenses of the defense, incurred throughout the litigation, with no distinction between expenses incident to the trial and those incurred in defending the judgment on appeal. West's Ann.Corp.Code, § 834.

12. Appeal and Error ⚷442

Although taking an appeal divests trial court of jurisdiction to take any action that affects a judgment, and the judgment must stand as it is entered as an adjudication of the issues that have been tried and the rights that have been determined, except as to subsequent proceedings authorized by statute, jurisdiction is not lost to act in collateral matters in which the rights of the parties require action if they do not affect the judgment.

13. Corporations ⚷320(12)

In stockholder's derivative suit against corporation and directors, where suit appeared to be without merit, and appeal from judgment of dismissal of the suit was without merit, it was not an abuse of discretion to order security in the sum of $2,250, to be posted as the estimated expense of defending the action in the trial court, and the sum of $2,250 to be posted as security for estimated expense of defending the judgment on appeal. West's Ann.Corp.Code, § 834.

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Joseph W. Fairfield, Ethelyn F. Black and Howard Marshall, Los Angeles, for appellant.

Jay J. Stein, Beverly Hills, for respondents.

SHINN, Presiding Justice.

In this action the plaintiff Kaiser, a stockholder, who owns 50 shares of preferred stock of Harbor Bedding Products Corporation, upon which he is entitled to receive and has received a yearly dividend of $50, is suing the corporation, Robert Easton, Elsa Easton and Morris Joelson, who are its officers and directors, for $5,000 general damages, $10,000 punitive damages, an accounting of corporate funds, removal from office of the defendants, the appointment of a receiver and other equitable relief. Defendants are the owners of all the common stock and 50 shares of the 100 shares of preferred stock that have been issued. The principal complaint on the appeal is that plaintiff was required to furnish security for the expenses of the defendants in defending the action in the trial court and upon the present appeal prosecuted by plaintiff. If there is one fact disclosed by the record which stands out above all others, it is that this action serves as an example of the class of litigation that led to legislation under which suing stockholders may be required to indemnify successful defendants for their expenses in defending themselves.

The present action was instituted by Harry S. Kaiser, in his representative capacity of stockholder of Harbor Bedding Products Corporation. The defendants answered and, after a trial, findings and judgment were in their favor. Before the trial, on application of defendants, plaintiff was ordered to and did furnish security in the amount of $2,500 pursuant to section 834 of the Corporations Code. Judgment was entered December 16, 1955. Plaintiff gave notice of appeal from the judgment on January 18, 1956. On February 17, 1956 defendants gave notice of a motion for an order increasing the amount of security to be furnished by plaintiff in the sum of $2,250 and the court ordered that additional security be provided in that amount. It was provided by the judgment that defendants should have recourse to the undertaking of Hartford Accident and Indemnity Company in the amount of $2,000 as reasonable fees for the services of defendants' attorney, $275 as reasonable charges of an accountant for services rendered to defendants and $81.17 as defendants' costs. The order requiring the furnishing of additional security provided that defendants should have recourse thereto in the amount of $2,250 "for such reasonable attorney fees as may hereafter be incurred by movants herein," which would be expenses on the appeal. Plaintiff did not appeal from the original order requiring the posting of security but he appeals from the order for additional security as well as from the judgment.

The articles of the corporation provide for four directors. Two of the original directors resigned and after certain changes the Board consisted of Morris Joelson and the defendants Easton, husband and wife. The fourth position was not filled. In June, 1947 Robert Easton acquired 100 shares of preferred stock and 50 shares of common at the par value of $100 per share; in November 1947 he acquired 25 shares of common for $2,500 and in August, 1948 he purchased 25 additional shares of common for $2,500. In 1947 plaintiff acquired 50 shares of Easton's 100 shares of preferred. In 1947 and 1948 one Guy Joseph purchased 200 shares of common stock at $100 per share and these were purchased from him by Easton for the sum of $20,000. In November, 1955 the bylaws were amended to provide for only three directors. Robert is president and treasurer, Elsa, secretary, and Joelson, vice-president.

The material allegations of the complaint were the following: Defendants claim to have loaned the corporation $24,000 and have been paying themselves sums on account thereof although, in fact, they made no loans to the corporation; defendants have paid themselves bonuses each year since 1947 although the corporation has been insolvent; they have created "artificial entertainment and automobile expenses for the defendants Robert Easton and Morris Joelson"; they have appropriated corporate sums to themselves. The court found all these allegations to be untrue except the allegation respecting the payment of bonuses, as to which the court found that bonuses were paid from profits to Easton and other employees in the years 1947 and 1948. It was found that at the time of the commencement of the action there were outstanding 400 shares of common stock of which Easton owned 350, and Joelson 50; also 100 shares of preferred stock of which Easton and plaintiff each owned 50 shares.

Upon the appeal from the judgment plaintiff questions the sufficiency of the evidence to support the findings. His briefs are replete with vague accusations of malfeasance. The general tenor of his argument is expressed as follows: "The crux of plaintiff's complaint is defendants' domination and control of the corporation. The gravamen of plaintiff's action is the utter and total disregard by the defendants of their fiduciary obligations. To argue, as the respondents now do, that the defendants may breach their fiduciary duty and be guilty of misfeasance, and that the plaintiff cannot complain therefor because it has not been directly injured is specious reasoning. (Sutter v. General Petroleum Co[rp]., 28 Cal.2d 525 [170 P.2d 898, 167 A.L.R. 271]). No one can take advantage of his own wrong (Civil Code, § 3517). Plaintiff does not have to stand idly by and await actual injury by the misconduct of the defendants before he may seek the aid of a court of equity." Plaintiff quotes from the cases general definitions of the duties of directors and officers as fiduciaries. His briefs call attention to no evidence that the defendants have misappropriated or wasted any funds of the company or have been guilty of any dishonest acts.

[1, 2] While not denying that Mrs. Easton and Joelson made loans to the corporation in large amounts and that the company used the money, plaintiff complains only that no formal action was taken by the Board for borrowing the money. The undisputed evidence was that Mrs. Easton loaned the company about $20,000 and that Joelson loaned it about $16,000 over a period of years. Payments were made on account until, at the time of trial, the

balance owing to Mrs. Easton amounted to $10,000 and the balance due Joelson, $3,500. No interest was charged on the loans although at one time Mrs. Easton was paid $63.20 and Joelson was paid $46.37 as interest. It is elementary that liability for money loaned or services rendered to a corporation for which it could legally contract, cannot be repudiated for informality of corporate action authorizing the same. Main v. Casserly, 67 Cal. 127, 7 P. 426; Woods Lumber Co. v. Moore, 183 Cal. 497, 505, 191 P. 905, 11 A.L.R. 549; Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 514, 185 P. 388; Kelly v. Ning Yung Benev. Ass'n, 2 Cal.App. 460, 466, 84 P. 321. Obligations of a closed corporation within the usual course of its business, authorized informally by its directors and stockholders who have usually conducted its affairs are binding upon the corporation. Brainard v. De La Montanya, 18 Cal.2d 502, 511, 116 P.2d 66.

Except for the years 1949 and 1950 the corporation made money each year. Easton's salary was fixed at various times at either $100 or $150 per week. During 1947 and 1948 there was accumulated unpaid salary of $1,400. Thereafter he received $100 per week. Commencing in the year 1952 Mrs. Easton devoted approximately 50 hours per week to the business and was paid $50 per week. The preferred stock was entitled to dividends at the rate of 1 per cent per year which have been paid but no dividends have been paid on the common stock. Except for the year 1950 dividends on the preferred stock were paid from earned surplus. If there should be default in the payment of dividends on the preferred stock for two successive years, the voting power went to the holders of the preferred; otherwise they had no voting rights. In 1950 Easton contributed $100 to the corporation as "paid in surplus". It was disbursed $50 to plaintiff and $50 to Easton. Plaintiff argues that this was a device to prevent his exercising voting rights under which, at that time he could have elected two of the four board members. The court was of the opinion that this irregularity in 1950 deprived the plaintiff of no right; that there was no default in dividends for two years and stated: " 'We have gone over and over this, and I don't see even if this payment was made erroneously, what possible effect it could have on your case? * * * So assuming that all this is true, what difference does it make? I don't see why you are harping on it.' " We take the same view of the incident.

[3–5] Although the payment of $850 to Easton in 1947 and the payment of $550 to him in 1948 were referred to by the parties as bonuses, it appears that these sums represented unpaid wages for those years and that the payments were not improper. Plaintiff says that a transfer of a certain credit by Easton to Joelson "is susceptible to a conclusion of fraud." The remaining discussion of the facts consists of similar vague and unsupported assertions of disregard of fiduciary obligations, disregard of the rights of plaintiff, and the operation of the business by defendants as if it were their own business. The answer to all of them lies in the fact that the trial court was convinced that the defendants were diligent and faithful in their conduct of the corporation's business and that they had been guilty of no wrongful practice. Easton has $35,000 and Joelson has $5,000 invested in the corporation. The Eastons ran the business; their salaries were modest, their profits lay in the success of the corporation, and we agree with the trial court that plaintiff produced no evidence to substantiate any of the charges of misconduct. Under these circumstances the corporation had no claim against the defendants, or either of them, for breach of duty toward the corporation and, consequently, a stockholder could have none. It is not conceivable that any court would have removed the directors from office and barred them from holding office in the future which plaintiff, even now, contends should have been done.

[6] Defendants urge that the order requiring plaintiff to post security prior to trial was an appealable order, that no ap-

peal was taken from it and that it must be deemed a valid order, not subject to review. Plaintiff replies that the order was void for the reason that in granting the application for the posting of security the court made no findings and that the void order was not appealable. The order was not void. It is immaterial whether it was an appealable order. The judgment is subject to review, and this includes the provision giving defendants resort to the security.

There are two sections of the Corporations Code that relate to the furnishing of security for the protection of defendants in stockholders suits, namely, sections 830 and 834. Section 830 governs in those cases in which a director, officer or employee of a corporation is sued for his acts or failure to act in accordance with his duties, and in which he seeks to fasten upon the corporation liability for his expenses in defending the action. The court is authorized to assess the expenses against the corporation if the individual has been successful and the court finds that he merits indemnification. Defendants sought no such relief. It would not be incorrect to say that they are, in reality, the corporation.

[7–9] The purpose of the remedy provided by section 834, invoked by defendants, is quite different. It is to impose conditions upon the prosecution of unfounded litigation by disgruntled stockholders against corporate directors, and others. The plaintiff may be required to provide indemnity in favor of the individual defendants and, in proper cases, indemnity as a protection against liability that might be assessed against the corporation under section 830. The indemnity sought by defendants and furnished by plaintiff was for the protection of the individual defendants. Section 834 was applicable; section 830 was not. Under either section the right to indemnification is determined after the action has been tried, and it is ordered only in case the court determines that those seeking indemnity have been successful in the litigation and are fairly and equitably entitled to have recourse against the surety. One of the findings was that defendants merited recourse in the amounts stated in the judgment. The original order requiring the posting of security, and the judgment awarding defendants recourse thereto were in all respects regular and proper. Although there was no segregation in the judgment among the defendants of their expenses, they were represented by the same counsel and it was to be presumed that they shared equally in all the expenses paid and incurred.

[10] The final point urged by plaintiff is that the court was without jurisdiction to order the posting of additional security after plaintiff had taken an appeal from the judgment. We cannot agree that the court lost jurisdiction by reason of the appeal.

The application of defendants for security was timely. Thereafter, as provided in section 834, the court "from time to time" could order the security increased or decreased upon a showing that it was inadequate or excessive. In their first application for security the defendants limited their request to $2,750, expressly basing their estimate of expenses upon the assumption that the action would be tried and that the expenses would be incurred in the trial. They excluded from their request any estimate with respect to any attorneys' fees or costs in the event of an appeal. In their application for additional security they set forth that the amounts fixed by the judgment as expenses totaled $2,356.17. It was shown that the attorney who had represented defendants at the trial would represent them on the appeal, and that he had rendered services to them subsequent to the judgment. The request was for additional security in the sum of $2,250 and, as we have stated, the order was for that amount as estimated attorney's fees.

[11, 12] The purpose of the remedy afforded by section 834, of course, is to provide full indemnity for expenses of the defense, incurred throughout the litigation, and no distinction is stated between the expenses incident to the trial and those incurred in defending the judgment on ap-

peal. The security of $2,500 became inadequate when the court fixed the amount of the trial expenses at $2,356.17. The court, no doubt, could have ordered that additional security be posted in the event of an appeal if application had been made therefor prior to entry of judgment. The authority for such an order follows from the right of the defendants to full indemnification and the fact that section 834 does not purport to limit it to the trial expense. The fact that no application was made at that time did not divest the court of jurisdiction to entertain an application after judgment had been entered and an appeal taken. It is the general rule that the taking of an appeal divests the trial court of jurisdiction to take any action that affects the judgment. It must stand as it is entered as an adjudication of the issues that have been tried and the rights that have been determined, except as to subsequent proceedings authorized by the Code. But jurisdiction is not lost to act in collateral matters in which the rights of the parties require action, if they do not affect the judgment. "The law is established in California that, notwithstanding the perfection of an appeal and stay of all proceedings upon the order appealed from and matters embraced therein, the superior court may proceed upon any other matter embraced within the action and not affected by the order appealed from." Hallam Cooley Agency v. Superior Ct., 30 Cal.App.2d 20, 85 P.2d 457, 458. Jurisdiction was acquired upon the making of the first order; it was subject to modification, or a new order could be made, "from time to time." There is, of course, no reason for an implication that "from time to time" means during the pendency of the action in the trial court. It means rather "any time during the pendency of the litigation when necessity for another order arises." Necessity did not arise in the present case until an appeal had been taken. That was the appropriate time for an application for additional security.

[13] There was no abuse of discretion in ordering security in the amount of $2,500 as the estimated expense of defending the action in the trial court. The complaint itself suggests the futility of the litigation. Plaintiff made a bad investment. He purchased preferred stock for $5,000 which can return him a dividend of only $50 per year. If he was imposed upon in that transaction nothing could be accomplished in the present litigation that would better his position. For these reasons, and the additional reason that the appeal from the judgment is without merit it was not abuse of discretion to order security in the sum of $2,250 as the estimated expense of defending the judgment on appeal.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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151 Cal.App.2d 190

George RONDOS, Petitioner,

v.

SUPERIOR COURT OF The State of CALIFORNIA, IN AND FOR The COUNTY OF SOLANO, Edward Essy and Marvin F. Caesar, Respondents.

Civ. 9277.

District Court of Appeal, Third District, California.

May 21, 1957.

Prohibition proceeding was brought against the Superior Court of the State of California in and for the County of Solano, and others to prevent the Superior Court from enforcing an order appointing a receiver. The District Court of Appeal, Van Dyke, P. J., held that where two partners owning and operating night club business entered into written agreement with third party to sell third party the interest of one of the partners in the business, but the interest of such partners was not to pass until on-sale liquor license had been transferred to new partnership, and prompt application was made to Department of Alcoholic Beverage Control for transfer of license in accordance with contract, but no transfer was authorized, third party was not entitled to have a receiver appointed to operate the business, since the third party had no interest which was in danger of being lost, removed, or materially injured.

Peremptory writ issued as prayed for.

1. Prohibition ⚿3(5)

Where operation of night club under a receiver was hazardous, and vicissitudes of a business so operated might bring about a condition that would make barren successful prosecution of appeal from order appointing receiver, and one appealing from order had been unable to give stay bond required, case was a proper one for issuance of writ of prohibition. West's Ann.Code Civ.Proc., § 943.

2. Partnership ⚿210

Where two partners owning and operating night club business entered into written agreement with third party to sell third party the interest of one of the partners in the business, but the interest of such partner was not to pass until on-sale liquor license had been transferred to new partnership, and prompt application was made to Department of Alcoholic Beverage Control for transfer of license in accordance with contract, but no transfer was authorized, third party was not entitled to have a receiver appointed to operate the business, since the third party had no interest which was in danger of being lost, removed or materially injured. West's Ann.Code Civ. Proc., § 564, subd. 1; West's Ann.Bus. & Prof. Code, § 23300.

3. Receivers ⚿36

Where complaint fails by its allegations to show that conditions required by law have been complied with, order for appointment of a receiver is void for all purposes. West's Ann.Code Civ.Proc., § 564, subd. 1.

Millard Smith, J. R. Traub and Jack B. Burstein, Vallejo, for petitioner.

Thomas F. O'Hara, Kilpatrick & O'Hara, Vallejo, for real party in interest.

VAN DYKE, Presiding Justice.

This is a proceeding in prohibition. Prior to January 16, 1956, George Rondos, petitioner herein, and Marvin Caesar, as copartners, owned and operated a business in the City of Vallejo known as the Stork Club, which business they operated under an on-sale license issued by the Department of Alcoholic Beverage Control. On that day Rondos, Caesar and Edward Essy, real party in interest herein, entered into a written agreement, the substance of which, so far as here material, is as follows: Caesar agreed to sell to Essy his one-half interest in the business, including all the assets thereof, and Rondos consented to that sale. Rondos and Essy agreed between them that they would form a partnership for the further conduct of the business and all three agreed to take steps to have the existing license transferred to the new partnership. The purchase price from Essy to Caesar was placed in escrow and it was agreed that title to Caesar's half interest in the business and its assets would pass upon the closing of the escrow after the issuance of the new license. This stipulation of the agreement is in harmony with Title 4, Section 60, Subdivision (d) of the California Administrative Code, which in respect of transferring on-sale licenses provides: "The transfer of title to the licensed business shall coincide with the transfer of the license." See Lenchner v. Chase, 98 Cal. App.2d 794, 220 P.2d 921. The stipulation is also in harmony with Section 23300 of the Business and Professions Code, which provides: "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division." The new license has never been issued, the escrow has never been closed, and according to the stipulation in the agreement and by virtue of the rule and the statute title to the business and its assets thus agreed to be purchased and sold has never passed from Caesar to Essy. The parties to the agreement promptly applied to the Department of Alcoholic Beverage Control for a transfer of the license in accordance with the agreement, and hearings were held, but no transfer was authorized and no new license was issued. After the matter had been pending for something over a year Rondos served upon Essy notice of rescission of the agreement and thereupon notified the department that he was withdrawing the application for transfer of the license. Upon this action being taken, Essy filed an action in the respondent court against Rondos and Caesar, the material allegations of the complaint being as follows: That on January 16, 1956, Caesar, Rondos and Essy agreed that Essy would become a partner with the other two in the ownership and operation of the business known as the Stork Club in Vallejo, and that they thereupon executed the aforesaid agreement, copy of which was attached to the complaint as Exhibit A; that the three thereupon entered into partnership and carried on the business and had ever since so continued until Caesar and Rondos breached the agreement (Exhibit A); that Essy had fully complied with the terms of the agreement, but that Caesar and Rondos had violated it "by cancelling and withdrawing the application for transfer of said license * * *" Plaintiff Essy prayed that the partnership existing between the three men be dissolved; that an account be taken of partnership transactions; that Caesar and Rondos be decreed to pay the plaintiff such sum as the accounting should show to be due and that in the meantime a receiver be appointed to manage and conduct the business, take over all of its assets, collect and receive all moneys owing to the partnership, pay its debts, and in the end to sell the partnership assets; that the proceeds then be distributed according to the interest of the parties. Essy gave notice in the action of a motion for appointment of a receiver, supporting it by reference to the complaint and adding an affidavit of the escrow agent which stated merely that Caesar and Rondos had served notice upon him that the escrow agreement had been rescinded and had instructed him to advise the department that such action had been taken and that the transaction was of no further effect. The motion was heard. At the hearing Essy, as plaintiff, rested upon his notice of motion and the complaint and affidavit. No other evidence was introduced by either side.

Petitioner herein appealed from the order appointing the receiver and that appeal is pending. He also applied to this court for a writ of prohibition to prevent the respondent court from enforcing the order appointing a receiver upon the ground that the same was void as being made without jurisdiction. The receiver took possession of the business and now holds possession of all the assets and is conducting the business under the order appointing him.

[1] At the outset it is asserted by respondent that prohibition ought not to be entertained upon the ground that the appeal is an adequate remedy, particularly in view of the provisions of Section 943 of the Code of Civil Procedure authorizing a stay upon giving a bond to be fixed by the court that appointed the receiver. However, it appears that in connection with the appeal petitioner herein applied for an order of the court fixing the amount of the stay bond but, the bond being fixed, he was unable to give the bond required. We think this a proper case for the issuance of a writ of prohibition if, as contended, the order appointing the receiver is void. It is apparent that by the nature of the business being conducted its operation under a receiver is hazardous and it may well be that the vicissitudes of such a business so operated may bring about a condition that would make barren the successful prosecution of the appeal. (Witkin, California Procedure, p. 2501.)

[2] We have concluded that the order appointing the receiver is void. It was sought under the provisions of Section 564,

Subdivision 1, of the Code of Civil Procedure, which provides that a receiver may be appointed "In an action * * * between partners * * * owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or funds, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." It is apparent from the record that Essy, plaintiff in the action, does not jointly own and is not interested as an owner in the business of the Stork Club or its assets, and it is equally apparent from the record that it is neither alleged nor was it shown that if he had any interest there was any danger of that interest being lost or removed or materially injured. We have already stated that by express stipulation of the contract title to Caesar's interest in the business and its assets was not to pass until the on-sale liquor license under which the business was operated had been transferred to the new partnership. Furthermore, had the contract not contained such a stipulation the law would have supplied it, for the regulations governing the conduct of an on-sale liquor business prohibit the transfer of title to the licensed business except coincidentally with the transfer of the license. Concerning that provision the court said in Lenchner v. Chase, supra, 98 Cal.App.2d at page 801, 220 P.2d at page 925:

> "* * * As we view it, the sentence 'The transfer of title to the licensed business shall coincide with the transfer of the license' is susceptible of no interpretation other than that found. True it fixes the event (and the time) when title to the business should pass but it means also that without a transfer of the license there could be no transfer of title to the *licensed* business. It can mean nothing else. The transfer of title to the business (plus license and lease) was the consideration for the payment of the $15,000 and it follows, of course, that if the business could not be transferred there would be a total failure of consideration."

[3] Notwithstanding the allegations in the complaint that vary somewhat from the stipulations of the contract, the contract, made a part of the complaint as an exhibit thereto, is specific on the point of the time when and the conditions under which, title to an interest in the business and assets would or could pass to Essy. The result, therefore, is that the order appointing the receiver was made without jurisdiction for want of the required property interest and was equally void for want of proof of the danger to a property interest involved if such interest had existed. The requirements of the statute are jurisdictional. As said in In re Stein, 14 Cal.App.2d 303, 305–306, 58 P.2d 175, 176:

> "* * * Where a complaint fails by its allegations to show that the conditions required by law have been complied with, an order for the appointment of a receiver is void for all purposes. The following cases so hold: McCutcheon v. Superior Court, 134 Cal.App. 5, 24 P.(2d) 911; Ellis v. Superior Court, 138 Cal.App. 552, 33 P.(2d) 60; Bibby v. Dieter, 15 Cal.App. 45, 113 P. 874 (holding that such appointment may be attacked collaterally); A. G. Col. Co. v. Superior Court, 196 Cal. 604, 606, 238 P. 926; First National Bank of Auburn v. Superior Court, 12 Cal.App. 335, 107 P. 322.
>
> "The allegations in the complaint in the instant case fail to state facts that would confer jurisdiction upon the superior court to appoint a receiver, and the court was without power under such circumstances to make the order of appointment."

Let the peremptory writ issue as prayed for.

SCHOTTKY and PEEK, JJ., concur.

151 Cal.App.2d 173

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Robert E. WILLIAMS, Defendant and Appellant.
Cr. 5785.

District Court of Appeal, Second District, Division 2, California.
May 21, 1957.

Defendant was convicted of first degree murder. From judgment rendered by the Superior Court of Los Angeles County, Beach Vasey, J., defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law ⚿1160

Before verdict of jury which has been approved by trial court can be set aside on appeal on grounds of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support conclusion reached in court below.

2. Criminal Law ⚿562

Determination of charge in criminal case involves two distinct propositions, (1) that offense was committed, and (2) that it was perpetrated by persons accused thereof.

3. Criminal Law ⚿1144(13), 1159(6)

Reviewing court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence and then determine whether such facts are sufficient to support verdict, and if circumstances reasonably justified verdict, opinion of reviewing court relying on those circumstances, that they might also reasonably be reconciled with innocence, will not warrant interference with jury's determination.

4. Homicide ⚿228(1, 2)

Proof of corpus delicti in murder case consists of two elements, death of alleged victim and existence of criminal agency as cause, either or both of which may be proved circumstantially or inferentially.

5. Criminal Law ⚿563

Proof of corpus delicti does not require identity of perpetrators and it is not necessary that it connect defendant with commission of crime, although it may do so.

6. Criminal Law ⚿406(1), 409

Corpus delicti must be established independently of admissions of defendant, but full proof thereof is not necessary before admissions may be received.

7. Criminal Law ⚿406(1)

Where homicide is committed in course of robbery, it is not necessary for prosecution to prove fact of robbery as part of corpus delicti, as degree of crime is not part thereof, and robbery may be proved by defendant's own statements after prima facie showing of homicide has been made by other proof.

8. Homicide ⚿228(1)

Corpus delicti, in prosecution for first-degree murder, was sufficiently established.

9. Criminal Law ⚿517(4)

Establishment of prima facie case entitled prosecution to use defendant's confirmatory confessions.

10. Homicide ⚿228(4)

To prove prima facie the corpus delicti, all that is required is to show with reasonable probability that criminal act of another was direct cause of death.

11. Criminal Law ⚿538(3)

Prosecution is not bound by exculpatory statements or self-serving declarations in a confession, and confessions stand upon same footing as other evidence and are to be weighed by jury in same manner.

12. Criminal Law ⚿517(1)

Discrepancies between confessions and proof go to weight and not to competency of the confession.

13. Criminal Law ⚿494

Expert's testimony leaves conflicting inferences for jury to resolve.

14. Criminal Law ⚿494

In murder prosecution wherein extensive confessions were introduced, testimony of psychiatrist proferred by defendant to show that defendant's statements were unreliable on every occasion so that he could have confessed to crime which he did not commit was not binding on jury, but psychiatrist's conclusions were to be weighed in light of reasons assigned therefor and the other facts in evidence.

15. Homicide ⚿235

Evidence, in first-degree murder prosecution, supported implied findings that defendant committed homicide in perpetration of robbery.

16. Criminal Law ⚿517(1)

Defendant could not introduce confessions, other than those introduced by state, to show alleged inconsistencies between them.

17. Criminal Law ⚿1036(1)

Defendant could not successfully complain on appeal of refusal to admit evidence where he failed to make any offer of proof at trial.

18. Criminal Law ⚿317

Defendant's failure to testify gave weight to evidence presented by state upon matters presumptively within his knowledge and which, if untruly stated, would normally have been denied by him.

◆

Gladys Towles Root, Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Henry K. Workman, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant, having been convicted of first degree murder with recommendation of punishment by imprisonment in the State prison for life and having been sentenced accordingly, appeals from the judgment. Counsel make three claims of error warranting a reversal, (1) that the evidence is insufficient to sustain a conviction of murder, (2) that it is insufficient to establish murder in the first degree, and (3) that prejudicial error was committed in the exclusion of declarations of defendant which contradicted his confessions.

[1-3] The guiding rule of review is stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780: "'[B]efore the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed, and second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

Essentially the argument in support of appellant's first claim is that there is nothing to connect defendant with the crime except his own statements, and that they are unreliable because he was proved by expert testimony to be a pathological liar. The second claim is that, as the first degree murder finding must rest upon a showing that the homicide was committed during the perpetration of a robbery, there must be independent proof of the robbery as a part of the corpus delicti and that there is no such evidence here except defendant's confessions.

[4-6] Proof of the corpus delicti in a murder case "consists of two elements, the

death of the alleged victim[s] and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially. * * * Proof of the corpus delicti does not require identity of the perpetrators. It is not necessary that it connect the defendant with the commission of the crime although it may do so. * * * It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof *aliunde* of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing that the alleged victim[s] met death by a criminal agency is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt." People v. Cullen, 37 Cal.2d 614, 624–625, 234 P.2d 1, 6. Accord: People v. Amaya, 40 Cal.2d 70, 75–76, 251 P.2d 324; People v. Cobb, 45 Cal.2d 158, 161, 287 P.2d 752.

[7] Where the homicide is committed in the course of a robbery it is not necessary for the prosecution to prove the fact of robbery as part of the corpus delicti; the degree of the crime is not part thereof; it may be proved by defendant's own statements after a prima facie showing of homicide has been made by other proof. "In this connection, Miller apparently contends that the prosecution was bound to establish by independent evidence the corpus delicti of the crime of attempted robbery, as well as the corpus delicti of the crime of murder, before his extra-judicial statements concerning the planning and execution of the attempted robbery could be used to prove the degree of the murder which was admittedly committed. He cites no authority to sustain his contention, and it appears to be without merit. The corpus delicti of the crime of murder having been established by independent evidence, both reason and authority indicate that the circumstances surrounding the commission of the crime can be shown by the extra-judicial statements of the accused, and that such evidence of the surrounding circumstances may be used to establish the degree of the crime committed." People v. Miller, 37 Cal.2d 801, 806, 236 P.2d 137, 139. See, also, People v. Amaya, supra, 40 Cal.2d 70, 80, 251 P.2d 324.

The evidence, viewed in the light of the rule of the Newland case, supra, establishes independently of defendant's own extra-judicial statements the following facts. Matt Manestar, the victim of the crime, was the owner of Rose Motel, located at 1345 West Pacific Coast Highway, in the Wilmington or Harbor City area. He was "well-to-do," and locally was reputed to have "quite a bit of money." One of his sons testified that "[w]e were asked about it quite a few times. * * * on the dock * * * they kept calling us money bags." On the night of January 22–23, 1956, Matt Manestar was in charge of the office or lobby of the motel; he had relieved his son Leonard at about 12:45 a. m. on the 23rd, a Monday; he was alone at the time. In one of the drawers of a table in the office was currency amounting to $27; in a box on the counter were some small coins for use for television. On the preceding Saturday $30 in currency had been delivered to Mr. Manestar. At 10:00 a. m. on Monday, the 23rd, another son, Emil, arrived at the office. No member of the family had seen Matt after Leonard left him and before Emil arrived. He found the doors unlocked, the lights on; Matt's hat, coat and glasses were on the counter; the table drawer was partially open and the $27 of currency was gone; the coin box had also disappeared. There was no evidence of a struggle.

On January 25th, about 4:00 p. m., Officer Schmitz of the Los Angeles Police Department saw Matt's body on a ledge of a cliff about 75 feet below the road near Point Firmin Park, several miles from the motel. There were no shoes, hat or glasses on the body. No automobile or other form of conveyance was near. An autopsy disclosed that the cause of death "was gunshot wound in the head and of the abdomen with hemorrhage and injuries to the brain." Also: "The point of entrance was in the left occipital region, which is back of the head on the left side. The bullet pierced the brain more or less diagonally and edged through the right eyelid. * * * The other wound was in the region of the abdomen, rather closely between the edge of the ribs and I think a little to the right, two or three inches to the right of the mid-line, being in this position (indicating). That bullet lodged posteriorly toward the back and had gone through the right lung and terminated under the skin of the back, from which point a bullet was recovered and saved." The police were unable to discover any clue to the identity of the criminal until they talked with defendant on April 17th.

[8–10] There can be no doubt that the foregoing makes a prima facie showing of homicide. Of course, that is enough to afford a basis for the use of defendant's confirmatory confessions. People v. Cullen, supra, 37 Cal.2d 614, 624, 234 P.2d 1; People v. Powell, 34 Cal.2d 196, 203, 208 P.2d 974. "To prove a *prima facie* case of *corpus delicti,* all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of the death * * *." People v. Ives, 17 Cal.2d 459, 464, 110 P.2d 408, 411. In People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12, 17, the court, speaking of the use of extrajudicial declarations and statements of a defendant, said: "[I]t is likewise well settled that to authorize their reception in evidence and consideration by the jury, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish the fact of guilt; rather slight or prima facie proof is sufficient for such purpose. [Citations.] It may be proved by circumstantial evidence and by inferences reasonably drawn therefrom. [Citations.] Direct or positive evidence is not essential [citations], nor is it necessary at this point to connect the defendant with the perpetration of the offense."

The possibility that decedent voluntarily walked or rode from the motel to the edge of the cliff several miles away, there shot himself and fell over the cliff was not suggested by anything in evidence. A mere possibility affords no evidence whatever. See Robinson v. Board of Retirement, 140 Cal.App.2d 115, 118, 294 P.2d 724, and authorities therein cited. The reasonable inference is death by violence. Basis is thus afforded for use of defendant's confessions for completion of the proof.

Defendant made two written and signed confessions, another which was taken down on a tape recorder, and numerous other oral statements pointing to himself as the perpetrator of a robbery resulting in the killing of Manestar.

On March 30, 1956, defendant, who apparently had been on parole from the Deuel Vocational Institution at Tracy, was returned for some infraction of rules not connected with this case. Within a week he went to Ralph R. Enos, an officer of the Guidance Center, essentially a counselor, and asked about getting or seeing an attorney. He was advised that ordinarily attorneys were not available to inmates of that institution but that Enos would see what he could find out. Shortly thereafter defendant again asked about an attorney and was told by Enos that he had inquired but had not been able to get an immediate answer. He asked defendant if there was something that he would feel free to tell that would concern an attorney, and defendant then said that he had been in some other trouble in addition to that which caused his return to Deuel and that "I will admit a robbery." He added that on January 24, 1956, at about 3:30 a. m. he robbed a motel at 1345 West Pacific Coast Highway in Harbor City. Enos then asked, "Well, was there something else?" and defendant said, "Well, there was a body at the bottom of the cliff." On April 9th defendant inquired again about the matter of an attorney, was told that nothing had been heard from a letter written by Enos. In one of these conversations defendant stated "that he wanted to get it off his conscience to ease his feelings about this. This was something that troubled him and he wanted to get it off his chest to relieve his feelings in the matter. * * * I asked the question if there was anyone else involved and he said there was but he did not identify the person." Enos reported the matter to the Los Angeles Sheriff's office.

Roy T. Asakawa, correction officer at Deuel, was sought out by defendant after his talks with Enos and before arrival of the Los Angeles officers, which was on April 17th. Defendant told him that he would like to confess a crime that he had committed in Los Angeles and that he had already talked to Mr. Enos. "He said that on January 24th of this year he had shot a man in Los Angeles; that him and a friend were riding around one night and they robbed a motel and his friend drove the car while Williams went inside the motel. He went inside and stuck up the motel and then he ordered the man outside. He said he didn't know why, but he did, and he put the man in the front seat of the car while he got in the back seat. Then he told his buddy to drive around out to the cliff somewhere, and he said all the time that they were riding he kept telling the man in the front seat how they were going to kill him, just to see what his reactions were. I asked him what he did after that, and he said they kept threatening the man, and about 45 minutes later or so, the man made a grab for the wheel and, 'I shot him. I shot him in the back of the head.' I asked him what he did with the gun and he said he couldn't tell me. I asked him about his accomplice and he said as long as they didn't have the gun, or his accomplice, that they couldn't do a thing to him. He said that no one would ever find the gun."

Upon arrival of Officers Butts and Weyant of the Los Angeles Police Department, defendant at first refused to talk to them, insisted on talking first to Asakawa, who said, "he talked to me mostly about what kind of a sentence that I thought he would get. He was afraid about getting the death penalty and I told him in my opinion he was pretty young and that they probably would look at his age and he didn't have too much to worry about that on the death penalty, but that seemed to be his only concern about the matter, getting the death penalty. He appeared to be awfully nervous."[1] Defendant then talked with Capt. Hawker, who was in charge of the Custodian Force of the institution. This occurred in the presence of Asakawa. The talk was along the same lines as that just had with him and defendant asked Hawker what he thought a jury would do to him. The Captain told him he could not say but "if he did it, to go ahead and confess it to get it off his chest. He said he couldn't tell him one way or the other."

Then defendant talked to Officers Butts and Weyant. Before he was told what they wanted "he asked us what we were trying to do, put him in the gas chamber? And he said that he could cop out to a robbery, but nothing else." Before this conversation began the police had no idea how the crime had been committed, and made it a point not to suggest to the defendant any particular point about the crime. They did not even mention the word "murder" until after he was well into the story of the crime itself. Defendant made an oral confession and repeated it as Weyant wrote it down in defendant's own words. It was then signed by him. There is no claim that it was not voluntary. That confession, in summary, says that defendant, on Sunday, had bought three guns, one a .38 revolver; that evening he and a friend (whom he refused to name) "got some weed," bought some Gallo wine and drove around smoking the weed and drinking. He had the .38 gun and his friend a .32, both loaded. The friend was driving and defendant told him to go down Highway 101 toward Lomita; he had heard about "this guy" in a motel having a lot of money there; he was supposed to be a Yugoslav. They decided to put him in the car, take him into the hills and "drop him off, so he couldn't call the heat on us." Defendant went into the office and the victim was sitting back of the counter about half asleep. Defendant pointed the gun at him, said he wanted his money, and "not to give me any static because I know you have more than just the motel money;" Manestar took the money from the drawer and handed it to defendant. "He kind of stuttered and I threatened him with the gun." The police knew nothing of Manestar's tendency to stutter when excited; they later learned the fact. Told to walk out to the car just like everything was all right, Manestar did so, was put in the front seat and defendant got into the rear. They drove into the hills. We started telling him we were going to kill him if he didn't tell us where the money was. I had no intention of killing him, just trying to scare him and I was hopped up on weed and Gallo wine. We were arguing and laughing more or less cutting up. I think the guy grabbed for the wheel. My gun went off hitting him in the head somwhere. Blood splattered all over. He fell forward towards the dashboard. We stopped for a second, then my partner said let's get him out of here. I and my partner had gotten out of the car. I wiped some blood off my shoulder, then I went through his pockets. All I took was some blue chips, three or four. I thought they were quarters at first, a fountain pen and a little round ring I think there were keys on them. I threw them away right there. We got back in the car. I don't think I shot him again. I don't remember if I did. I don't remember. I actually don't remember what happened after that." (The police when at Tracy knew nothing of the poker chips; Emil Manestar had seen them in the office about two days before the father's disappearance.) Upon return to his hotel room defendant found that he and his friend had taken $47 and they split it. There were two or three five dollar bills, one ten, and some ones. Leonard had noted that he turned over to his father a ten dollar bill, two fives and seven ones; the father had received from a little girl on Saturday three ten dollar bills. Defendant said he gave the .38 and the .32 to a friend the next day but he declined to name that person.

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[1] The record does not disclose defendant's age, but several references to his youth appear therein. The Deuel Institution exists "to provide custody, care, industrial, vocational and other training, guidance and reformatory help for young men, too mature to be benefited by the programs of correctional schools for juveniles and too immature in crime for confinement in prisons." Pen.Code, § 2036. It is a fair inference that defendant is in his early twenties.

In writing down the confession Officer Weyant drew a diagram of the motel office under defendant's directions, locating the door, the walls and each object as specified by him. They were thus put in their proper places without any suggestion from Weyant. This included the place where the victim was sitting, the table from which the money was taken and the color of the divan which defendant correctly said was green. He did not recall the desk under the front window. He said he took no money from the desk or the box on it.

The police took defendant from Deuel to San Pedro on April 20th. On the way defendant asked what they were taking him to Los Angeles for, was told that it was an investigation of the killing of "this motel man," and defendant replied, "you got the wrong man on that, sir." The conversation was sporadic, but as Officer Butts testified: "Then all of a sudden he might ask me, like he did several times, about that statement that he had signed at Tracy. He wanted to know if that amounted to a confession and I told him that in my opinion that the statement that he had signed had all the elements of the case in it and did amount to a confession."

That night at the police station Butts showed defendant a picture of the Manestar family group and a small one of Matt Manestar and asked if that was the man he robbed. The reply was that the small one "looks like the man."

That same evening a further interview was had and a tape recording made. Defendant again talked voluntarily and freely. Among other things he pointed on his own body to the places where the bullets went through the head and the torso. When explaining the latter wound he testified that he just had the victim by one hand, trying to hold him up, that he was falling and defendant shot him "[r]ight in here or the guts. Q. You mean in the guts or upper chest or the lower chest? A. Right in the area."

On May 1st defendant made an oral confession. Though it differs in certain repects from the first one,—e. g., substituting Carpenter for Caprell as an accomplice,—he again told of the weed and the wine, the robbery inside the motel office, marching the victim to the car, driving into the hills, the attempted grabbing for the wheel, the shooting of the victim, searching him, finding a ring of keys, a few chips, a pen, and nothing else. "He said he shot him the second time when he was searching him. The gun went off accidentally. This was before driving down to the point. And he stated then they drove down to the point and got out of the car and Bob said he got hold of the man's feet and Jimmie got hold of the man's arms and they threw him over the cliff." Defendant also said he got $47 in the robbery.

On May 2nd at the police station defendant said all his previous stories were false; that he knew only what he had read in the San Pedro and Wilmington newspapers while at Tracy. But the transcription of the recording of April 20 contains this:

"Q. By Officer Butts: Did you read about it in the paper? A. No. The only part that I read in the paper, well, I heard about it, you know. He showed me a clipping of it, Frank showed me a clipping of it, and then when I got to Tracy there was a clipping. But the only clipping I had in Tracy, where he was kidnapped and vanished.

"Q. Where he was missing? A. Yah.
"Q. Before he had been found? A. Yah."

In a second conversation in the district attorney's office on the second of May defendant again asserted that all he knew about the crime was what he read in the newspapers. But after being quizzed as to how he knew certain things he said: "All right, that is not the truth. I actually was in on the robbery. * * * He stated that the way he had told us about the robbery and kidnapping and shooting happened was all true; that it happened that way, except that he was by himself. He had pulled the job by himself; that he went over to the motel and walked into the office and found the man as he described him; that he had taken him out to the hills to keep him from calling the police, and had parked the car and started to search the man. He started to walk away from him and he got scared and shot him and he said he thought the man was going to get away from him. He said after shooting him he then walked up and shot him again to make sure that he was dead. He dragged the body over and threw it over the cliff himself." This was followed by written confession of the same date, May 2nd, which defendant volunteered to write in his own hand. It differed from the first one in numerous particulars but contained an admission of the robbery and the homicide. The description of the robbery was substantially the same as before except that it was a one-man job; in the hills defendant ordered Manestar out of the car; "I went to look in his pockets and he turns and began to leave; the gun went off hitting him in back of the head or neck. I then went over and started going through his pockets real fast. I found a pen and a key set and some chips. I threw the keys and put the pen and chips in my coat. Then as I went to push him off right there where the cliff was the gun went off again. The first time was because I was scared, the second time it went off by mistake. I was holding him and pushed him over." This document concludes: "I told a lot of stories to cover up for my brother's car and all the reason I named these other people was because I knew they had nothing to worry about, this is final and at last the whole truth and am glad." Then follows the signature.

[11, 12] There were numerous other statements made by defendant from time to time which were contradictory of his confessions, just as there was inconsistency between the confessions themselves, but those things presented problems for the jury to solve by drawing the more reasonable inferences. "The prosecution is not bound by the exculpatory statements or self-serving declarations in a confession when shown by direct or circumstantial evidence to be untrue. * * * Moreover, confessions stand upon the same footing as other evidence and are to be weighed by the jury in the same manner. All parts are not necessarily entitled to the same credit, and the jury may believe a part and reject the remainder of a confession. People v. Wyman, 15 Cal. 70, 74; 8 Cal.Jur. 119, § 207." People v. Garcia, 2 Cal.2d 673, 679, 42 P.2d 1013, 1016. "There are some discrepancies between details of the confession and other proof, but that goes to the weight, not the competency, of the confession." People v. Wade, 138 Cal.App.2d 531, 536, 292 P.2d 303, 306.

But appellant argues that the confessions should have been rejected as untrustworthy because he was proved to be a pathological liar and a psychopathic personality. For this he relies upon the testimony of an expert. As a partial basis for that testimony defendant's mother testified to childhood illnesses, head injuries and a penchant for telling mean and ugly things which he had done, which proved to be untrue; exemplified by the claim that he had "stomped" a boy in the stomach and knocked him out; another that he was involved in a murder case in Texas when in fact he was being held for vagrancy. Defendant's brother testified to his inclination to tell "tall tales," such as beating up another person with whom he had had no fight in fact; also illustrated by his claim that he had had a fight with Officers Thornberry and Butts, and that he had told many other false tales. Any evidence of facts indicating a congenital or pathological inability or disinclination to tell the truth was received when offered.

The expert, an experienced psychiatrist, had been told by defendant's attorney that he thought defendant possibly had confessed to something he did not do, and the witness started his examination of defendant with the feeling that anything defendant had told the police officer in the nature of a confession was untrue; that he had falsely confessed to a crime. This witness, who relied upon undisclosed conversations with other persons and reports made by them, expressed the opinion that defendant "is a psychopathic personality with a pathological line," who, actuated by hidden and unrecognized motives, would be likely to make a false confession of crime, motivated by desire for publicity, a craving to look big to his associates, to play the role of an important person, a wish to cause trouble and frustration to officials working on the case, or to worry and harass people who care about him and thus excite their pity, or for other esoteric reasons would thus assume the temporary burden of a crime he had not committed. This expert testified that hardly anything defendant says is reliable, but he conceded that he did not know whether it was true or false when defendant denied his guilt, and he would not say that defendant is incapable of telling the truth about anything.

It is significant that defendant in his first conversation with Mr. Enos gave the exact address of the motel, 1345 West Pacific Coast Highway; in his first confession to officers Butts and Weyant he spoke of using a .38 revolver and the bullet found in Manestar's body came from a .38; he said Manestar "kind of stuttered," a fact unknown to the police; told of the poker chips, which were unknown to the officers; gave details of the Manestar office from which Weyant made an accurate diagram in his presence; later pointed to the places on the head and body where the victim was shot. The expert answered in the affirmative this question: "If this defendant described things about this crime he could not have gained from any source excepting having seen it or been there, then you would say that he would be telling the truth on that, would you not, if it was accurate?"

Again: "I will put the question to you this way: If the defendant did commit the murder there is nothing about the thing that you diagnosed here that would prevent him or render him incapable of accurately narrating the circumstances of the killing, would there? A. No, there isn't. Q. He would be perfectly capable of doing that, would he not? A. Yes, he would be capable of it." Finally: "Q. Secondly, you do not purport to say here, Doctor, whether or not the defendant told the truth on any given occasion or did not tell the truth on any given occasion? A. No, I don't purport to say that. I purport to say that his statements are unreliable on every occasion. Q. Unreliable, but you do not purport to say that anything he says could be true? A. No, I don't purport to say that."

[13–15] Counsel argue that this was the only expert evidence on the subject and hence cannot be rejected; from this predicate they conclude that defendant's confessions are unreliable to the point where they must be rejected and that the State is therefore left without any evidence connecting defendant with the crime. There are two answers to this contention. Firstly, the expert's testimony leaves a field open to conflicting inferences, and it was the province of the jury to resolve that conflict. See People v. Berry, 44 Cal.2d 426, 432, 282 P.2d 861; People v. Martin, 87 Cal.App.2d 581, 584, 197 P.2d 379; People v. Loop, 127 Cal.App.2d 786, 800, 274 P.2d 885. Secondly, this is not one of those occasions so familiar in malpractice actions (see Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604) where expert opinion is binding upon judge and jury. It is rather one of those situations in which the expert's conclusions are to be weighed in the light of the reasons assigned therefor and the other facts in evidence. Pen.Code, § 1127b; People v. Long, 15 Cal.2d 590, 606–607; People v. French, 12 Cal.2d 720, 763, 87 P.2d 1014; People v. Denningham, 82 Cal.App.2d 117, 119–120, 185 P.2d 614; People v. De Mordaigle, 138 Cal.App.2d 435, 440, 292 P.2d 3; 20 Am.Jur. § 1208, p. 1059; 32 C.J.S. Evidence § 569a, § 569c, pp. 390, 391, 396. The jurors well may have concluded that the original confession emanated from a sense of guilt and a nagging conscience, fortified perhaps by a belief that "as long as they didn't have the gun, or his accomplice, that they couldn't do a thing to him." We conclude that evidence of substantiality supports the implied findings that defendant committed the homicide and did so in the perpetration of a robbery.

[16] Counsel for appellant also assert error in the exclusion of proffered evidence "of other confessions and statements of appellant concerning the matter at issue," saying, "[t]he appellant wished to show that the other statements were inconsistent with the confessions offered by the prosecution as going to appellant's mental traits and the validity of the introduced confessions."

Officer Weyant was the first witness concerning defendant's confession, the one of April 17th. During his cross-examination he was asked whether he had had any further discussion with the defendant "wherein he confessed." He replied in the affirmative and was then asked, "[w]ould you relate those confessions?" Objection being made, defendant's attorney defined his purpose as having the prosecution confession's "validity repudiated on the basis of the other confessions." He also said: "I think that the jury has a right to be able to take those other confessions into consideration in determining whether this particular confession is valid. * * * We are concerned with the validity of the confession. I repeat that that is the main issue in this case, and if you don't allow the other evidence, the other confessions in, we are not allowing evidence on the only important issue in the whole case." The prosecutor's objections were sustained. Following that ruling Officer Butts, called as a defense witness, testified he was present when the Deuel confession of April 17th and the tape recording of April 20th were made, said he had other conversations with defendant and was asked: "And did he make any confessions at any of those times?" Objection being made, defense counsel asserted: "Your Honor, the other confessions involved here go to the validity of the confession that was introduced into evidence. The books are full of cases that the defendant can later introduce evidence of confessions, and I am trying to introduce this confession in rebuttal in showing that the confession is inconsistent." Again, "I think we have a point here. The last confession that was made was a written confession, written and signed entirely in the defendant's own handwriting. One of them, not the last one, but the first one was written by the police officer and the last one was written by the defendant himself, written and signed in his own handwriting. If any confession is entitled to credibility, or to believability, that should be the one that is admissible." The court having indicated a contrary ruling would be made, counsel then said: "Well, I will have to put him on the stand," referring to defendant. Clearly, the import of counsel's arguments was that inconsistent statements (confessions) of defendant would disprove the one introduced by the State and that they were competent for that purpose. The ruling was correct.

Fricke on California Criminal Evidence, Third Edition, page 67: "The confession of a defendant is admissible only as evidence when offered by the prosecution and, when such a statement made by the defendant is offered in his behalf it is objectionable as being hearsay and self serving and is inadmissible." Such was the holding in State v. Jones, 47 La.Ann. 1524, 18 So. 515, 518, and State v. Mattio, 212 La. 284, 31 So.2d 801. In the last cited case it is said, 31 So.2d at page 808: "While appellant's statement in the instant case contained certain admissions of inculpatory facts it was basically exculpatory. It disclosed no criminal intent and recited no admission of guilt; it amounted to nothing more than a self-serving declaration, inadmissible in evidence when offered in the accused's behalf, as the trial court correctly ruled. Undoubtedly the principal reason for denying a defendant the right to introduce in evidence his exculpatory declaration is that if he were permitted to do so he would be presenting his testimony to the jury without taking the witness stand and without running the risk of impeachment on cross-examination." See also, 22 C.J.S. Criminal Law § 842, p. 1478.

It is now said that one of the purposes of the proffered contradictory statements was "going to appellant's mental traits." This does not square with the record, as is shown by the above quotations from counsel's remarks.

After the ruling was made the court received without objection various self-serving declarations of defendant, such as a letter and oral statements to his friend Toby Moody, and a statement to his mother concerning the case. The prosecution also reopened its case in chief, proved defendant's oral denials of guilt on April 21st and on May 2nd, his statement on the 21st that he was taking the rap for someone else and for a consideration of $5,000, and his written confession of May 2nd which contradicts in some respects the original one of April 17th.

[17] Appellant's counsel did not make any offer of proof and it is impossible to determine from the transcript or the briefs what specific evidence he had that was not actually received. He is now in no position to complain. People v. Harris, 169 Cal. 53, 63–64, 145 P. 520; People v. Danielly, 33 Cal.2d 362, 376, 202 P.2d 18.

[18] Defendant was not called to the witness stand. While this fact alone could not fill any hiatus in the proof of the prosecution, it nevertheless lends weight to evidence presented by the State upon matters presumptively within defendant's knowledge and which, if untruly stated, would normally be denied by him. See People v. Adamson, 27 Cal.2d 478, 489–490, 165 P.2d 3; People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271; People v. Goldstein, 136 Cal.App.2d 778, 790, 289 P.2d 581.

Defendant's voluntary confessions, considered in connection with the independent proof of the corpus delicti, leave little room for reasonable doubt of his guilt. 3 Wigmore on Evidence, Third Edition, § 866, page 357, says this: "(1) Now, assuming the making of a confession to be a completely proved fact—its authenticity beyond question and conceded,—then it is certainly true that we have before us the highest sort of evidence. The confession of a crime is usually as much against a man's permanent interests as anything well can be; and, in Mr. Starkie's phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance."

There appears to have been no miscarriage of justice in the instant case.

Judgment affirmed.

MOORE, P. J., and RICHARDS, J. pro tem., concur.

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151 Cal.App.2d 171

Evert L. HAGAN, Plaintiff and Appellant,

v.

Benjamin H. FLESHER, Defendant and Respondent.

Civ. 22223.

District Court of Appeal, Second District, Division 2, California.

May 21, 1957.

Hearing Denied July 16, 1957.

Civil action from an order of the Superior Court of Los Angeles County, James G. Whyte, J., striking an amended cost bill filed by plaintiff after recovering judgment, he appealed. The District Court of Appeal, Ashburn, J., held that plaintiff-appellant's brief, stating that on discovering that jury fees were incorrectly set out in cost memorandum attached to his motion for leave to file amended cost bill, he changed figures to correct ones, in explanation of fact that amended bill was not similar in form to or in manner or amount set forth in cost memorandum attached as exhibit to his notice of motion for such relief, as required by court's oral order granting leave, showed no merit in appeal, where such excuse did not appear in record, plaintiff did not make new application for relief from default, and brief did not show that condition imposed by court was unreasonable or that judge abused his discretion.

Order affirmed.

See also Cal.App., 302 P.2d 827.

Appeal and Error 🔑984(1)

A plaintiff, stating in brief on appeal from order striking amended cost bill, filed by him after recovering judgment, that on discovering that jury fees were incorrectly set out in amended cost memorandum filed by him with court's leave, he changed figures to correct ones, in explanation of fact that amended bill was not similar in form to, nor in manner or amount set forth in, cost memorandum attached as exhibit to his notice of motion for such relief, as required by court's oral order granting leave, showed no merit in appeal, where such excuse did not appear in record, plaintiff made no new application for relief from default, and brief did not show unreasonableness of condition imposed or abuse of judge's discretion. West's Ann.Code Civ. Proc., § 473.

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Jesse A. Hamilton, Los Angeles, for appellant.

Samuel V. Cornell, Compton, for respondent.

ASHBURN, Justice.

Appeal from order striking amended cost bill. Plaintiff, having recovered judgment, filed a premature cost bill, then one which was rejected by the clerk because it did not comply with court rules. On July 26, 1954, an amended bill was filed; it was re-taxed by striking items for jury fees and cost of depositions; the costs were taxed at $66.75. Plaintiff then moved under section 473, Code of Civil Procedure, for leave to file a second amended cost bill "similar in form, a copy of a cost memorandum which was attached as Exhibit A." [1] The motion was granted "to file a cost memorandum similar in form to the one attached as Exhibit A." Plaintiff then filed a new cost bill, making changes or corrections in the jury fees and deposition items, but it "was not in the manner or amounts set forth in Exhibit A attached to the notice of motion for relief under Section 473 C. C. P." It included additional items, and a motion to strike this bill was granted with leave to file another amended bill, but "expressly providing by oral order that said cost bill should be in the form set forth in Exhibit A of the prior motion." Plaintiff filed another bill including the items originally allowed in amount of $66.75 and jury fees and cost of depositions, but it "was not similar in form to Exhibit A in the prior motion"; it "was not in the manner or the amounts set forth in Exhibit A attached to the notice of motion for relief under Section 473 C. C. P." Motion to strike was granted on October 20, 1954, and appeal taken from that order.

Appellant's brief offers as an explanation the following: "It so happened that between the time of the allowance of the order 473 C. C. P. which gave the appellant the right to file an amended costs memorandum, appellant discovered that the jury fees had been incorrectly set out in the motion under Section 473 C. C. P. Not willing to verify a cost memorandum appellant knew was not true, the appellant changed the figures to the correct ones." This excuse does not appear anywhere in the record. If true, plaintiff chose to ignore the condition of relief previously granted under 473, rather than to make a new application under that section.

It provides for relief from default upon such terms as may be just. Nothing appears in the statement or appellant's brief which shows that the condition imposed was unreasonable or that there was any abuse of discretion on the part of the judge.

Appellant has failed to show any merit in his appeal.

Order affirmed.

MOORE, P. J., and RICHARDS, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.

* * *

151 Cal.App.2d 150

Earl E. THOMAS, Plaintiff and Appellant,

v.

Leila R. BRUZA, Pete Chavez, John Doe, Richard Roe, Jane Doe, James Black and David White, individually and as co-partners doing business as Black & White Company, a co-partnership, Blue Company, a corporation, and Red Company, a corporation, Defendants,

Leila R. Bruza, also known as Lela R. Bruza, Respondent.

Civ. 22145.

District Court of Appeal, Second District, Division 2, California.

May 20, 1957.

Action for injuries sustained by plaintiff when he was struck by man who had become intoxicated on alcohol served to him in defendants' establishment. From adverse judgment of the Superior Court, Los Angeles County, Jerold E. Weil, J., the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that plaintiff should have been permitted to amend his complaint to charge that defendants negligently failed to protect him from the assault or to preserve order for his protection.

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[1] The quotations herein are taken from appellant's settled statement on appeal.

Judgment reversed with instructions.

1. Intoxicating Liquors ⚷306

Complaint, which alleged that defendants invited plaintiff into their saloon and that one of defendants served a customer alcohol until he became intoxicated knowing that he was pugnacious and quarrelsome when drunk and that such intoxicated person struck plaintiff causing him injury, was insufficient to state cause of action.

2. Intoxicating Liquors ⚷285

Sale of alcoholic beverages to person is not basis for him or his heirs to recover from dispenser of such beverages for injuries suffered by a wilfully bibulous patron who has become intoxicated on alcoholic beverages purchased from proprietor of place.

3. Intoxicating Liquors ⚷288

Although mere sale of alcoholic beverages to bibulous and pugnacious person is not actionable, if proprietor of saloon neglects to guard innocent patrons against violence of known pugnacious, drunken men and evil doers he is liable.

4. Intoxicating Liquors ⚷288

Any guest in place serving intoxicating liquors has right to assume that he is in an orderly house and that proprietor or his employees will exercise reasonable care in maintaining appropriate decorum, and proprietor has a duty of exercising reasonable care to protect his patrons from injury at hands of fellow guests.

5. Pleading ⚷243, 248(1)

Amendment to pleading should be allowed unless attempt is made to present entirely different set of facts, and litigant should not be deprived of his right to amend merely because his complaint does not state a cause of action. West's Ann.Code Civ. Proc., § 473.

6. Pleading ⚷249(1)

Plaintiff may not amend his pleading to state a new cause of action but he may amend his pleading to change theory regarding basis of recovery. West's Ann. Code Civ.Proc., § 473.

7. Pleading ⚷246(3)

In action for injuries sustained by plaintiff when he was struck by drunk man who had become intoxicated on alcohol served to him in defendants' saloon, plaintiff should have been permitted to amend his complaint by stating that defendants negligently failed to protect him from the assault and to preserve order for protection of plaintiff. West's Ann.Code Civ.Proc., § 473.

◆

Arthur Garrett, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee and Kenneth R. Garrett, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant sued to recover damages alleged to have resulted from injuries suffered from a blow administered to him by one Peter Chavez, a drunk man. The parties were in a saloon whose proprietor had been requested on numerous occasions not to furnish Mr. Chavez alcoholic beverages sufficient to cause him "to become intoxicated thereon." After the jury had been empaneled and a witness had been sworn, defendants' objection to the first question and to plaintiff's motion to amend his complaint having been sustained, defendants' motion for judgment on the pleadings was granted. Now, on appeal it is contended that such rulings were prejudicially erroneous and that the judgment should be reversed.

[1] The complaint alleges that appellant was in defendants' establishment by invitation; that with knowledge that one Chavez is pugnacious and quarrelsome when drunk, respondent received him in a sober condition and served alcohol to him "until and after said defendant, Pete Chavez, became

intoxicated"; that respondent previously had refused to discontinue serving Chavez alcohol until the latter had become inebriated; that as a proximate result of the blow, appellant "was injured in his health, strength and activity, received * * * numerous contusions about the body and person * * * receiving multiple fractures of the right leg" etc.

[2] The serious feature of the pleading has been the subject of similar causes presented to the appellate courts. No allegation of a negligent supervision of the saloon appears. Neither does the complaint allege that respondent had an opportunity to prevent the battery or that the blow was dealt in the presence of respondent. There is no allegation that the injuries of appellant were the proximate result of respondent's negligence. Interpreting the complaint liberally, the most that can be reasonably inferred is that respondent sold to Chavez alcoholic beverages knowing him to be quarrelsome and pugnacious when drunk; that Chavez became intoxicated and struck appellant and that the blow caused the latter's injuries. Such allegations are not enough to state a cause of action against respondent. Cole v. Rush, 45 Cal.2d 345, 354, 355, 289 P.2d 450; Fleckner v. Dionne, 94 Cal.App.2d 246, 249, 210 P.2d 530; Hitson v. Dwyer, 61 Cal.App.2d 803, 808, 143 P.2d 952. In the Cole case it was not the sale of the liquor that caused the drunkenness of plaintiff's husband, but the consumption thereof that dethroned his social instincts. The defendants had not only knowledge that when Cole became intoxicated he was quarrelsome and pugnacious, but that prior to his fatal visit to the "Tropic Isle" of defendants, Mrs. Cole had specifically requested the defendants "not to sell or furnish intoxicating beverages" to her husband sufficient to intoxicate him. They spurned her warnings. Mr. Cole purchased liquors from defendants, became belligerent and quarrelsome, fought with one Franklin Leonard and was by him mortally wounded. It was there held that the common law[1] gives no remedy for injury or death following the mere sale of liquor to the ordinary man; that no statute has been enacted by California to take the place of or to set aside the common law; that it is the consumption of intoxicants which is the proximate cause of any subsequent conduct rather than the sale thereof. Cole v. Rush, supra. The decisions of this state are in unanimous accord that the sale of alcoholic beverages to a person is not a basis for him or his heirs to recover from the dispenser of such beverages for injuries suffered by a willfully bibulous patron who had become intoxicated by the alcoholic beverages purchased by such patron from the proprietor of the place. Fleckner v. Dionne, supra; Hitson v. Dwyer, supra; Lammers v. Pacific Electric Railway Co., 186 Cal. 379, 384, 199 P. 523.[2]

[3] While it is clear that merely by reason of the sale of the intoxicating liquor to Chavez appellant is not entitled to recover from respondent, yet the complaint indicates that it might be so amended as to declare a valid cause of action. Respondent was concededly operating a barroom where the proprietor is obligated to be on the alert for quarrelsome and pugnacious characters who may at any time come to provoke others or to breach the peace. It is true that the mere sale of an alcoholic beverage to a bibulous and pugnacious person is not actionable, yet, if the proprietor of a saloon is so negligent as to the character of his patrons who frequent his establishment that he is as likely to cause damage to his innocent patrons by

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[1] "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." Civ.Code, § 22.2; Cole v. Rush, 45 Cal.2d 345, 355, 289 P.2d 450.

[2] Alcoholic beverages are not included in "habit-forming drugs," the sale of which has, at times, entitled a wife to recover from the vendor the damages caused by the consumption of such merchandise. (Rest.Torts, Vol. 4, § 696.)

neglecting to guard them against the violence of known pugnacious, drunken men and evil doers as by neglecting to prevent a good citizen from falling on a newly waxed floor or from falling through a trapdoor into his cellar, then he is liable for his negligent failure to protect the innocent patron.

The result of a proprietor's negligence where he has knowledge of a customer's pugnacious character was the subject of a learned opinion by Judge Dimond in the federal court of Alaska in Cherbonnier v. Rafalovich, D.C., 88 F.Supp. 900. The facts in evidence were similar to those at bar. The plaintiff had alleged that while he was eating in the defendants' saloon, one Hobson who was then in a drunken condition, without provocation by plaintiff, threatened plaintiff with bodily harm. Thereupon the defendants' servant immediately sold Hobson more drinks; while plaintiff was still eating, Hobson maliciously attacked the plaintiff and severely injured him. The attack was made with full knowledge of the defendants' servant who not only made no attempt to protect the plaintiff but in fact aggravated the situation by serving Hobson drinks while the latter was intoxicated. The court dismissed the complaint as was done in the action at bar, approved the holdings such as those cited herein, but concluded that (1) plaintiff should have been allowed to amend his complaint to show that the defendants' servant had knowledge of Hobson's threat to do the plaintiff bodily harm before he served the last of the intoxicating liquor to Hobson and (2) the plaintiff should be permitted to allege, if he could do so, that Hobson was known to be of a violent disposition or that he was likely to commit a battery while under the influence of liquor. By such additional allegations it was thought that the complaint would declare a case of negligence in the operation of the saloon. Therefore, the court authorized the plaintiff to apply for leave to amend his complaint.

[4] The proprietor of a place where intoxicating liquors are dispensed owes a duty of exercising reasonable care to protect his patrons from injury at the hands of fellow guests. Any guest of such a place has the right to assume that he is in an orderly house and that the proprietor or his employees will exercise reasonable care in maintaining appropriate decorum. (30 Am. Jur., p. 574.) Such is the law of California as decided recently in Winn v. Holmes, 143 Cal.App.2d 501, 299 P.2d 994, 996. In that case, plaintiff was assaulted by other patrons following threats of such action. She alleged in substance that this was known to the defendant proprietor and that he did nothing to prevent the assault. On appeal from the judgment after the demurrer had been sustained without leave to amend, it was held that an owner's duty to his invitees requires him to exercise reasonable care against injuries due not only to the conditions of the premises, but he "must use reasonable care to protect them against injury through the negligent or wrongful acts of other invitees on the premises where he has reasonable cause to anticipate such acts and the probability of injury resulting therefrom. [Citations; also see 106 A.L.R. 1003.]. * * * A person who enters a restaurant to eat a quiet meal has a right to assume that the management will use reasonable care to guard him against injury. * * * The proprietor's duty arises from his control over the premises and his power to restrain or expel offenders against the peace and safety of the premises." At any restaurant which dispenses intoxicating liquors, the operator owes the duty to exercise reasonable care to protect his guests from injury at the hands of fellow guests. A guest of such place has a right to rely upon the presumption that it is an orderly house and that its proprietor or his employees will preserve order and avoid injury to the guests. Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996.

In the instant action the court below had its attention directed to the California holdings that a mere sale of liquor to a pugnacious person does not constitute a valid cause of action against the vendor. It was not advised by the pleading that the proprietor of a saloon is under duty to look out for and guard his guests against accidents and vicious people. While the acts alleged did not state a cause of action, it is not improbable that the plaintiff can allege other acts of neglect which would make the proprietor of the saloon liable to a quiet conservative patron injured by reason of negligence. In such event, the amendment should be allowed. A lawsuit is not a game to be won by the cleverest performer, but it is a solemn action authorized to right wrongs and to determine where justice lies.

[5, 6] Section 473, Code of Civil Procedure, has received very liberal interpretations. An amendment should be allowed unless an attempt is made to present an utterly different set of facts. Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318. Not even a change of theory regarding the basis of recovery is a change of the cause of action or the introduction of a different action. Pruitt v. Fontana, 143 Cal.App.2d 675, 683, 300 P.2d 371. A litigant should not be deprived of his right to amend merely because his complaint did not state a cause of action. The commonest variety of amendments is that made to a pleading which did not state facts sufficient to constitute a valid complaint. Klopstock v. Superior Court, supra, 17 Cal.2d at page 20, 108 P.2d at page 910. All that can be required is that a wholly different cause of action shall not be introduced. As a test of the proposed amendment the law means that the defendant not be required to answer a wholly different legal liability from that originally stated. (Ibid.) Respondent argues that an amendment should be denied where a new cause of action would be stated. But this does not mean that an amendment may not change the legal theory of the complaint. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358.

[7] Here no change in theory is contemplated. Appellant's motion was to amend his "complaint by inserting after the comma on page 3, line 27, the following words: 'and said other defendants negligently failed to protect plaintiff from said assault or to preserve order for the protection of plaintiff.'" The denial of such amendment or any amendment on the plaintiff's first application that would make the pleading a valid cause of action is not such liberal treatment of a pleader as is suggested by the decisions of the appellate courts. Klopstock v. Superior Court, supra.

It is ordered that the judgment is reversed with instructions to allow plaintiff to file an amended complaint as herein suggested, if he be so advised.

ASHBURN, J., and RICHARDS, J., pro tem., concur.

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151 Cal.App.2d 168

J. Wilma WEBER, formerly J. Wilma Bunger, also known as Julia Seman, Plaintiff and Respondent,

v.

Milton TONINI and K. M. Gunz, Defendants and Appellants.

Milton TONINI, Cross-Complainant and Appellant,

v.

J. Wilma WEBER, formerly J. Wilma Bunger, also known as Julia Seman, Cross-Defendant and Respondent.

Civ. 17170.

District Court of Appeal, First District, Division 2, California.

May 21, 1957.

Rehearing Denied June 20, 1957.

Hearing Denied July 16, 1957.

Action to quiet title to certain real property wherein a defendant filed a cross-complaint. From a judgment of the Superior Court, Marin County, J. F. Good, J., the defendants appealed. The District Court of Appeal, Dooling, J., held inter alia, that where contract provided that plaintiff was to buy, maintain, care for and preserve realty purchased at plaintiff's own cost and that defendant who held a real estate salesman's license but was not licensed as a real estate broker "is to be her exclusive agent for the sale, leasing or exchange thereof" with compensation for such services fixed at one-third of net profits, contract was not joint adventure contract but was one of agency and hence was void because defendant was not a licensed realty broker.

Affirmed.

1. Brokers ⚿42

Where contract provided that plaintiff was to buy, maintain, care for and preserve realty purchased at plaintiff's own cost and that defendant who held a real estate salesman's license but was not licensed as a real estate broker "is to be her exclusive agent for the sale, leasing or exchange thereof" with compensation for such services fixed at one-third of net profits, contract was not joint adventure contract but was one of agency and hence was void because defendant was not a licensed realty broker. West's Ann.Bus. & Prof.Code, §§ 10130, 10131.

2. Brokers ⚿3

A person not a licensed real estate broker is prohibited by statute from entering into contract in his own name to act as agent for sale, leasing or exchange of realty. West's Ann.Bus. & Prof.Code, §§ 10130, 10131.

3. Brokers ⚿42

Where contract entered into with person who held a real estate salesman's license was void because he was not licensed as a real estate broker, and contract was an entire one, the illegality invalidated it in toto. West's Ann.Civ.Code, § 1608; West's Ann.Bus. & Prof.Code, §§ 10130, 10131.

* * *

John J. Dailey, San Francisco, for appellants.

G. H. Van Harvey, San Francisco, for respondent.

DOOLING, Justice.

Defendants Tonini and Gunz and cross-complainant Tonini appeal from a judgment in favor of plaintiff quieting her title to certain real property.

In August of 1940 respondent went to appellant Tonini's office seeking advice on real estate investments. Tonini at that time held a real estate salesman's license but was not licensed as a real estate broker. Some time later Tonini informed respondent that the property here in dispute was available. Respondent gave Tonini her check for $250. The property was contracted to be sold by the owners to appellant Gunz, an associate of Tonini's, in her maiden name of Gallwey and a $250 deposit on the purchase price was given by Tonini's check.

On November 16, 1940, appellant Tonini and respondent, under her then name of Julia Seman, entered into an agreement with relation to this property, which (omitting the description of the property) read as follows:

"1. Milton Tonini is to have one-third of all net profit from sale or exchange of or from the rents, issues, or profits, from any or all of the following described real property.

"[Description of property.]

"2. Julia Seman is to buy, maintain, care for and preserve said realty at her cost and expense and,

"3. Milton Tonini is to be her exclusive agent for the sale, leasing or exchanging thereof without other charge than the above interest and all transfers, sales, leases, rentals or exchanges of said realty or any part thereof to be approved by both the undersigned, but approval thereof shall not be unreasonably withheld by either party.

"4. The parties hereto shall not construct or repair, or alter any buildings or do any work on said premises, or place or permit any lien or encumbrance on the same without first getting the written consent of both parties hereto.

"5. Title to above described realty to be held in trust in the Title Insurance and Guaranty Company subject to terms hereof and holding agreement signed by parties hereto.

"This agreement binds the heirs and assigns of the parties hereto."

Thereafter on November 18, 1940, respondent deposited $9,000 of her own money with the title company in part payment of the purchase price. On November 29, 1940, the owners conveyed the property to Gallwey (Gunz) and Gunz executed a note and deed of trust upon the property to secure the payment of the balance of the purchase price. Before the time of trial the full purchase price had been paid to the sellers by respondent.

The property was conveyed to the title company by Gunz subject to a holding agreement executed by Tonini and respondent as provided in paragraph 5 of the above quoted agreement. The property was later conveyed by the title company to respondent in 1943 to permit her to place a deed of trust upon it to secure a loan to pay off the balance of the purchase price and record title was in her name at the time of trial.

[1] While other questions are argued by the parties they need not be discussed in view of our conclusion that the following findings are sufficient to support the judgment in any event. The court found that the agreement above set out of November 16, 1940, was one appointing and employing Tonini the exclusive agent for the sale, leasing and management of said property for a consideration of ⅓ of the net profits; that Tonini at no time was a licensed real estate broker and that the contract was therefore illegal and void. Appellants argue that the contract is a joint venture contract and not one of agency. This flies in the face of the express provisions of paragraphs 2 and 3 of the agreement. By paragraph 2 respondent is to buy, maintain, care for and preserve said realty at her own cost and expense and by paragraph 3 appellant Tonini "is to be her exclusive agent for the sale, leasing or exchange thereof" with his compensation for such services fixed at ⅓ of the net profits. The contract clearly contemplates that ownership of the beneficial interest in the property shall be in the purchaser, respondent, and makes appellant Tonini her exclusive agent for the sale, leasing or exchange thereof.

[2] Appellant does not dispute that it is now, and was when this contract was made, forbidden by statute for one not a licensed real estate broker to enter into a contract in his own name to act as agent for the sale, leasing or exchange of real property. (Bus. & Prof.Code §§ 10130, 10131; Firpo v. Murphy, 72 Cal.App. 249, 236 P. 968; Wise v. Radis, 74 Cal.App. 765, 242 P. 90; 9 Cal.Jur.2d, Brokers, § 68, pp. 224 et seq.)

[3] Since the contract is an entire one the illegality in this particular invalidates it *in toto*. Civ.Code, § 1608; Haas v. Greenwald, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493.

Judgment affirmed.

KAUFMAN, P. J., and STONE, J. pro tem., concur.

151 Cal.App.2d 261

CITY OF MENLO PARK, a municipal corporation, Plaintiff and Respondent,

v.

James ARTINO, David Garibaldi and Emilia Garibaldi, his wife, also known as Amelia Garibaldi, John Garibaldi, Lida Del Sarto and Lillian Duzanica, Defendants and Appellants.

Civ. 17224, 17267.

District Court of Appeal, First District, Division 2, California.

May 27, 1957.

Hearing Denied July 24, 1957.

City brought eminent domain proceeding against landowners to condemn land for off-street parking plazas. The Superior Court, San Mateo County, Louis B. Demateis, J., rendered judgment, and certain of the landowners appealed. The District Court of Appeal, Kaufman, P. J., held that condemnation was for a "public use" within meaning of statute authorizing condemnation of realty for off-street parking and within meaning of provision of the constitution that private property shall not be taken or damaged for "public use" without just compensation.

Judgment affirmed.

1. Eminent Domain 🔑131

Generally, in condemnation proceeding present market value of condemned land must ordinarily be determined by consideration only of uses for which land is adapted and for which it is available, but, as an exception to such general rule, if land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, and evidence tends to show a reasonable probability of change in the near future in zoning ordinance or other restriction, then effect of such reasonable probability on minds of purchasers generally may be considered in fixing present market value.

2. Trial 🔑295(1)

Instructions are to be read as a whole and in light of circumstances of case in which they were given.

3. Trial 🔑191(2)

In proceeding by city against landowners for condemnation of land for off-street parking plazas, instruction that an enactment of zoning ordinance, which is adopted by a city in good faith, and which actually affects market value of land, is competent evidence in behalf of city in subsequent condemnation proceeding, and that city is not estopped from proving actual market value of land merely because city's enforcement of police regulations may have affected value of land, was not erroneous, on ground that it assumed a fundamental fact in issue. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc., § 1238.1.

4. Appeal and Error 🔑1011(1)

Where trier of facts rests determination of issue of fact on conflicting evidence from which reasonable minds might draw different conclusions, District Court of Appeal on appeal is bound by decision of trier of facts.

5. Eminent Domain 🔑7

A municipal corporation has no inherent power of eminent domain and can exercise such power only when expressly authorized by law. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc., § 1238.1.

6. Eminent Domain 🔑13

A city has no power to condemn private property for a use which is not public.

7. Eminent Domain 🔑67, 68

Neither designation by the Legislature nor resolution of city that use for which land is to be condemned is a public use can make a use that is in fact a private use a public use. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc., §§ 1238.1, 1241.

8. Eminent Domain 🔑67

The Legislature must designate, in the first place, the uses in behalf of which right of eminent domain may be exercised, and such designation is a legislative declaration that such uses are public, and will be recognized by courts, but whether, in any individual case, use is a public use must be determined by judiciary from facts and circumstances of that case. West's Ann. Const. art. 1, § 14; West's Ann.Code Civ. Proc., §§ 1238.1, 1241.

9. Eminent Domain ⟹67

If subject-matter of eminent domain legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the Legislature must prevail over the doubts of the court. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc., §§ 1238.1, 1241.

10. Eminent Domain ⟹13

"Public use" within constitutional provision that private property shall not be taken or damaged for public use without just compensation is a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government. West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

11. Eminent Domain ⟹19

Condemnation by city of lands for off-street parking plazas was for a "public use" within meaning of statute authorizing condemnation of realty for off-street parking and within meaning of provision of the constitution that private property shall not be taken or damaged for "public use" without just compensation. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc., § 1238.1.

12. Eminent Domain ⟹96

In condemnation proceeding, there must be unity of title, contiguity of use, and unity of use in order to entitle landowner to severance damages. West's Ann.Code Civ.Proc., § 1248.

13. Eminent Domain ⟹96

To constitute unity of property between two or more contiguous but prima facie distinct parcels of land, so as to entitle landowner to severance damages in condemnation proceedings, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make enjoyment of parcel taken reasonably and substantially necessary to enjoyment of parcels left, in most advantageous and profitable manner in business for which they are used. West's Ann.Code Civ.Proc., § 1248.

14. Eminent Domain ⟹96

Where each of three contiguous lots, which were owned by the same landowners, had a separate dwelling on it, and there was no evidence of any intention on part of landowners to use the three lots in any manner other than as individual rental properties, as they were being used, landowners were not entitled to severance damages on the taking of one of the lots by city for construction of off-street parking plazas. West's Ann.Code Civ.Proc., § 1248.

15. Eminent Domain ⟹96

In order to entitle landowner to severance damages on condemnation of one of two or more contiguous parcels of land, loss in market value claimed must directly and proximately flow from the taking, and that damage which is speculative, remote, imaginary, contingent, or merely possible, cannot serve as a legal basis for recovery. West's Ann.Code Civ.Proc., § 1248.

16. Appeal and Error ⟹931(1)

The District Court of Appeal on appeal is bound to indulge in every intendment which supports judgment of lower court.

17. Appeal and Error ⟹996

When two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

◆

Christ, Peters & Donegan, Elton F. Martin, Palo Alto, for appellants.

James T. O'Keefe, Jr., City Atty., City of Menlo Park, Redwood City, for respondent.

KAUFMAN, Presiding Justice.

This proceeding in eminent domain was brought by respondent, City of Menlo Park, a municipal corporation, against the appellants, who are the owners of certain lands, sought by respondent for the construction of off-street parking plazas. These consolidated appeals are taken from a judgment after a verdict fixing the amount of appellants' damages in condemnation proceedings and from an order granting respondent immediate possession, after denial of a writ of supersedeas by this court.

A detailed statement of the facts is necessary for a proper understanding of the issues raised on appeal.

Under the respondent's Land Use and Zoning Ordinance, the six block strip of Santa Cruz Avenue, the main business street of Menlo Park, which is bordered by Menlo Avenue on the north, University Drive on the west and El Camino Real on the east, is zoned for retail commercial uses without any requirement of parking facility in connection with such use. With the exception of a few vacant lots the entire six block strip is occupied and being used for such purposes. An alley runs the full length of the six block area, at the rear of the commercial frontage on the south side of Santa Cruz Avenue. The respondent's Land Use and Zoning Ordinance of April 28, 1953, with the exception of two markets on parcels of property zoned commercial and parking, placed the area bounded by the alley on the north, Menlo Avenue on the south, University Drive on the west in an R-4-T Zone, which means Multiple Family Residence with a transitional suffix. This zoning classification permits multiple residence and parking uses and recognizes that the area's uses are transitional and moving into commercial uses. Appellants' parcels are within this transitional zone. In August 1954, several of the lots in the transitional area were rezoned to Central Commercial and Public Parking uses to permit the construction of Bettencourt's Super Market with adjoining customer parking. (Ord. Nos. 250, 259) On February 23, 1955, the city council similarly rezoned several other lots in the transitional area to permit the construction of Draeger's Super Market and customer parking area, (Ord. No. 258) and also adopted a Resolution of Intention, No. 1955-1 to acquire and construct parking plazas and to pay the cost thereof by assessment upon the lands benefited thereby and to form an assessment district for that purpose. The assessment district includes lots in the city's central commercial zone which the city council determined would be benefited by the parking plazas. Under the resolution as adopted on April 12, 1955, no part of the costs of acquisition of land and construction of the parking plazas was to be borne by the public generally. All lands required for the parking plazas were secured by the respondent before the institution of this condemnation proceeding on July 1, 1955, with the exception of 11 parcels of which five parcels were originally involved in this case. As to the five parcels here involved the jury rendered a verdict and the court made the awards as follows:

Parcel 18	—	$12,500.00
Parcel 11	—	12,500.00
Parcel 9	—	13,000.00
Parcel 6	—	14,000.00
Parcel 14	—	3,900.00

The owner of Parcel 6 did not appeal; the owners of Parcel 14 filed a notice of appeal and subsequently abandoned it. This appeal is taken by appellant Artino, the owner of Parcel 18 and appellants, Garibaldi, the owners of Parcels 9 and 11, on these grounds:

(1) That the trial court committed prejudicial, reversible error by instructions which assumed that the market value of the appellants' lands was actually affected by the city's zoning ordinance, as this matter was a basic fact in issue which should have been left to the determination of the jury.

(2) That the parking plazas for which respondent seeks to take appellants' lands is not a public use within the meaning of Code of Civil Procedure, § 1238.1 and Art. I, Sec. 14 of the State Constitution.

(3) That the trial court committed prejudicial error by directing the jury to disregard all evidence of severage damages as to Parcel 9.

These contentions will be discussed in the order presented.

1. Whether the trial court committed prejudicial error by instructing the jury that the market value of appellants' land was adversely affected by the zoning ordinance.

Appellants contend that the following instruction is erroneous as it assumes the basic fact in issue, namely, whether the zoning ordinance adversely affected the market value of appellants' land:

> "The enactment of a zoning ordinance which is adopted by a city in good faith and which actually does affect the market value of real property is competent evidence in behalf of the city in a subsequent suit for condemnation of the property for public use. The city is not estopped from proving the actual market value of the property merely because its enforcement of police regulations may have affected the value of the property.
>
> "The Land Use and Zoning Ordinance of the City of Menlo Park has been introduced in evidence as it is competent evidence to be considered in a suit for condemnation of property located within the district which is affected thereby, for the purpose of determining the actual market value thereof. The ordinance is competent evidence for or against the city which enacted it, when the municipality is a party to the condemnation proceedings. Zoning ordinances are uniformly sustained as valid exercise of the police powers of a municipality."

[1,2] As stated in Long Beach City H. S. Dist. of Los Angeles County v. Stewart, 30 Cal.2d 763, at pages 768 and 769, 185 P.2d 585, at page 588, 173 A.L.R. 249: "* * * the general rule is that present market value must ordinarily be determined by consideration only of the uses for which the land 'is adapted and for which it is available.' The exception to this general rule is that if the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a 'reasonable probability' of a change 'in the near future' in the zoning ordinance or other restriction, then the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value." That case was a proceeding to condemn land zoned for single family residences for a junior high school; the appellant there argued that the adaptability of the land for industrial purposes should have been considered. On this point the court said, 3 Cal.2d at page 766, 185 P.2d at page 586: "* * * appellant claims that in fixing the market value of the land, 'adaptability' for any use should be considered by the jury, but that 'availability' should not. Such is obviously not the law, for the jury should consider whether the land is or is not available for particular uses under existing zoning ordinances, as such 'availability' does affect market value." It is axiomatic that the instructions are to be read as a whole and in the light of the circumstances of the case in which they were given. In the instant case the ordinance was introduced into evidence (Plaintiff's Exhibit No. 2) and was considered by the expert witnesses of both parties in giving their estimates of valuations.

[3,4] The appellants also contend that the giving of the first instruction complained above, assumed a fundamental fact in issue. However, when seen in the light of the rule of availability set forth above, this is not so. Appellants further contend that the jury must have relied on the instruction because the final result reached by the jury is closer to the value estimated by respondent's appraisers than the values estimated by appellants' appraisers. However, here the jury had the opportunity to hear and evaluate the testimony of experts on both sides. It should be noted that the appellants here made no motion under Code of Civil Procedure, § 1871 to have the trial court appoint experts on its own motion to assist it in resolving the conflict. All that appears here is that the lower court rested its determination of an issue of fact on conflicting evidence from which reasonable

minds might draw different conclusions. Under such circumstances we are bound by the decision of the trier of facts. Southern Cal. Gas Co. v. Goss, 149 Cal.App.2d 339, 308 P.2d 41; County of Los Angeles v. Carpenter, 118 Cal.App.2d 871, 258 P.2d 1056; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

In People ex rel. Department of Public Works v. Dunn, 46 Cal.2d 639, 297 P.2d 964, it was held that it was not error to admit testimony that a change of zoning was reasonably probable. In the instant case the jury was not prevented from considering the reasonable probability of a change in the zoning ordinance as the trial court also instructed the jury as follows: "If you should find from the evidence introduced that there is a reasonable probability of a change in the existing zoning restrictions which now restricts the use of any of the property here being condemned, you may consider the effect of such probability of a change in the zoning restrictions on the minds of purchasers generally in fixing the market value of the property." Additional instructions on this point were also given. There was, therefore, no error in the trial court's refusal to give the instructions requested by the appellants, nor can we find any other prejudicial error in any of the other instructions complained of by the appellants. The instructions given were proper under the rulings of Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979; People v. Marblehead Land Co., 82 Cal.App. 289, 255 P. 553; People v. La Macchia, 41 Cal.2d 738, 264 P.2d 15; People ex rel. Dept. P. W. v. Schultz Co., 123 Cal.App.2d 925, 268 P.2d 117.

2. Whether the parking plazas for which respondent seeks to take appellants' lands is a public use within the meaning of Code of Civil Procedure, § 1238.1 and Article I, Section 14 of the State Constitution.

[5, 6] As a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law, City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529; Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9; City of Los Angeles v. Koyer, 48 Cal.App. 720, 192 P. 301; Mackay v. City of Los Angeles, 136 Cal.App. 180, 28 P.2d 706, the City of Menlo Park has no power to condemn private property for a use which is not public.

Code of Civil Procedure, § 1238.1 provides: "Subject to the provisions of this title, the right of eminent domain may be exercised on behalf of the following public uses:

"1. Off-street parking. Off-street motor vehicle parking places, including property necessary or convenient for ingress thereto or egress therefrom, established by any city or city and county for public use."

Code of Civil Procedure, § 1241, provides: "Before property can be taken it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; provided, when the board of directors of an irrigation district, of a public utility district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or irrigation, public utility, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or irrigation, public utility, or water district, of property located outside of the territorial limits thereof."

[7–9] Resolution No. 1130(k) adopted by the city council of Menlo Park on June 14, 1955, after describing among other parcels, the real property which is the subject of this action, declared that:

> "The public interest and necessity require * * * a public off-street motor vehicle parking place and plaza upon, over and across those certain lands * * *.
>
> "That the use of all of said lands for said public off-street motor vehicle parking place and plaza is a public use authorized by law."

We are in agreement with appellants' contention that neither the legislature's designation nor the city's resolution that the parking plazas are a public use can make that which is in fact a private use become a public use. As stated in University of Southern California v. Robbins, 1 Cal.App.2d 523, at pages 525–526, 37 P.2d 163, at page 164, and recently quoted in Linggi v. Garovotti, 45 Cal.2d 20, at page 24, 286 P.2d 15: "The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public, and will be recognized by courts; but whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of that case. [citation] If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court."

Appellants rely on City & County of San Francisco v. Ross, supra, and Barker v. Kansas City, 146 Kan. 347, 70 P.2d 5. However, both of these authorities are inapplicable and easily distinguishable from the instant case. In San Francisco v. Ross, supra, City and County of San Francisco sought to acquire certain lands which were to be leased to private parties for the construction and maintenance of off-street parking facilities. The Supreme Court held that the particular method employed was not a public use because the city and county was to retain no controls or regulations as to rates, fees, charges over the properties to be leased to private persons. In Barker v. Kansas City, 146 Kan. 347, 70 P.2d 5, a taxpayer's action to enjoin a city from taking property by eminent domain for parking areas and making assessments therefor, it was held that there was no right of condemnation because there was no statute which authorized cities to acquire and operate off-street parking and there were errors in the ordinance and in the procedural steps taken by the city. The appellants are correct that City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956, chiefly relied upon by the respondent, only upheld the validity of the Vehicle Parking District Act of 1943, St. 1943, p. 2859. However, that case in recognizing that public parking places relieve congestion and reduce traffic hazards, is in accord with the broader interpretation of "public use" recently followed in this state. University of Southern California v. Robbins, supra; Alexander v. Mitchell, 119 Cal.App.2d 816, 260 P.2d 261; Redevelopment Agency, etc. v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105.

Appellants further contend that because the two areas of the transitional zone which have been zoned commercial and have provided their own private parking, Draeger's and Bettencourt's Super Markets, are excluded from the assessment district and because no part of the costs of the plazas is to be paid out of general funds or bonds, the city had admitted that parking is entirely for the private benefit of Santa Cruz Avenue frontage.

This contention is aptly disposed of by the following statement made in City of Whittier v. Dixon, supra, 24 Cal.2d at pages 667 and 668, 151 P.2d at page 7: "The levy of a special assessment is justified if the improvement is a public one and the property to be assessed will receive a special benefit. [citations] Merchants frequently acquire and operate private parking places to attract customers and vacate buildings when no parking space for customers is available. Parking places that tend to stabilize a business section, by making it readily accessible to trade, benefit the property in the vicinity."

[10, 11] " 'Public use' within the meaning of section 14 [Art. I of the California Constitution] is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." Bauer v. County of Ventura, 45 Cal.2d 276, at page 284, 289 P.2d 1, at page 6. We cannot say that the above test has not been met in the instant case.

3. Whether the trial court erred in instructing the jury to disregard all evidence as to severance damages with reference to Parcel 9, and in its finding that Parcel 9 was not a part of a larger parcel.

[12] Parcel 9, which is owned by appellants David and Emilia Garibaldi, is contiguous to Lots 11 and 12, also owned by the Garibaldi family. It is appellants' contention that pursuant to Code of Civil Procedure, § 1248, subd. 2, they should be paid for the destruction of the unitary value of the two lots not taken, (Lots 11 and 12) based upon the reasonable probability of the combined use of all three lots in the near future for commercial purposes. Appellants' expert witness testified that these three lots were the only piece of land of that size left on Menlo Avenue under one ownership and not commercial improved. At the time of this action each of the three lots had a separate dwelling on it. In January 1955, about five months before the institution of this proceeding the house on Lot 11 was moved there from another location and a driveway constructed. There was no evidence introduced which showed any intention to use these three lots in any manner other than as individual rental properties as they were being used. Under Code of Civil Procedure, § 1248, the owner is not entitled to severance damages for injury to separate and independent parcels. To recover severance damages there must be unity of title, San Benito County v. Copper Mountain Min. Co., 7 Cal.App.2d 82, 45 P.2d 428; City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228, contiguity, People v. Ocean Shore Railroad, 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179; City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705, and unity of use, City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467. There is no problem as to the presence of the first two requirements here. The controversy centers on the third requirement.

Appellants rely on People, By and Through Department of Public Works v. Thompson, 43 Cal.2d 13, 271 P.2d 507, which dealt with physically contiguous land crossed by a highway, and in which in affirming the severance damages awarded by the lower court, our Supreme Court said that there was no division of use but only a failure to use some of the property.

[13–15] The case is distinguishable on that point, as here the three lots were used separately. In a somewhat similar situation involving the condemnation of one of three separate farms which were contiguous and under one ownership it was held that the issue of severance damages was not a proper issue for the jury. Sharpe v. United States, 191 U.S. 341, 24 S.Ct. 114, 48 L.Ed. 211. As stated in City of Stockton v. Marengo, supra, 137 Cal.App. at page 766, 31 P.2d at page 470: "To constitute a unity of property between two or more contiguous but *prima facie* distinct parcels of land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used * * *". We are in agreement with the respondents here that the unity of use asserted by the appellants is prospective only and that, "To recover severance damages under section 1248, subd. 2, of the Code of Civil Procedure, the loss in market value claimed must directly and proximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible * * cannot serve as a legal basis for recovery." Arnerich v. Almaden Vineyards Corp., 52 Cal.App.2d 265, at page 272, 126 P.2d 121, at page 124.

[16, 17] Appellants contend that there is substantial evidence in the record which would support a finding that the taking of Parcel 9 would cause a diminution of the value of Lots 11 and 12. However, on appeal we are bound to indulge in every intendment which supports the judgment of the lower court. Hind v. Oriental Products Co., Inc., 195 Cal. 655, 235 P. 438. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Hartzell v. Myall, 115 Cal.App.2d 670, 252 P.2d 676.

It is our view that the record before us amply supports the verdict and judgment of the trial court and that no prejudicial error exists.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; CARTER, J., dissenting.

150 Cal.App.2d 811

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence M. PEARSON, Defendant and Appellant.

Cr. 3272.

District Court of Appeal, First District, Division 1, California.

May 14, 1957.

Defendant was convicted of assault with a deadly weapon and possession by a felon of a firearm capable of being concealed upon the person. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that, where, for a certain prior offense, defendant had been given life sentence as a habitual criminal, it was mandatory for Superior Court to cause terms of punishment for the two convictions involved in the prosecution to run concurrently, not consecutively, with defendant's life term.

Judgment modified and, as modified, affirmed; order denying new trial affirmed.

1. Criminal Law 🔑641(1)

Defendant, who wished to represent himself in criminal proceeding and told trial judge that he did not want the public defender and asked to be taken to law library for about 15 hours to prepare his defense but, at suggestion of court, stated that it would be satisfactory for public defender to sit at counsel table and, throughout trial, conducted his own case in person, was not denied the right to defend by being denied right to prepare and having counsel not of his own choosing forced upon him by the court.

2. Criminal Law 🔑1114(1)

Points which have no foundation in the record cannot be considered by a reviewing court.

3. Criminal Law 🔑641(1)

Defendant who chooses to conduct his own defense in person does so subject to the disabilities normally attendant upon the status of prisoner.

4. Assault and Battery 🔑56

Automatic pistol, which defendant threatened to fire, and which had six shells in the clip but none in the firing magazine, which was in full firing order, and which could be fired by pulling a slide back and allowing it to go forward again, constituted a "deadly weapon" within meaning of the Penal Code. West's Ann.Pen.Code, § 245.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

5. Assault and Battery ⚷95

In prosecution for assault with a deadly weapon, question whether defendant intended to transfer shell from clip in the weapon to the firing magazine was one of fact to be determined by the jury. West's Ann.Pen.Code, § 245.

6. Arrest ⚷71

Criminal Law ⚷395

Where, after entering defendant's home with a search warrant or warrant for defendant's arrest, officers told defendant that they wanted to talk to him "downtown", but defendant pulled a pistol from his coat and ordered the officers to line up against the wall but was then disarmed and taken into custody, the pistol was not obtained as result of an illegal search and, therefore, was admissible in evidence in subsequent prosecution for assault with a deadly weapon and possession by a felon of a firearm capable of being concealed on the person. West's Ann.Pen.Code, §§ 245, 12021.

7. Assault and Battery ⚷92

In prosecution for assault with deadly weapon in possession by a felon of a firearm capable of being concealed on the person, evidence was sufficient to prove defendant's ownership or possession of a concealable weapon. West's Ann.Pen. Code, § 12021.

8. Witnesses ⚷391

Where, in prosecution for assault with a deadly weapon and possession by a felon of a firearm capable of being concealed on the person, defendant's wife testified that gun involved was hers and that, to her knowledge, defendant knew nothing about it, and, on cross-examination, denied stating to the police that defendant had it when she and defendant were on a fishing trip, permitting police inspector to testify that wife had told them that defendant had the gun in glove compartment of automobile on a fishing trip was proper. West's Ann.Pen.Code, §§ 245, 12021.

9. Criminal Law ⚷1169(3)

Where, on cross-examination, defendant freely admitted his prior felony convictions, fingerprint evidence of such convictions was cumulative, and error, if any, in allegedly taking defendant's fingerprints against his will and using them as evidence of a prior conviction was not prejudicial. West's Ann.Pen.Code, § 12021.

10. Criminal Law ⚷720(7)

In prosecution for assault with a deadly weapon, evidence warranted prosecutor's statement in argument and at other times that the gun involved was a loaded, not an unloaded, one.

11. Criminal Law ⚷720(5)

In prosecution for assault with a deadly weapon and possession by a felon of a firearm capable of being concealed upon the person, evidence warranted prosecutor's statement, in his argument to jury, that testimony of defendant's wife was untruthful concerning where she got the gun, in view of facts that his statement was qualified by him as expressive of his opinion and was followed by comment that her recollection as to where she got the gun was "faint". West's Ann.Pen.Code, §§ 245, 12021.

12. Criminal Law ⚷720(7)

In prosecution for assault with a deadly weapon and possession by a felon of a firearm capable of being concealed upon the person, prosecutor's comment that the gun had been around defendant's house for months and was unmistakably defendant's gun and that gun was probably not registered because a "con" or a felon with a gun cannot register it constituted fair comment.

13. Criminal Law ⚷1036(2), 1170½(1)

Where, in prosecution for assault with a deadly weapon and possession by a felon of a firearm capable of being concealed upon person, defendant answered in the affirmative, question whether on certain occasion he was shot in the arm and another man was kicked in the forehead was not prejudicial error, in view of facts that defendant had admitted numerous prior felony convictions, that it was not clear that he was involved in the physical violence described, and that no objection was made to the question. West's Ann.Pen. Code, §§ 245, 12021.

14. Assault and Battery ⚷48

Where one uses immediate threat of violence toward persons to force a present act or omission without lawful right to do so and proceeds as far as it is then necessary to go with intent to use such violence if necessary, crime of assault may be complete despite fact that such violence was neither used nor directly attempted.

15. Criminal Law ⚷826, 829(3)

In prosecution for assault with a deadly weapon, refusal to give instruction that pointing of an unloaded gun and threat to shoot, without attempt to use gun otherwise, would not constitute an assault with a deadly weapon was not prejudicial error, in view of other instructions given and of fact that the requested instruction was presented to the court ten minutes before court began instructing the jury, even though, before trial, defendant was told that court would entertain suggestion as to instructions up to time the people's argument actually started.

16. Criminal Law ⚷995(6)

Where, for a certain prior offense, defendant had been given life sentence as an habitual criminal, it was mandatory for Superior Court to cause terms of punishment for the two convictions involved in the prosecution to run concurrently, not consecutively, with defendant's life term. West's Ann.Pen.Code, §§ 644, 669.

◆

Clarence M. Pearson, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of violating sections 245 and 12021 of the Penal Code, assault with a deadly weapon and possession by a felon of a firearm capable of being concealed upon the person, defendant has appealed.

[1] (1) *Was defendant denied the right to defend, by being denied the right to prepare and by having counsel not of his own choosing forced upon him by the court? No.*

He wished to represent himself. He states in his brief that he told the trial judge that he did not want the Public Defender and asked for an order permitting him to be taken to the law library for approximately 15 hours to prepare his defense. There is only one reference to the Public Defender in the transcript of the trial. In the absence of the jury, the court said, "Now, the Public Defender has been making his services available to you up to this point, and I propose that he continue in the same capacity, but in the court room in the presence of the jury, do you want him to sit at counsel table, or would you rather he sit somewhere else in the court room where you can call on him if and when you need him?" The defendant answered, "I guess at counsel table would be satisfactory, Your Honor." That, it would appear, was done, but throughout the trial defendant conducted his case in person, asking all questions and making all motions and presenting all arguments.

We see in that no infringement of defendant's right to conduct his defense in person. The practice of making counsel from the Public Defender's office available to defendants acting in propria persona was approved in People v. Richardson, 95 Cal.App.2d 703, 707, 213 P.2d 734.

[2, 3] Concerning the request to be taken to the law library for 15 hours of research, the record is silent. Points that have no foundation in the record can not be considered by a reviewing court. People v. Ruiz, 103 Cal.App.2d 146, 150, 229 P.2d 73. Moreover, a defendant who chooses to conduct his defense in person does so subject to the disabilities normally attendant upon the status of prisoner. "A defendant who intelligently refuses counsel and insists upon personally conducting

and controlling his defense does not lose the status of prisoner and become entitled to extraordinary privileges not accorded defendants who are represented by counsel, nor does he become entitled to proceed in a manner different from that permitted to attorneys." People v. Chessman, 38 Cal.2d 166, 174, 238 P.2d 1001, 1006.

[4] (2) *Was the gun which defendant used a "deadly weapon" within the meaning of that term as used in section 245 of the Penal Code? Yes.*

Defendant threatened to shoot, not to use the gun (a Colt automatic pistol) as a bludgeon. It had six shells in the clip, none in the firing magazine, but was in full firing order. The clip was in the gun, which could be fired by pulling a slide back and allowing it to go forward again; i. e., by holding the gun in one hand and pulling the slide back with the other hand.

[5] Defendant contends that this was an unloaded gun and that its possession did not give him the requisite "present ability" to commit the threatened act of shooting. The answer we find well expressed in People v. Simpson, 134 Cal.App. 646, 25 P.2d 1008. We need only to substitute "pistol" for "rifle" in the following statement made by the court in that case: "An automatic repeating rifle may not be termed an unloaded gun when its magazine contains loaded cartridges which may be instantly transferred to the firing chamber by the mere operation of a lever. It is unreasonable to hold that a rifle is unloaded and that it is not susceptible of immediate discharge under such circumstances. * * * We are of the opinion an automatic repeating rifle which contains loaded cartridges in its magazine may constitute a deadly weapon with which one may have the present ability to commit violent injury upon another person, by firing the weapon at him, although it is first necessary to transfer a loaded shell to the firing chamber by operating a lever. The questions as to whether the accused person really intends to transfer the shell and fire the weapon are facts to be determined by the jury from the circumstances of the case." 134 Cal.App. at page 651, 25 P.2d at page 1010. See also People v. Young, 105 Cal.App.2d 612, 614, 233 P.2d 155.

Defendant would distinguish the Simpson case on the ground of a conflict of evidence whether defendant made any effort to operate the lever. That, however, bears on the question of the defendant's intent, not the character of the weapon.

He would distinguish the Young case on the ground that the meaning of "deadly weapon" as used in section 1203 of the Penal Code was involved and the fact that there the defendant had been convicted of robbery and section 211a, dealing with robbery, uses the term "dangerous or deadly weapon" not "deadly weapon." In some situations that conceivably would make a difference, but not here. The gun involved in the Young case, similar to that involved in the instant case, "contained cartridges in the magazine. These cartridges could be chambered and fired almost instantly. It therefore constituted a deadly weapon." At page 614 of 105 Cal.App.2d, at page 157 of 233 P.2d.

[6] (3) *Was the gun obtained as the result of an illegal search and therefore inadmissible as evidence? No.*

Four officers, suspecting that defendant had issued some fictitious checks, went to his home (with neither a search warrant nor a warrant for defendant's arrest) and knocked on the door. Defendant's wife opened it. Officer Williams told her his name and asked to see the defendant, Clarence. He also told her the house was surrounded and to tell the defendant not to leave by the back door. She made a gesture and pointed to the kitchen. The defendant was seated on the kitchen floor. The officers told the defendant they wanted to talk to him "down town." Williams suggested he put his coat on.

Defendant went into the back bedroom and got a coat. Williams followed him into the front room. The other officers were in the front room. Inspector Harper started to frisk the defendant. When

Harper got to defendant's hips, the defendant stepped off, reached in his coat, pulled out a .32 Colt, and said, "This is it, line up against the wall, all of you." He pointed the gun at all the officers in the room. He was then disarmed and taken into custody.

It well may be that the officers visited defendant to make an arrest and lacked authority to arrest him. If so and if their discovery of the gun was a natural result or product of such endeavor on their part the seizure would be illegal. In Badillo v. Superior Court, 46 Cal.2d 269, 273, 294 P.2d 23, 25, the "defendant's flight out the front door and attempted disposal of the evidence was the direct result of * * * [a police officer's], illegal entry." But in our case the defendant's pointing the gun at the officers and threatening them was no mere gesture of disposal of contraband, which might be viewed as "the direct result" of the officers' conduct. They were not threatening him with bodily harm. Instead, he was threatening them, voluntarily producing the gun in aid of his assault upon them. What really happened was that in the very act of unlawfully assaulting the officers the defendant voluntarily exposed the gun to their view. That was not the direct or any result of a search, legal or illegal. Such a veiw of the incident is supported by the officers' testimony. The fact, if it be a fact, that defendant's testimony may be somewhat inconsistent therewith produced at most a conflict which the triers of the facts resolved against him.

[7] (4) *Was the evidence sufficient to prove ownership or possession of a concealable weapon? Yes.*

An ex-convict "who owns or has in his possession or under his custody or control" a pistol "capable of being concealed upon the person" is guilty of the offense proscribed by section 12021 of the Penal Code. The gun had been reposing in a pocket of his overcoat. He testified he did not know a gun was in the pocket, not until he had donned the coat upon this occasion. His wife testified that it was her gun and as far as she knew the defendant did not know of its existence. However, the jury could have inferred from the whole sequence of events that defendant did know of the gun's existence, that he deliberately put on the coat so as to have access to the gun when he returned to the room where the other officers were standing, and that his wife was testifying untruthfully in his behalf.

[8] (5) *Was it error to allow proof of out of court inconsistent statements of defendant's wife? No.*

Defendant's wife testified that the gun was hers and that to her knowledge he knew nothing about it. On cross-examination, she denied making a statement to the police shortly after defendant's arrest that he had it when she and he were on a fishing trip. Inspector Harper testified that on this occasion defendant's wife told them that defendant had the gun in the glove compartment of the car on a fishing trip the previous fall. No objection was made to this testimony at the trial.

This was proper cross-examination. People v. Brazil, 53 Cal.App.2d 596, 599–601, 128 P.2d 204. See also People v. McCoy, 25 Cal.2d 177, 186, 153 P.2d 315; People v. Crow, 48 Cal.App.2d 666, 671, 120 P.2d 686.

[9] (6) *Was it prejudicial error to take defendant's fingerprints against defendant's will and use them as evidence of a prior conviction, in proof of a violation of section 12021? No.*

Whether the police had authority to take defendant's fingerprints against his will and without his affirmative freely given consent, we need not decide. Upon cross-examination he freely admitted his prior felony convictions. The fingerprint evidence of such convictions was, therefore, cumulative and as such not prejudicial.

(7) *Did the district attorney commit prejudicial misconduct? No.*

[10] It was not misconduct for the prosecutor in argument and at other times to treat this as a loaded, not an unloaded, gun. The evidence supports such a view.

[11] Nor was it misconduct for the prosecutor in his argument to the jury to refer to defendant's wife's testimony as untruthful, concerning where she got the gun. His statement in that regard was qualified by him as expressive of his opinion. It was followed by the comment that her recollection as to where she got the gun was "faint," as indeed it was.

[12] The prosecutor also commented upon the gun having been around the house for months. "It was unmistakably Clarence's gun, and as the charge in this indicates, a con or felon with a gun cannot register a gun because he cannot have it lawfully. That is probably why the gun was not registered." The fact that the gun had been around the house for months was testified to by appellant's wife. Inspector Harper testified that the gun according to the officer's information was not registered. That the gun was the defendant's was a conclusion, and from the context it was apparent that it was expressed as the prosecutor's conclusion.

We deem this to have been fair comment. Moreover, we have found in the record nothing to indicate that defendant objected at the time and requested the court to admonish the jury to disregard statements which he now challenges. See People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881; People v. Sutic, 41 Cal.2d 483, 497, 261 P.2d 241; and People v. Adamson, 27 Cal.2d 478, 494, 165 P.2d 3. There is nothing about the prosecutor's statements in this case to bring them within the scope of the exception to the rule noted in People v. Codina, supra, at page 362 of 30 Cal. 2d, at page 884 of 181 P.2d.

[13] Defendant complains that upon cross-examination he was asked concerning other crimes he had committed. This occurred in a series of questions concerning other guns he had owned. The fact that he admitted owning many guns, most of them illegally, would make it more likely that he did knowingly possess a gun at the time charged in the information. The only question going improperly into the circumstances of a prior conviction appears to be the following, asked after he admitted owning or having possession of a gun in 1939 at the time of his arrest in Los Angeles: "Is that the occasion you were shot through the arm yourself and another man was kicked in the forehead?" He answered this in the affirmative, making no objection. This would seem to have nothing to do with the issues in this case. However, in view of the fact that he admitted numerous prior felony convictions, and that it is not clear that he was involved in the physical violence described, it is not likely that this isolated question was prejudicial. The lack of objection and the absence of a showing of prejudice preclude reversal on these grounds.

(8) *Was error committed in the giving of instructions?*

[14] Defendant complains of the court's giving the jury the dictionary definitions of "present" and "ability", followed by this instruction: "When one uses the immediate threat of violence toward persons to force a present act or omission without lawful right to do so, and proceeds as far as it is then necessary to go with intent to use such violence if necessary, the crime of assault may be complete despite the fact that such violence was neither used nor directly attempted." This impresses us as a correct statement of the law. People v. McCoy, 25 Cal.2d 177, 191, 153 P.2d 315. Defendant distinguishes the McCoy case and others upon the ground that the nature of the weapon was not involved in these cases. That is true, but this instruction also has nothing to do with the character of the weapon.

The court gave the following definition of a deadly weapon: "Any object, instrument or weapon when used in a manner capable and likely to produce death or great bodily injury is then a deadly weapon." From this, the instruction defining assault with a deadly weapon and the definitions of "present" and "ability", the jury was presented with a question of fact as to whether or not the gun in its then condition constituted a deadly weapon.

[15] Defendant complains of the court's refusal to give the following instruction: "The pointing of an unloaded gun at the prosecuting witness accompanied by a threat to shoot him, without any attempt to use it otherwise, is not an assault with a deadly weapon, and cannot sustain a conviction for an assault for want of a present ability to commit a violent injury on the person threatened in the manner attempted." Respondent says the evidence shows, as a matter of law, that this gun was a deadly weapon. We do not so interpret People v. Simpson, supra, 134 Cal.App. 646, 25 P.2d 1008, nor People v. Young, supra, 105 Cal.App.2d 612, 233 P.2d 155. As we read them, neither case sanctions taking the question from the jury. But the court by the instructions it did give submitted the question to the jury in an appropriate and understandable fashion. There was no need to duplicate. People v. Hill, 76 Cal.App.2d 330, 173 P.2d 26. Defendant's proposed instruction might have tended to confuse the jury by injecting the concept of an "unloaded gun" without giving the jury assistance in deciding that question. Moreover, defendant presented this instruction to the court ten minutes before the court began instructing the jury, despite the fact that before the trial began he was told that the court "will entertain any suggestion from you with regard to the instructions up to the time the People's argument actually starts." People v. Brown, 27 Cal.App.2d 612, 81 P.2d 463, held that an instruction submitted after the time set by the trial court for the presentation of instructions was properly refused.

Under these circumstances we find no error, certainly no prejudical error, in the refusal of the requested instruction.

[16] (9) *Was it error to cause defendant's sentences to run consecutively? Yes.*

For a certain prior offense defendant had been sentenced as an habitual criminal. That carries a life sentence. Pen. Code, § 644. In the case of conviction of two or more crimes (whether in the same proceeding or court or different proceedings or courts) "if the punishment for any of said crimes is expressly prescribed to be life imprisonment, whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term. * * *" Pen.Code, § 669.

It was mandatory, in the instant case, for the court to cause the terms of punishment for the two convictions here involved to run concurrently, not consecutively, with defendant's life term. Instead, the court ordered those two terms to run concurrently, as to each other, but to begin "at the expiration of any term or terms that defendant is presently required to serve and shall run consecutive thereto."

The state contends that it was entirely competent for the trial court to do as it did. Executive clemency in the form of a pardon or commutation of the life sentence would make it physically possible for the defendant to serve later sentences. The state cites In re Pedrini, 33 Cal.2d 876, 882, 206 P.2d 699, which is quite inapplicable for the statute in force at the time of the offense there involved did not, as it now does, expressly provide that other sentences must run concurrently with a life sentence. See footnote 3 on pages 877 and 878 of 33 Cal.2d, on page 704 of 206 P.2d.

In such a case as this there is "no need of a reversal of the judgment or of further proceedings in the superior court. It is sufficient that this court modify the terms of the several sentences to declare that such sentences should run concurrently." People v. Tucker, 127 Cal.App.2d 436, 438, 273 P.2d 934, 935.

Accordingly, the concluding clause of paragraph (3) of the judgment herein is amended to read as follows: "These terms of imprisonment shall ~~begin at the expiration of~~ *run concurrently with* any term or terms that defendant is presently required to serve ~~and shall run consecutive thereto~~." (New matter in italics, omitted matter in strikeout type.) As thus modified the judgment is affirmed; and the order denying a new trial is affirmed.

PETERS, P. J., and BRAY, J., concur.

151 Cal.App.2d 294

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Herbert R. SMITH et al., Defendants; Hiram Blair, Defendant and Appellant.
Cr. 5805.

District Court of Appeal, Second District, Division 2, California.
May 27, 1957.

Hearing Denied July 24, 1957.

Prosecution for burglary in the first degree. From adverse judgment of the Superior Court, Los Angeles County, Clement D. Nye, J., and from order denying a new trial and from verdict, one of the defendants appealed. The District Court of Appeal, Richards, J. pro tem., held that the evidence was sufficient to sustain conviction.

Judgment and order denying motion for new trial affirmed, and purported appeal from verdict dismissed.

1. Burglary ⚷41(1)

Evidence was sufficient to sustain conviction for first degree burglary. West's Ann.Pen.Code, §§ 21, 460.

2. Criminal Law ⚷1177

Error of court in stating at time of judgment and sentence that defendant had been found guilty of burglary in second degree when in fact court had found defendant guilty of burglary in first degree at conclusion of trial, neither prejudiced nor tended to prejudice defendant when record was clear that he had been convicted of burglary in the first degree. West's Ann.Pen.Code, §§ 459, 1404.

3. Criminal Law ⚷992

Court has no authority to change degree of offense in pronouncing sentence.

4. Criminal Law ⚷989

The historical statement of facts included in an arraignment for judgment is by statute made mandatory on court as preliminary to pronouncing sentence but such preliminary statement constitutes no part of judgment itself. West's Ann.Pen. Code, § 1404.

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Robert Barnett, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Morris Schachter, Deputy Atty. Gen., for respondent.

RICHARDS, Justice pro tem.

Appeal from judgment of conviction by the court, a jury having been waived, of burglary in the first degree, from the verdict and from an order denying defendant's motion for a new trial. The assignments of error are: insufficiency of the evidence, and error of the minute order of judgment reciting a conviction of first degree burglary.

[1] Viewing the evidence most favorably to the respondent, the record discloses that John Rowan and his wife ran a variety store on Vermont Avenue in Los Angeles and about mid-afternoon, May 10, 1956, defendant and another man entered the store and walked to the center of the store, where the cash register was located, and asked Mr. Rowan the location of the dental paste. Mr. Rowan pointed it out and after they stood around that counter for three or four minutes, appellant then asked where to find the Mother's Day cards. Mr. Rowan told them that the cards were at the front of the store and the two men walked to the card counter. In the meantime Rowan stayed near the middle of the store but overheard appellant make some disparaging remark about

the quality of the cards. After some discussion between the two men and Mrs. Rowan, Rowan started toward the front of the store where the appellant and his companion were standing and when Rowan was about six feet away, they came around the end of the card counter and into the center aisle and at that time appellant's companion was holding a gun and ordered Rowan to go to the rear of the store. Unintimidated, Rowan started towards appellant's companion and as he did so, appellant hit Rowan in the jaw knocking him over onto the counter. Mrs. Rowan screamed and the two men ran out of the store and were subsequently apprehended.

Clearly, the foregoing evidence is sufficient to sustain the conviction of first degree burglary by reason of the assault on Rowan (Pen.Code, sec. 460).

There is no merit in defendant's contention that the evidence fails to disclose an intent to commit theft. The action of the men loitering near the cash register on the pretense of looking for dental paste; their actions in drawing Rowan to the front of the store by engaging into controversy with Mrs. Rowan about the Mother's Day cards; their simultaneous approach on Rowan, one with a drawn gun, ordering Rowan to the rear of the store; the personal assault by defendant and their subsequent flight justified an inference that defendant's original entry was to commit theft. "The intent or intention [with which a crime is committed] is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. * * *" Pen.Code, sec. 21. The element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence. "Where the evidence is sufficient to justify a reasonable inference that such intent existed, as in the present case, the verdict may not be disturbed." People v. Kuykendall, 134 Cal.App.2d 642, 645, 285 P.2d 996, 998.

[2-4] Appellant contends that the judgment of conviction of first degree burglary as entered in the minute order of the clerk is erroneous and must be corrected to show an actual judgment of conviction of second degree burglary. At the conclusion of the trial, the court found the defendant guilty of burglary in the first degree. Defendant's motion for new trial was subsequently denied and thereafter, in arraigning the defendant for sentence the court said "The application for probation in this matter is ordered denied, and it is the judgment and order of this Court that for the crime of burglary * * *, upon which you have been found guilty, which the Court *has fixed as burglary in the second degree*". (Emphasis added.) Upon completion of the sentence the defendant asked the court, "Is that second degree, or first?" to which the court replied, *"Second degree."* (Emphasis added.) The clerk's minutes of the judgment of conviction state in part, "Whereas the said defendant having been duly found guilty in this court of the crime of Burglary (Sec 459, P.C.), a felony, as charged in Count 3 of the information, which the Court found to be Burglary in the first degree * * *." Appellant contends that by reason of the statements of the court in arraigning the defendant for sentence, the judgment of conviction was for second degree burglary, and that the record of the judgment is erroneous. This contention is untenable, as the court has no authority to change the degree of the offense in pronouncing sentence (People v. Superior Court, 202 Cal. 165, 259 P. 943; People v. Machen, 3 Cal.App.2d 499, 39 P.2d 893). The recital by the court in pronouncing sentence amounted to only a *lapsus linguae*, an erroneous statement of a past act that the degree of the crime had been fixed in the second degree, whereas the court in fact had previously fixed the degree of the crime in the first degree. "The historical statement of facts included in an arraignment for judgment [Pen.Code, sec. 1200] is by statute made mandatory on the court as a preliminary to pronouncing judgment [citations]. Such preliminary statement has been said to constitute no part of the judgment itself [citations], but even though technically it is not a part of the

judgment, the judgment is only a part of the proceeding in and by which the respective rights of the State and the defendant are determined. In the case of Hambrick v. State, 1920, 80 Fla. 672, 86 So. 623, 624, 14 A.L.R. 987, at page 989, the Supreme Court of Florida said: 'The entire record may be looked to in ascertaining the offense for which the accused is sentenced, and an erroneous recital or statement of the offense by the court in pronouncing sentence, or of the clerk in recording in the minutes of the proceedings kept by him the judgment imposed, will not vitiate the judgment when the record fully discloses the offense for which the accused was indicted, tried, and convicted. In such case the record furnishes a complete protection against another prosecution for the same offense.'" In re Basuino, 22 Cal.2d 247, 250, 138 P.2d 297, 299. Accord: People v. Becker, 80 Cal. App.2d 691, 694, 181 P.2d 958. By parity of reasoning, an erroneous statement of the degree of the offense would come within the same principle. We conclude that in this case there was a judgment of conviction for the offense of burglary in the first degree as shown by the entire record, notwithstanding the erroneous statement by the court in pronouncing sentence. "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Pen.Code, sec. 1404. The mistake of the trial court in erroneously stating the degree of the offense at the time of judgment and sentence neither prejudiced nor tended to prejudice the defendant as the record is clear that he was convicted of burglary in the first degree.

The judgment and order denying motion for a new trial are affirmed. The purported appeal from the verdict is dismissed.

MOORE, P. J., and ASHBURN, J., concur.

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151 Cal.App.2d 84

FALLBROOK PUBLIC UTILITY DISTRICT, Plaintiff and Appellant,

v.

Gene E. MARTIN, as Executrix, et al., Defendants.

Verlie L. Bayle et al., Defendants and Respondents.

Civ. 5462.

District Court of Appeal, Fourth District, California.

May 16, 1957.

Rehearing Denied June 13, 1957.

Hearing Denied July 10, 1957.

Utility district's eminent domain proceeding to acquire lands for dam and reservoir on Santa Margarita River in which to store water to be supplied to consumers and lands within district. The Superior Court of San Diego County, Dean Sherry, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Mussell, J., held, inter alia, that trial court's finding that there was insufficient surplus of river water was erroneous.

Reversed.

1. Eminent Domain 🔑196

In Fallbrook Utility District's eminent domain proceeding to acquire lands for dam and reservoir on Santa Margarita River in which to store water to be supplied to consumers and lands within district, evidence did not sustain trial court's findings that there was insufficient surplus water available in the river to warrant construction of the dam.

2. Waters and Water Courses 🔑240

Fallbrook Utility District could properly appropriate surplus water of Santa Margarita River for its consumers and lands and could erect dam in furtherance of such action.

3. Eminent Domain 🔑196

In Fallbrook Utility District's eminent domain proceeding to acquire lands for dam and reservoir on Santa Margarita River in which to store water to be supplied to consumers and lands within district, evidence would not support trial court's findings that public interest, convenience and necessity did not require the district to build dam and reservoir.

4. Eminent Domain ⚷196

In Fallbrook Utility District's eminent domain proceeding to acquire lands for dam and reservoir on Santa Margarita River in which to store water to be supplied to consumers and lands within district, evidence would not sustain landowners' contention that district had been guilty of bad faith in bringing proceeding.

5. Eminent Domain ⚷196

In utility district's eminent domain proceeding to acquire lands for dam and reservoir on river, evidence would not sustain trial court's finding that district had attempted to coerce some of the condemnees to sell their lands.

6. Eminent Domain ⚷68

In absence of any showing of abuse of discretion or fraud on part of utility district in instituting plan for erection of dam and reservoir and condemnation proceedings to acquire necessary lands, its resolution therefor could not be disturbed in condemnation proceeding.

7. Fraud ⚷50

Fraud is never presumed but must be established.

8. Eminent Domain ⚷196

In Fallbrook Utility District's eminent domain proceeding to acquire lands for dam and reservoir on Santa Margarita River, evidence was insufficient to support trial court's finding that there had been abuse of discretion in planning and acquiring of land for water facilities, apparently based on its other erroneous finding that there was insufficient surplus water available.

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Swing, Scharnikow & Staniforth, San Diego, for appellant.

George Stahlman, Los Angeles, and Hayes & Hayes, Oceanside, for respondents.

MUSSELL, Justice.

This is an action in eminent domain in which Fallbrook Public Utility District, organized under the laws of the State of California for the purpose, among others, of procuring, storing and distributing water to the lands lying within the boundaries of said district in the county of San Diego for irrigation and domestic purposes, seeks to acquire lands for a dam and reservoir site on the Santa Margarita River in which to store water to be later supplied to the consumers and lands within the district. The defendants who appeared herein raised numerous affirmative defenses and the action proceeded to trial as to the issues thus raised by this group. The trial court rendered judgment that plaintiff take nothing as to defendants named in the judgment and plaintiff district appeals.

The Fallbrook Public Utility District (hereinafter referred to as the "District") was first organized in 1922 and embraced about 450 acres. In 1937–1938 the area of the district was increased to approximately 5,000 acres by taking over parts of the Fallbrook Irrigation District, which was then disincorporated. In 1950, about 3,000 acres was added to the district by annexation, bringing the total area thereof to approximately 8,000 acres. There are extensive plantings of citrus and avocado orchards in this area, the average rainfall is about 17 inches per year, the climate is nearly frostless, and the rapid growth and development of the area was shown by continuous annual increases in the assessed valuation, meter installations and water sales.

The District, when first organized, obtained its water from wells, but this source proved to be inadequate. Numerous studies were made in the Fallbrook area for the development of water supplies, which studies indicated that it was necessary to depend upon storage and conservation of winter flood waters of the Santa Margarita River for the water necessary to the development of the area. The Fallbrook Irrigation District, predecessor in interest of the plaintiff district, applied to the State for a permit for appropriation of water from the Santa Margarita River and a permit was issued, but the irrigation district did not have the financial resources to construct a reservoir to store 35,000 acre-feet of water at the site selected, which was approximately at the same place as the Fallbrook-Lippincott Dam as proposed by appellant herein.

In 1946 a cooperative agreement was made by the district with the State Division of Water Resources for it to make the necessary investigations, surveys and studies and the preparation of a written report, and on November 1, 1948, the State reported favorably on the Fallbrook-Lippincott site and gave preliminary estimates of costs and of safe yields at that location for dams varying in height up to 142 feet above streambed.

In 1949 the corps of Army engineers completed a study of several possible multiple-purpose projects on the Santa Margarita River, including a reservoir at the Fallbrook site, and found that the Fallbrook site was feasible and would have large tangible and intangible benefits. In 1951 the United States commenced an action against Fallbrook Public Utility District, D.C., 110 F. Supp. 767, claiming title to most of the water of the Santa Margarita River for its own use at Camp Pendleton and judgment was rendered by Judge Yankwich approving their claims. Subsequently, Congress attempted to settle the litigation by legislation and on July 28, 1954, enacted Public Law 547, 68 Stat. 575 authorizing the building of a dam at the De Luz site for the joint use of the Navy and Fallbrook. On March 30, 1956, the Yankwich judgment was reversed and most of the Navy claims were disapproved by the decision of the United States Court of Appeals. People of the State of California v. United States, 9 Cir., 235 F.2d 647. The Army engineers' recommendations and the authorization of Congress for the building of the dam at the De Luz site resulted in the construction of no project, either for the benefit of Fallbrook or the Navy.

In 1953 the District directed that a study be made by its chief engineer and in the report thereon it was recommended that the board of directors build a 30,000–35,000 acre-foot capacity reservoir at the Fallbrook-Lippincott site but that the construction of the dam be made in three successive stages.

The District's records of sales of water for use on the lands and by the people within the district show a continuous and steady increase year after year, culminating in about 8,000 acre-feet in the year preceding the trial herein. In the winter months little water is required and the summer months bring peak usage. The variations in water demands run from a low of 175 acre-feet in a winter month to 1,361 acre-feet in a summer month.

The present available water supplies of the District are:

(1) 2½ cubic feet per second direct diversion from the Santa Margarita River under State permit No. 7033 (1,800 acre-feet if taken throughout the year).

(2) 2,500 acre-feet per annum from San Luis Rey River under State permit No. 5227 "subject to vested rights". However, in 1954 this source was cut off by temporary injunction until the underground water table should again rise to a level of not less than 18 feet below ground surface.

(3) From the Colorado River, being water received by Fallbrook from the San Diego Water Authority via the Metropolitan Water District by virtue of Fallbrook's membership in the San Diego Water Authority, which, in turn, reserves the water by virtue of its membership in the Metropolitan Water District. Fallbrook's entitlement is about 1,100 acre-feet per annum. The District has benefited by the purchase of excess Colorado River water but there was no excess Colorado River water available at the time of trial and for a year prior thereto.

(4) From the city of San Diego. The city agreed with the District to permit it to store its unused Colorado River entitlement existing during the winter months in the city's San Vicente reservoir and during the following summer months to take substantially the same amount of the city's Colorado

River water, on an exchange basis, out of the main aqueduct at the point where the water passes the Fallbrook area. However, the city notified the District that it could not continue the storage exchange agreement as a permanent arrangement and that the District would have to arrange for other storage.

The existing reservoirs and storage capacities of the District are:

Two reservoirs located at the District's pumping plant on the Santa Margarita River with capacity of 200,000 and 400,000 gallons, respectively.

Martin reservoir. Capacity 1,000,000 gallons.

Lang reservoir. 1,000,000 gallons.

Sand Trap reservoir. Capacity 100,000 gallons.

Red Mountain reservoir. Capacity 200 acre-feet.

Rattlesnake reservoir (a steel tank). Capacity 3,500,000 gallons.

The directors of the District found these reservoirs were inadequate for any carry-over storage and sufficient to meet only temporary emergencies of short duration and they therefore hired storage facilities from the city of San Diego.

On January 10, 1955, the board of directors of the district adopted its resolution No. 448 in which it was declared that the public interest, convenience and necessity of the district required the construction and completion by it of a public improvement, to wit, a dam on the Santa Margarita River, and the creation of a reservoir for the impounding and storage of the water behind said dam and the acquisition of real property as a site for said dam and reservoir; that the need for said public utility works has continued and still exists; that the proposed public utility works are planned and located in the manner which will be most compatible with the greatest public good and the least private injury. It was further declared and ordered that the District prepare and prosecute in its name such suit or suits in the proper court having jurisdiction thereof as were necessary to condemn, take and acquire said real property or any part thereof. This resolution had the approval of the voters of the district for the record shows that at the biennial district election in May, 1954, one of the principal issues was the construction of the Lippincott dam, and two directors of the District who favored the policy of the board in building the dam were elected. It also appears that at the biennial district election in May, 1956, three directors favoring the district plan to build the Lippincott dam were elected. The record shows that the results of several engineering studies and reports were made available to and given consideration by the board of directors before the resolution was passed and that the directors had substantial evidence before them showing the necessity of the project. In accordance with this resolution the present action was filed on January 14, 1955.

Respondents state in their brief that "The crux of the appeal issue centers on the finding of the trial court that the appellant failed to make a showing of necessity for the project proposed and described by the testimony."

[1] Appellant's first contention is that the trial court erred in its findings and conclusions that there was not any surplus waters in the Santa Margarita River available for appropriation and that the Fallbrook Utility District had not acquired rights therein by virtue of its permits and pending applications.

In its finding number XIX the court found that "There are insufficient surplus waters available to the Fallbrook Utility District at this time in the Santa Margarita River to warrant the construction by the District of a dam at this time."

However, the record shows that large quantities of waste waters flow into the ocean from the Santa Margarita River after all upstream requirements have been met and that there is surplus water sufficient for appropriation by the District. Defendants' own witness, Max Bookman, principal hydraulic engineer for the Division of Water Resources of the State of California, testified that he had recently made a study of the Santa Margarita River to find a plan that would best conserve the unappropriated water in the watershed and that a 35,000 acre-foot reservoir at the Lippincott site would create 5,100 acre-feet net safe yield of "new water which is now wasting into the ocean"; that by the United States Geological Service Gaging Station records at Ysidora, near the ocean on the Santa Margarita River, under normal conditions, "there is about 36,000 acre-feet of wastage to the ocean"; that "at the present time, with Vail reservoir constructed and with Vail reservoir in full operation and the present utilization of water in the Santa Margarita basin, the wastage to the ocean on the average is about 25,200 acre-feet per year."

One of appellant's expert witnesses, William Penn Rowe, a hydraulic engineer of extensive experience and familiar with the Santa Margarita River, estimated the annual waste into the ocean, which is surplus water, at the present time will average around 32,000 to 35,000 acre-feet. He recommended the so-called Lippincott site as the best site at which Fallbrook could build a dam to store the surplus waters of the Santa Margarita River and stated that in his opinion such a dam was economically feasible and would yield about 5,100 feet per annum.

Appellant's chief engineer, in his 1953 report to the board of directors of the District, recommended the building of a dam at the Fallbrook-Lippincott site to create a reservoir with an ultimate capacity of approximately 30,000 to 35,000 acre-feet. At the trial he produced and explained charts, graphs and diagrams showing that ample surplus water existed in the Santa Margarita River during flood seasons, which, if stored and conserved, would meet the present and future growth requirements of the district.

In 1956 there was published by the State Division of Water Resources, Department of Public Works a bulletin giving the results of an investigation by the department of the Santa Margarita River and the official state figures reveal an average wastage into the ocean of 34,000 acre-feet per annum which constitutes "surplus" which, under the laws of this state, is subject to appropriation.

We find no substantial evidence in the record to support the trial court's finding number XIX and agree with appellant's contention that it is contrary to and unsupported by the evidence.

[2] In finding number XVI the court found "That the Fallbrook Public Utility District does not have established or vested rights in the waters of the Santa Margarita River sufficient to warrant the construction of any dam at this time." This finding is likewise unsupported by and contrary to the evidence.

The record shows that the State has issued its permit No. 8511 to the District for 10,000 acre-feet of the Santa Margarita River water. This permit was and is an administrative determination on the part of the State Division of Water Resources that there exists surplus water in the Santa Margarita River in amounts sufficient to warrant it in issuing that permit. Appellant also has applications numbers 12178 and 12179 which will give Fallbrook Public Utility District certain additional legal rights and priorities to the waters of the Santa Margarita River.

In City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 925–926, 207 P.2d 17, 28, it is said:

> "Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority. Peabody v. City of Vallejo, 2 Cal.2d 351, 368, 40 P.2d 486. Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for nonoverlying

> uses, such as devotion to a public use or exportation beyond the basin or watershed. [Citations.]
>
> "It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation. Peabody v. City of Vallejo, 2 Cal.2d 351, 368-369, 372, 40 P.2d 486; see 26 Cal.Jur. 277."

Judge Yankwich in his decision in United States v. Fallbrook Public Utility Dist., 110 F.Supp. 767, supra, found that there was no surplus water available at that time sufficient to appropriate. However, the Ninth Circuit Court of Appeals, after quoting that finding and the further finding that "There is no surplus water at the present time available for appropriation from the Santa Margarita River system; there was no surplus so available in the year 1946; there was no surplus so available when Camp Pendleton was placed in operation as a military installation in 1942", said, "If these are findings of fact, they are clearly erroneous; and, if conclusions of law, they are wrong." [235 F.2d 657.] The Circuit Court further said "It is certain from the evidence in the case that in some years there is surplus water which flows clear through the watershed and wastes into the sea."

[3] Appellant next contends that the trial court erred in its decision that public interest, convenience and necessity did not require Fallbrook Public Utility District building a dam and reservoir on the Santa Margarita River at this time, and that public interest, convenience and necessity did not require the district acquiring lands for that purpose. These conclusions of the trial court are not supported by the evidence and are inconsistent with its findings that the district has been distributing about 8,000 acre-feet of water per year, including 2,800 acre-feet of Colorado River water last year; that plaintiff is greatly in need of new and additional water supplies; that plaintiff has state permits to appropriate and store at the Lippincott site 10,000 acre-feet per annum of the surplus water of the Santa Margarita River; that the Lippincott site proposed by plaintiff for the project is feasible from an engineering standpoint; that plaintiff is able to finance the building of the proposed dam and reservoir project; and that before the commencement of this action the board of directors of the district adopted a resolution declaring that "the public interest, convenience and necessity require the construction and completion of a public improvement, to wit, a dam on the Santa Margarita River, * * * and the creation of a reservoir for the impounding and storage of water behind said dam", and the acquisition of a site therefor. The court, in its conclusions of law, declared that under the existing circumstances the board of directors was and is entitled to exercise a wide discretion in planning and acquiring land for water facilities and constructing projects thereon, which, in its best judgment is in the public interest of the district; that said board is entitled to take into consideration not only the present but also the future needs and requirements of the District.

[4] Appellant further contends that the court erred in imputing fraud or bad faith to plaintiff and in basing his decision, in part, upon the assumed existence of such fraud or bad faith in this case. Defendants allege in their answer that the district was guilty of "bad faith" in the filing of a condemnation action in 1951, intending thereby to coerce the defendants in failing to prosecute said action. However, defendants failed to prove bad faith of plaintiff in bringing this action and it was dismissed by the District on January 14, 1955. No other allegations of fraud are contained in the answers filed. The trial court found in its finding number XI:

> "That the said District, acting through its general manager, urged the engineer of the San Diego County Water Authority to suppress information concerning certain plans of the District for the project; and the District, acting through its said general manager, repeatedly stated publicly that the

> 'dam' would not cost more than one million dollars; and the District, acting through its said general manager, stated publicly that all required plans for the project had been approved by the proper state authorities, withholding the information that no such plans were necessary; and the land agent for the District, acting for the District, attempted to coerce some of the condemnees to sell their land to the District by making various threats to harm said condemnees; and the District, acting through its directors and agents, misrepresented to the public that all plans and specifications for the dam had been completed."

However, the court, in its memorandum decision, after reviewing the matters related in finding number XI, said, "However, it has not been shown that this fraudulent conduct of the District officers was successful, and hence is not sufficient to vitiate the proceedings before us." The first incident stated in finding XI relates to a letter written by appellant's general manager to the general manager of the San Diego County Water Authority. This letter was written four years before the instant action was commenced and while it was suggested therein that the matter should not be discussed publicly and that it was unwise at that time to discuss any type of annexation, it appears that the purpose of the letter was to obtain advice from the San Diego County Water Authority. The second incident referred to in said finding is that the District's manager repeatedly stated that the "dam" would not cost more than one million dollars. This statement was no doubt made by the manager. However, he may well have believed it to be true and this statement does not appear to have been made in bad faith. Moreover, in the engineer's report to the board of directors in 1953, the overall cost for the project was shown to be $3,373,500 and this report was well publicized at the time. The third incident is that plaintiff's general manager stated publicly that all required plans for the project had been approved by the state authorities, withholding the information that no such plans were necessary. However, as the trial court said in his memorandum decision: "It is not necessary for the condemnor to show that he had obtained in advance all of the permits and plans necessary before the land is condemned." Citing California Southern R. R. Co. v. Kimball, 61 Cal. 90; Vallejo & N. R. R. Co. v. Home Savings Bank, 24 Cal.App. 166, 140 P. 974; Tuolumne Water Power Co. v. Frederick, 13 Cal.App. 498, 502, 503, 110 P. 134; Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co., 20 Cal.2d 684, 128 P.2d 529.

[5, 6] It is next stated in finding XI that the land agent for the District attempted to coerce some of the condemnees to sell their land to the district by making various threats to harm said condemnees. We have been unable to find any testimony in the record to support this specification. The same is true as to the next incident specified in said finding that the directors misrepresented to the public that all plans and specifications for the dam had been completed. The incidents related in the court's finding number XI are not, in our opinion, sufficient to establish that the appellant was guilty of fraud or acted fraudulently in commencing or maintaining the instant action. Since fraud or abuse of discretion was not established, it follows that the determination of the board of directors as reflected by their resolution could not be disturbed by the trial court and is binding upon us. Berkeley High School Dist. v. Coit, 7 Cal.2d 132, 137–138, 59 P.2d 992; West Coast Life Ins. Co. v. Glenn, etc. Irr. Dist., 50 Cal.App.2d 204, 209, 122 P.2d 595; Ransom v. L. A. City High School Dist., 129 Cal.App.2d 500, 505, 277 P.2d 455; Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 315, 144 P.2d 4.

[7] Fraud is odious and is never presumed; it must be established by proof. Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114. And, as is said in Hannon v. Madden, 214 Cal. 251, 267–268, 5 P.2d 4, 11:

> "It is a cardinal rule of pleading that fraud must be pleaded in specific lan-

guage descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions. * * * Fraud being a term which imputes venality and corruption to the person charged, should be clearly proved and satisfactorily established, especially where the persons charged are public officers vested with wide discretionary powers. If official acts may be explained on any reasonable theory of duty honestly, even though mistakenly performed, they must be resolved in favor of the presumption, which may not be lightly ignored."

[8] Finally, appellant contends that the trial court erred in concluding that "the plaintiff in this case, acting through its officials, had abused that discretion" vested in them by law, to wit, the "planning and acquiring land for water facilities and constructing the projects thereon which in their best judgment is in the public interest of the Fallbrook Utility District" and "that further expenditure of funds at this time by the District officials toward the construction of the proposed project would be an abuse of discretion by the officials of said District."

Apparently, the basis for the court's conclusion that there was an abuse of discretion is the finding that "there are insufficient surplus waters available to the Fallbrook Utility District at this time in the Santa Margarita River" and "that the district does not have rights in the waters of the Santa Margarita River sufficient to warrant the construction of any dam." However, the evidence and the findings of the trial court that the District is vested with the power and obligation of furnishing water to the lands and residents within the district; that it is anticipated that its present supply will diminish in succeeding years; that plaintiff is greatly in need of additional water supplies; that plaintiff's board of directors adopted a proper resolution reciting that the public interest, convenience and necessity required this public improvement; that the proposed project would be for storing surplus waters of the Santa Margarita River; that the lands sought to be condemned would be for a public use; that the project would cost about three million dollars; that the plaintiff is able to finance such a project; that the Lippincott site selected by plaintiff is feasible from an engineering standpoint; that plaintiff has a state permit to appropriate 10,000 acre-feet per annum of the surplus waters of the Santa Margarita River for storage at the Lippincott site and has two additional pending applications, each for 10,000 acre-feet of the river water; that the total average annual flow of the river at the site is about 8,000 acre-feet but that over 25,000 acre-feet of water per annum, on an average, have and will continue to waste into the ocean, all fully support the action of the board of directors of the District and the condemnation sought in the complaint herein. The good faith of the directors was established by the evidence and no abuse of discretion appears.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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151 Cal.App.2d 133

Esther MacLEAN, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants,

Benny D'Amico et al., Defendants and Respondents.
Civ. 17239.

District Court of Appeal, First District, Division 1, California.
May 20, 1957.
Rehearing Denied June 19, 1957.
Hearing Denied July 16, 1957.

Action by bus passenger for injuries sustained when she stepped in wet substance while walking from bus to curb. From adverse judgment of the Superior

Court, City and County of San Francisco, Albert C. Wollenberg, J., the passenger appealed. The District Court of Appeal, Peters, P. J., held that exclusion of police accident report filed by investigating police was not error in absence of showing that report was based upon officer's own observations.

Judgment affirmed.

1. **Automobiles** ⚷309(4)

In action by bus passenger for injuries sustained when she fell while alighting from bus at place where two of defendants were doing construction work on property of third defendant, evidence was sufficient to warrant instruction on contributory negligence.

2. **Automobiles** ⚷309(4)

In action against property owner and contractors by bus passenger for injuries sustained when she slipped and fell after stepping in wet substance between bus and curb, instruction on contributory negligence leaving to jury question whether wet substance was in plain sight and if so whether passenger was negligently inattentive was justified by evidence.

3. **Municipal Corporations** ⚷821(25)

Momentary inattention by person using street or sidewalk does not constitute negligence as a matter of law but only presents factual question for determination of jury.

4. **Municipal Corporations** ⚷806(1)

While pedestrians making normal use of sidewalk or streets have right to assume that area is safe, they can be guilty of contributory negligence if jury finds that they looked but did not see what was plainly visible.

5. **Appeal and Error** ⚷1064(1)

Giving of instruction which should not have been given is not prejudicial when jury is told nothing that it does not already know.

6. **Evidence** ⚷325

In a proper case, business records exception applies to public documents as well as to private ones. West's Ann.Code Civ. Proc., §§ 1953e to 1953g.

7. **Appeal and Error** ⚷1057(1)
Evidence ⚷318(4)

In action for injuries sustained by bus passenger when she fell as she stepped in wet substance while going from bus to curb, police accident report filed by investigating police was properly excluded in absence of showing that it was based on officer's own observation, and even if it was based on personal observations of officer, its exclusion was not error when officer's testimony adequately covered contents of report. West's Ann.Code Civ. Proc. §§ 1953e to 1953g.

8. **Appeal and Error** ⚷1053(3)

In action by bus passenger for injuries sustained when she fell after stepping in wet substance after alighting from bus near place where contractors were doing construction work, error in permitting general contractor to testify that he had not received notice that ordinance prohibiting accumulations of building materials in streets was being violated by subcontractor was not prejudicial when jury was fully and correctly instructed on passenger's theory of case in that regard.

9. **Trial** ⚷412

In action by bus passenger for injuries sustained when she slipped on wet substance in street while walking from bus to curb at place where contractors were doing construction work, error in admitting testimony of general contractor that he had received no notice that city ordinance prohibiting accumulations of building materials in streets was being violated by subcontractor was waived when testimony to same general effect had been previously brought out on cross-examination of general contractor. West's Ann.Code Civ. Proc., § 2055.

10. **Appeal and Error** ⚷1052(5), 1056(4)

Where property owner's liability was purely derivative and he could not be held liable unless general contractor and subcontractors, who were doing construction work for him, were liable, plaintiff was not prejudiced by rulings on admission and exclusion of several items of evidence in reference to owner, when contractors were held to be not liable.

11. Appeal and Error ⚷1067
Trial ⚷260(8)

In action by bus passenger for injuries sustained when she fell after stepping on wet substance while walking from bus to curb at a place where contractors were performing construction work, failure of court to give proffered instruction that bus operator and one of contractors were not guilty of any negligence was not prejudicial in view of evidence and instruction on concurrent negligence.

12. Trial ⚷115(4)

No error resulted from re-reading testimony of certain witnesses to jury when portion read was agreed upon by attorneys for both parties and all testimony requested by complaining party was read to jury.

13. New Trial ⚷102(6)

Motion for new trial based on ground of newly discovered evidence consisting of document concerning statement given to investigator by witness was properly denied, when document had been given to plaintiff's attorney who thereafter found it in his papers, and no motion was made for continuance to search for document and no attempt was made to use copy of document.

◆

George Olshausen, San Francisco, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, Joseph W. Rogers, Jr., San Francisco, for respondent Benny D'Amico.

Alexander, Bacon & Mundhenk, and Herbert Chamberlin, San Francisco, for respondents Barsotti and Bernardini.

Boyd & Taylor, San Francisco, for respondent Arnaud.

PETERS, Presiding Justice.

Plaintiff alighted from a bus operated by the City and County of San Francisco, fell and was injured. She brought an action for damages, joining the City and County, and three sets of contractors who were working on a construction job near the scene of the accident. At the first trial plaintiff was nonsuited as to all defendants. On appeal, this court affirmed as to the City and County and as to one of the contractors, but reversed as to the other two contractors, one being the general contractor Barsotti and Bernardini, and the other being the plastering subcontractor, D'Amico. MacLean v. City & County of S. F., 127 Cal. App.2d 263, 273 P.2d 698. Before the second trial plaintiff joined as a new defendant Arnaud, the owner of the property on which the construction job was being performed. The case proceeded to trial before a jury against the owner and the two named contractors. The jury brought in a verdict in favor of all three defendants. From the judgment entered on this verdict plaintiff again appeals. Her main three contentions are that there were prejudicial errors in the instructions to the jury, in the admission and exclusion of evidence, and in the proceedings after the jury retired.

[1] Appellant first contends that the jury should not have been instructed at all on the issue of contributory negligence, and that even if general instructions on this issue were proper the standard of care applicable to her was erroneously defined. These two contentions are interwoven. The trial court, in the course of an unusually clear and extensive charge to the jury, gave an instruction, correct as to form, on contributory negligence. It also gave, of its own motion, the following instruction:

> "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in

such evidence or the person was negligently inattentive."

It is the contention of appellant that there was no evidence of her contributory negligence, and that, on the prior appeal, it was so held as a matter of law. On the prior appeal in discussing the propriety of the nonsuit as to the city, and in particular in discussing whether the city should be charged with knowledge of the condition then existing in the street, this court stated: "There was no evidence that the material on which plaintiff slipped was visible to either plaintiff or the driver * * *." (127 Cal.App.2d at page 270, 273 P.2d at page 703.) What was there said, of course, related to the evidence and issues then before the court, and was not said in reference to the issue of contributory negligence which was not then before the court. While the present record is somewhat similar to the prior one, and, in some respects, identical, it also differs in some material respects. The present record contains enough evidence to warrant the instruction on contributory negligence.

The general facts have been set forth in the prior opinion and need not be repeated in detail here. So far as the point under discussion is concerned, the record shows that appellant, a passenger on a municipal bus, about 8 p.m. on August 16, 1949 alighted from that bus at the corner of Scott and Chestnut Streets in San Francisco. The bus stop was then occupied by other vehicles so that appellant's bus stopped at an angle to the curb and about six to eight feet therefrom. Appellant alighted from the bus, carrying a suitcase and a handbag.

On both trials it was appellant's contention that she slipped in some wet material that was the residue from work being done nearby by respondent contractors for respondent owner. All the witnesses testified that about three feet from the curb and between the bus and the curb there was a pool of some semi-liquid substance, which was quite slimy and probably was refuse from the construction job, that is, wet cement, mortar, plaster, slag or wash. There is evidence that this material was washed down the street from the construction job.

There was evidence that this pool of wet material was noticeable if a person looked at it—in fact, appellant so testified. The witnesses described the illumination in the area as "dark," or "fair," "or just past dusk," or "darker than dusk, a little," or "fairly dark" or as "past dusk." There was evidence that the sun had set at 7:02 p.m. that night; that a neon sign at the corner furnished some illumination, and that the lights from the bus on which plaintiff was riding reflected from the back of a bus that was in the loading zone and, to some extent, illuminated the scene.

Appellant testified that, before alighting, she looked down the side street and saw that no bus was approaching from that direction; that she observed a bus and an automobile parked in the bus loading zone; and that the curb she desired to reach was in her "full line of vision." She also testified that, after alighting, she took a "quick stride," or a "good stride" toward the curb and then slipped and fell. Appellant and two witnesses testified that they did not see the pool until after the accident.

This evidence was sufficient to justify the instruction on contributory negligence. There is evidence that the substance that caused the fall was visible to the onlooker. Appellant was carrying a heavy suitcase and a handbag. This, together with her quick stride forward, and her possible failure to observe where she was walking, was sufficient to warrant the instruction.

In Washington v. City & County of S. F., 123 Cal.App.2d 235, 238, 266 P.2d 828, 830, the proper rule is stated as follows: "In considering the testimony with a view to determining whether, as a matter of law, there was sufficient evidence to justify the court in giving the instructions complained of, this testimony must be considered in a light most favorable to respondent, for in order to find that the giving of any certain instruction was not warranted by the evidence, the court must find that, as a matter of law, there is in the record not even slight or inconclusive evidence on the point covered by the instruction. In 24 Cal.Jur. p. 832, the rule is stated as follows: 'In order to warrant the giving of an instruction it is not necessary that the evidence upon an issue be clear and convincing, it being sufficient if there be slight or, at least, some evidence upon the issue. *Even though the evidence may not be sufficient to sustain the cause of action or defense to which an instruction applies, a reversal may not be had if the evidence on other defenses is sufficient to sustain the verdict.'* * * *

"And in 53 Am.Jur. p. 457: 'In determining whether there is evidence that will warrant an instruction, the court does not pass on the weight and sufficiency of the evidence. It is not error to submit an instruction covering a theory advanced by a party if there is any evidence on which to base it, although it may be slight and inconclusive, or opposed to the preponderance of the evidence.'"

Tested by this standard, there was sufficient evidence to justify the court in instructing on contributory negligence.

[2] But, says appellant, even if it was proper to instruct on contributory negligence the court by giving the "to look is to see" instruction above quoted applied an erroneous and prejudicial standard of care to her. Appellant seems to argue that the challenged instruction only applies to persons crossing railroad tracks during daylight hours and not to persons on city streets after dark, and claims that she was entitled to assume, as a matter of law, that the street was safe.

In arguing this point appellant erroneously assumes that the challenged instruction told the jury that her failure to see what was within sight, as a matter of law, constituted negligent inattention. The instruction says no such thing. It left the question to the jury. The jury, under the instruction and under the evidence, could have found, as a fact, that the wet substance was not in plain sight, or that even if it were, appellant was not negligently inattentive. If appellant desired a more detailed instruction on this phase of the case she should have offered it. This she did not do.

The cases cited by appellant do not support her contention on this issue. Thus, in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, the court was concerned with whether the evidence was such that it disproved, as a matter of law, plaintiff's evidence that he did stop, look and listen for oncoming trains. The court said that because it was dark, the train had no light and made no noise on its approach, to look did not necessarily mean plaintiff would have seen the train nor that his testimony that he listened and did not hear was necessarily untrue. Obviously, the case differs from the instant one where the evidence is capable of the interpretation that the substance causing the fall was plainly visible to one in the street, and where the jury found against appellant on this issue.

There are also a series of cases cited by appellant which contain language that one using a sidewalk may assume it to be a safe place. Thus, in Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 712, 103 P. 190, the defendant was found to have been negligent in a case where the plaintiff fell into a hole in the street dug by defendant. The court instructed that whether the signals and warnings put up by defendant, if any, should have been seen by plaintiff, and whether her failure to see them constituted contributory negligence, were questions of fact. On appeal the defendant objected that the challenged instruction failed to include possible carelessness or abstraction on the part of plaintiff. In response to this contention the court said: "Mere abstraction or lack of attention to the condition of the sidewalk by a pedestrian passing over it cannot be assigned as contributory negligence." (155 Cal. at page 722, 103 P. at page 195.)

To the same effect is Barry v. Terkildsen, 72 Cal. 254, 13 P. 657, where the plaintiff fell in a hole in the sidewalk. There was evidence that plaintiff was momentarily distracted and so did not notice the hole. The court stated (72 Cal. at page 256, 13 P. at page 658): "In our opinion, there is nothing in the point that respondent was guilty of contributory negligence. A sidewalk of a street in a city not near a crossing may be taken by one passing over it to be a safe and not a dangerous place. In this case the respondent had a right to presume that the sidewalk was in the same condition in which she had always found it; and the fact that her attention was momentarily attracted in another direction,—a thing of the most common occurrence to travelers along a street,—falls far short of that contributory negligence *which in law* defeats an action for damages." (Emphasis added.)

[3] All that these cases stand for is the proposition that momentary inattention does not, in a sidewalk or street case, constitute negligence as a matter of law. But, as already pointed out, in the present case, the question was simply presented to the jury as a factual one. This was proper.

A case which states the proper rule is Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55. There, the plaintiff, an elderly woman, fell when she stepped into a depression in the sidewalk in front of defendant's apartment house. Although the accident happened at noon on a clear day, she testified that she did not see the depression. The Supreme Court rejected the defendant's argument that this made the plaintiff guilty of contributory negligence *as a matter of law,* holding that the question was properly *one of fact.* The court stated (41 Cal.2d at page 424, 260 P.2d at page 59): "It is well settled that, in the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. [Citations, including the Perkins and Barry cases.] Even if a defect is one which might be visible to a person who is looking for such a condition, it does not follow that a pedestrian is guilty of negligence as a matter of law in failing to see and avoid it. [Citations.] *Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact.*" (Emphasis added.)

[4] Thus, while pedestrians making normal use of the sidewalk or streets have the right to assume that the area is safe, they can be guilty of contributory negligence if the jury finds that they looked but did not see what was plainly visible. That is all the challenged instruction told the jury. In the instant case, as already pointed out, the evidence was in conflict. Interpreted most strongly in favor of respondents, it supports the implied finding that plaintiff was contributively negligent in not seeing what was, under one version of the evidence, plainly visible.

There are many cases where the "to look is to see" instruction has been held to have been properly given in cases not involving railroad crossings and not involving conditions of good visibility. See Powell v. Bartness, 139 Cal.App.2d 394, 294 P.2d 150, and Hoagland v. Chargin, 134 Cal.App.2d 466, 286 P.2d 931, involving intersection collisions on sunny days; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 282 P.2d 148, involving a fall by a pedestrian after nightfall; Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 258 P.2d 1063, involving an accident during daylight; Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P.2d 706, where the instruction was specifically approved; LaBranch v. Scott, 82 Cal.App.2d 1, 185 P.2d 823, and Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486, involving accidents after dark; O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159, where the visibility was poor.

[5] Moreover, the instruction merely states an obvious fact. It has been held that even in a case where the instruction should not have been given, the giving of it could not have been prejudicial because the jury is told nothing it does not already know. Colbert v. Borland, 147 Cal.App.2d 704, 306 P.2d 53.

[6] Appellant next complains of the exclusion by the court of a police accident report. She offered in evidence an accident report filed by the investigating police. Upon respondents' hearsay objection the report was excluded. It is now argued that this report was admissible under the Uniform Business Records As Evidence Act. Code Civ.Proc., §§ 1953e to 1953g.

The excluded report reads as follows: "The above named injured woman slipped and fell after she had alighted from a Municipal Railway Bus that was unable to park in the Bus Zone as another unknown vehicle forced the Bus to double park. Number and other information on the Bus unknown.

"Upon our investigation we discovered that the woman had slipped on wet Mortar that apparently had been washed down from in front of 3204–Scott St. Construction work was being done at this location. We found that the Mortar had led from 3204–Scott St. to 3258A–Scott St. where the Mortar was very thick and wet. We were unable to find out any information about who the Contractor or person working at 3204–Scott St. was or the owner of the building.

"Fire department called by us, street washed down by the fire department to prevent another reoccurrence of this mishap."

There can be no doubt that, in a proper case, the business records exception applies to public documents as well as to private ones. Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569; Loper v. Morrison, 23 Cal. 2d 600, 145 P.2d 1. The question is, does this exception apply to police reports of accidents?

There are a substantial number of cases on this subject. It was the general rule before the adoption of the so-called Model Act, adopted in some states, or the Uniform Act, adopted in California, that such reports were not admissible, and it seems pretty well settled that the adoption of either of the two statutes mentioned did not change the rule.

The reason why such records are not admissible is stated as follows in McCormick on Evidence, p. 602, § 286: "The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observation of someone whose job it is to know the facts recorded. * * * But if the evidence in the particular case discloses that the record was not based upon the report of an informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reported to the recorder." Police accident reports are ordinarily based on the description of witnesses and others at the scene of the accident. Such informants, of course, have no business duty to render reports to the police.

The leading case on the subject, holding that under the Model Act such reports are inadmissible for the reasons stated above, is Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517. The Lutz case was cited with approval and followed, and such reports held not admissible, in Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 288 P.2d 989. See also McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 21 A.L.R.2d 1206; 48 Columbia L. Rev. 920; 144 A.L.R. 727.

[7] In the present case the excluded report does not disclose on its face whether it is based on the officer's own observations or upon the observations of third parties. If the latter, the above cases require its exclusion. If the report was based on the officer's personal observations its exclusion, even if erroneous, could not have been prejudicial because the officers who prepared it were available as witnesses and, in fact, testified at the trial, and the report was used to refresh their recollections. Their testimony adequately covered the contents of the report.

[8] Appellant also objects to a ruling of the trial court permitting one of the partners of the general contractor to testify that he had not received notice that

certain ordinances prohibiting accumulations of building materials in the streets were being violated by the subcontractors. This evidence should have been excluded. Plaintiff's theory of liability, so far as the general contractor was concerned, was that under the doctrine of *respondeat superior* the general contractor would be liable for the acts of the subcontractor in creation of a public nuisance in violation of the general contractor's non-delegable duty to maintain safe and unobstructed public ways, regardless of actual notice. This was so declared to be the law in the prior opinion (127 Cal.App.2d at page 268, 273 P.2d 698.)

[9] But this erroneous ruling could not have been prejudicial. The jury was fully and correctly instructed on appellant's theory of the case in this regard. (R.T. 695–697.) Moreover, appellant's counsel, under section 2055 of the Code of Civil Procedure, examined the general contractors, who were also performing the carpentry work, at length, as to whether they had supervised the subcontractors in the matter of dumping materials in the gutters and as to whether the general contractors had actual knowledge that wet materials were being dumped there. This testimony, first brought out by appellant, is to the same general effect as the testimony under consideration. This amounts to a waiver of the error. Jameson v. Tully, 178 Cal. 380, 173 P. 577. Thus, the erroneous ruling was not prejudicial.

[10] Appellant next complains of the admission and exclusion of several items of evidence relating to the claimed liability of the respondent property owner. The owner's liability, if any, under the facts, was admittedly purely derivative. If the general and subcontractor were not liable, the owner could not be liable. Since we have concluded that the judgment must be affirmed as to the contractors, no prejudice could be suffered by any rulings on the evidence in reference to the owner.

[11] Appellant also objects to the failure of the court to give her proffered instruction to the effect that the city and county and the brick subcontractor were, as a matter of law, not guilty of any negligence proximately contributing to the accident. On the prior appeal this court affirmed nonsuits as to the city and the brick subcontractor, thus holding that, as a matter of law, there was no evidence that they were negligent. Appellant asserts it was error not to give the instruction because, so it is claimed, one of respondents' theories was that appellant fell while on the bus steps, and, without the proffered instruction, the jury may well have found that liability for the accident rested with the city.

It does not appear that on this trial respondents seriously argued that appellant fell while on the bus steps. The only evidence bearing on the matter at all was testimony from the former trial read into the record on this trial for purposes of impeachment. In the testimony from the former trial there is no direct statement that appellant fell while on the bus steps. The same witness testified on the present trial that the fall occurred after appellant had taken two or three steps away from the bus. Thus, the basic premise of appellant's argument on this point is not borne out by the record.

It should also be pointed out that the jury was fully instructed on the doctrine of concurrent negligence, and were expressly instructed that if respondents were negligent they would be liable even though someone else was also negligent. Thus, even if the jury found the city negligent, which is most unlikely, such finding would not affect the liability of respondents. Thus, the failure to give the instruction was not prejudicial.

[12] Appellant next contends that the court committed prejudicial error in failing to have certain evidence re-read to the jury. After retiring, the jury requested a reading of the testimony of two witnesses—that of Miss Claymore and Mr. Schlichtmann. The jury also requested a review of certain instructions. The in-

structions were read as requested. As to the testimony, the reporter, in response to an inquiry from the court, stated that it would take about four hours to read all of the requested testimony. The court asked the foreman if the requested testimony could not be "pinpointed" so as to save the reading of all of it. The foreman replied: "The only part is what they saw at the scene of the accident, just at the particular moment that Mrs. MacLean fell, just at that particular time." The judge then stated that he would read to the jury the requested instructions, and that he and the reporter and the attorneys would then "sit down and agree on certain portions to be read." The instructions were then read, and the jury retired. Counsel and the court then apparently conferred on the portions of the testimony to be read, and the jury was brought back. The court told the jury that "we went over the attorneys' notes * * * in order to condense" the testimony. The reporter then read 21 pages of the testimony given by Miss Claymore (R.T. 713 to 734), and 9 pages of the testimony of Henry Schlichtmann (R.T. 734–743). The record then shows that "the Court inquired of the Foreman whether the reading of the testimony by the Reporter covered the request of the jurors, and the Foreman replied that it was sufficient."

Appellant now claims error in failing to read other portions of the witnesses' testimony. It is difficult to follow appellant's charge of error. The selection of the portions read was obviously a cooperative effort. Appellant made no objection to this procedure, nor does she claim that any testimony was not read that her counsel requested should be read. Moreover, practically every fact found in the omitted portion was covered by the portions read. Thus, there was no error.

[13] The last contention of appellant is that her new trial motion should have been granted on the ground of "newly discovered evidence." It is claimed that an important item of evidence, marked at the first trial for identification, was missing during the second trial and not rediscovered until after the jury had retired.

This claimed "newly discovered evidence" relates to the the question as to whether appellant fell on the bus steps or on the street. One of appellant's witnesses, Miss Claymore, gave a statement to an investigator that appellant had fallen in the street. This statement was used on the first trial, but appellant's counsel could not find it on the second trial. Appellant contends that Miss Claymore was impeached by respondents on this issue, that this amounted to an attack based on the claim of recent fabrication, and that for this reason the statement would have been admissible to rehabilitate the witness.

If it be assumed that the statement, if presented, would have been admissible, a point not entirely free from doubt, the record fails to demonstrate that appellant's counsel was not guilty of inexcusable neglect in failing to "discover" the document earlier. The clerk of the court averred that at the close of the first trial he handed appellant's counsel all documents marked for identification, including the statement in question. Appellant's counsel averred that he made a "diligent effort" to locate the document before trial by searching, without success, a box containing all of the exhibits from the first trial, and finally found the document in an envelope containing documents that, during the first trial, had been marked for identification. Counsel for respondents averred that appellant's search was not diligent, and one of the counsel averred that during the course of the trial he had seen the document in possession of counsel for appellant in the very place it was subsequently found. It is worthy of note that during the second trial appellant's counsel did not seek a continuance to search for the document, nor did he make any attempt to use a copy of the document, although copies were available. Thus, the trial court was amply justified in denying the motion on the ground that appellant had failed to support her burden of showing due diligence.

It should also be pointed out that the record shows that the redirect examination of Miss Claymore completely rehabilitated the witness on the issue involved, if the witness needed to be rehabilitated on this point. As already pointed out, the evidence was overwhelming that the accident happened in the street and not on the steps of the bus, and the respondents made no serious contention to the contrary. There was no abuse of discretion in denying the motion for a new trial.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

151 Cal.App.2d 333

Harry MARGOLIS, Ann Margolis, Petitioners,

v.

SUPERIOR COURT of the State of California, IN AND FOR The COUNTY OF SAN MATEO, Honorable Louis B. Demattels, Judge thereof, and United States Hoffman Machinery Corporation, a corporation, Respondents.

Civ. 17620.

District Court of Appeal, First District, Division 1, California.

May 28, 1957.

Rehearing Denied June 27, 1957.

See 313 P.2d 29.

Proceeding, for writ of mandamus, against the Superior Court in and for the County of San Mateo, Louis B. Dematteis, J., and another, to compel court to proceed with a trial. The District Court of Appeal, Fred B. Wood, J., held that where mortgagees under deed of trust brought conversion action against vendor of chattels installed on mortgaged realty which removed them when buyers-mortgagors failed to complete payment, ground that mortgagees acquired title to chattels when they were first affixed and when subsequently reinstalled, after removal, upon being conditionally sold by second sellers after assignees of second sellers instituted claim and delivery action against mortgagees, wherein court made findings adverse to mortgagees, though judgment had not become final, court trying mortgagees' action committed no abuse of discretion in continuing action pending outcome of assignees' action.

Writ denied.

1. Continuance 🔑10

Main question in determining propriety of granting continuance pending determination of another action wherein instant plaintiff was defendant and same property was involved was whether or not judgment therein, when it became final, would be determinative of one or more issues in action sought to be continued.

2. Continuance 🔑10

Where two actions involved same subject matter and plaintiffs in one were defendants in another, disparity of parties adversary did not necessarily preclude granting a continuance in the one action pending determination of the other.

3. Fixtures 🔑18(1)

Realty mortgagee's title to fixture attached when fixture was affixed to realty and could not be divested by wrongful removal or sale of the fixture. West's Ann. Code Civ.Proc., § 1743.

4. Parties 🔑53

Additional parties could not be brought in without permission of court. West's Ann.Code Civ.Proc., § 389.

5. Pleading 🔑147

No leave of court was required for defendants to file cross-complaint against plaintiff. West's Ann.Code Civ.Proc., § 442.

6. Continuance ⚷10

Where vendor of chattels installed on mortgaged realty removed them, and after assignees of second sellers of chattels instituted claim and delivery action against mortgagees, wherein court made findings adverse to mortgagees though judgment had not become final, mortgagees brought conversion action against vendor, court trying mortgagees' action committed no abuse of discretion in continuing action pending outcome of assignees' action.

◆

Dreyfus & McTernan, San Francisco, for petitioners.

Currie, Lebsack & Hannig, Redwood City, for respondent Hoffman Machinery Corp.

FRED B. WOOD, Justice.

Petitioners Harry and Ann Margolis seek a writ of mandate to require the superior court to proceed with the trial of an action wherein they are plaintiffs and U.S. Hoffman Machinery Corporation is defendant, an action for the conversion of certain dry cleaning equipment. The superior court has continued the trial of that action until the judgment becomes final in a claims and delivery action involving the very same equipment, an action wherein A. M. Grupp and Melvin A. Schiller, copartners, are plaintiffs and Margolis and wife are defendants, the Hoffman Corporation not being a party thereto. The judgment awarded this equipment to Grupp and Schiller but is not final because Margolis' appeal therefrom is still pending.

[1] The main question is whether or not this judgment if and when it becomes final without modification will be determinative of one or more of the issues in the action not yet tried. See Houghton v. Superior Court, 187 Cal. 661, 203 P. 765.

[2] The disparity of parties adversary to Margolis (Grupp and Schiller in one action; The Hoffman Corporation in the other) does not necessarily compel a negative answer. See Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892; 2 Witkin, California Procedure 1751, Trial, § 24; 3 Witkin, California Procedure 1926–1929 and 1956–1962, Judgment, §§ 44–45 and 68–70.

In the instant case, may it be said that one or more issues are common to both actions and that there is such a privity of interest between Grupp and Schiller and the Hoffman Corporation as would entitle the latter to invoke the Grupp and Schiller judgment as determinative of such issue or issues if and when the judgment becomes final?

Let us consider first, in their sequence, certain significant events that are not in dispute. In March, 1953, the Karps, owners of certain improved real estate, borrowed $6,000 of Margolis, giving as security a deed to the realty and a bill of sale for certain personalty (not including the equipment here involved). Later, Margolis reconveyed and the Karps gave Margolis a deed of trust and chattel mortgage to secure the loan.

In April, 1953, the equipment in question, which the Karps purchased from Hoffman, was installed in a building situate on the real property mentioned.

In February, 1954, Hoffman removed the equipment, Karps assertedly having failed to complete the purchase price.

In March, 1954, Eli Rosen bought the equipment from Hoffman and sold it to the Karps upon a conditional sales contract. The Karps installed the equipment upon the premises. Thereafter and prior to October 29, 1954, Rosen sold to Grupp and Schiller his interest in the equipment and in the contract of sale.

On September 1, 1954, Margolis bought the real property at a foreclosure sale conducted by the trustee, pursuant to the deed of trust given to secure the loan from Margolis to Karps.

The court among other things found that on several occasions between October 19, 1954, and February 10, 1955, the date of the filing of the complaint, Grupp and Schiller demanded and Margolis refused delivery of possession of the equipment; that Grupp and Schiller were entitled to possession on and after October 19, 1954; and that Margolis had no interest, ownership or right to the possession of the equipment.

Margolis' theory seems to be that the action not yet tried involves a transaction quite separate and distinct from and independant of the transaction involved in the action which has gone to judgment. In effect, he says that the removal by Hoffman in February, 1954, was a tortious interference with Margolis' security interest in the realty (the equipment having been so installed as to be a part of the realty); that Margolis has chosen to waive his right to follow that property, by electing to sue Hoffman for the value of it. He then argues, in effect, that the repurchase and reinstallation by Karps was a new and separate transaction, as much so as if Harps had bought other equipment (not the Hoffman installed and removed equipment) from some other manufacturer or distributor (not Hoffman). His argument concludes with the claim that the judgment in question decides issues peculiar to the second transaction; especially, that it is not determinative of the status of the equipment as installed in 1953 and latter removed by Hoffman. This line of reasoning, if correct, would seem to entitle Margolis to the writ requested.

[3] Counsel for Hoffman say that not only is this the same equipment, with Margolis' title based upon the same security instruments in each case, but that the equipment was installed in identical fashion each time and Rosen's title (likewise Grupp and Schiller's title) stems from Hoffman, thus furnishing the necessary privity or tie-in between the two transactions. Implied, we think, is the claim that in the action which went to judgment Margolis was asserting and trying title to this equipment predicated not only upon its having become a part of the realty when reinstalled (because of the manner of installation) but also upon the title acquired by Margolis when it was first affixed. If it became a part of the realty when first affixed and Margolis' interest attached thereto, Margolis would not lose title upon its wrongful removal by Hoffman nor could Hoffman defeat that title by "selling" to Rosen, nor Rosen by "selling" to Karp and to Grupp and Schiller. Title would continue in Margolis. Civ.Code, § 1743; Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605; Woodsend v. Chatom, 191 Cal. 72, 79, 214 P. 965; Barthelmess v. Cavalier, 2 Cal.App.2d 477, 38 P.2d 484; 22 Cal.Jur. 908, Sales § 6; 46 Am.Jur. 620, 622, Sales, §§ 458, 459.

If Margolis tried his title to this equipment he should have presented both sources of his asserted title: (1) the title he acquired when the equipment was first installed, a title not defeasible by wrongful removal by Hoffman, rendering Hoffman incapable of passing title to or vesting it in Rosen, Karp or Grupp and Schiller (unless Margolis chose to ratify the taking and hold Hoffman for the value of the property taken), and (2) the title Margolis claims he acquired when Karp and Rosen reinstalled the equipment. If he presented one source of title and not the other he may have split his cause of action.

Our examination of the record upon the appeal from the judgment indicates that Margolis tendered both sources of title for consideration and decision. We gather this from the pleadings, the findings and the briefs in that action.

In the first affirmative defense to their answer to the Grupp and Schiller complaint, Margolis and wife alleged that they "are the legal owners of all of the property * * [the equipment in question] * * * and were such at all times material to this action." (These allegations the court found untrue.) Attached to the answer physically and as a part of the same document the defendants Margolis pleaded a cross-complaint in three counts. Among the allegations are these: This equipment was purchased by Karp from Hoffman in 1952 and placed on the realty in April, 1953, remained there until about February 18, 1954, when it was removed by Hoffman with the knowledge and participation of Karp and Rosen. It was returned and reinstalled in

March, 1954. Grupp and Schiller derived their claim to the equipment from Rosen with knowledge of the foregoing facts. They stand in Rosen's shoes. Some time during 1953 and 1954 the cross-defendants entered into a conspiracy which still continues to deny, deprive, and exclude the cross-complainants from their legal rights in and to the ownership, possession and enjoyment of the realty and the equipment attached thereto. Hoffman removed the equipment in February, 1954, without the knowledge and consent of Margolis. Rosen purchased from Hoffman and sold to Karp in March, 1954, and the equipment was reinstalled that month. The acts of Karp, Rosen and Hoffman "in the initial installation, later removal, sale, and reinstallation * * * constituted a conversion thereof to cross-complainant's damage." Cross-complainants Margolis prayed for judgment in their favor and for a declaration that Grupp and Schiller have no right, title or interest in or to the equipment.

[4, 5] That, it would clearly seem, was a tendering of the issue of title to the equipment from the very instant of the first installation, not limited to the second installation. True, there is nothing in the clerk's transcript showing that permission was granted to bring in any new parties. Neither Rosen, nor Hoffman was an original party. Although such permission would be necessary to bring them in as new parties (Code Civ.Proc., § 389; Brady v. Kobey, 27 Cal.App.2d 505, 81 P.2d 263; Supermatic Products Corp. v. Hegberg, 131 Cal.App.2d 168, 280 P.2d 152) we find nothing in the clerk's transcript to indicate that the cross-complaint was stricken and nothing to indicate but that it was treated as a valid and proper cross-complaint insofar as it pertained to the plaintiffs and the other defendants, such as the Karps, who were already parties to the action. The applicable statute says that whenever the defendant seeks affirmative relief "against any party * * * affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." Code Civ.Proc. § 442. By the very terms of this statute no permission of court was required to file this cross-complaint as against plaintiffs Grupp and Schiller.

Moreover, prior to trial and with permission of the court, Margolis did bring the administrators of the Estate of Rosen into the action by cross-complaint. In this cross-complaint Margolis alleged among other things that this equipment was affixed to the realty some 19 months prior to the time [late October, 1954] of any alleged interest of Grupp and Schiller in the equipment. This obviously referred to the original installation made by Hoffman and Karp in April, 1953. Rosen's administrators as one of their defenses to this cross-complaint alleged that Margolis and wife "at no time" owned this equipment.

[6] Accordingly, it is a fair inference that the court was determining the issue of title with reference to the first installation as well as the second when it found (1) the defendants Margolis are not and were not the legal owners of this equipment; (2) in executing security documents the parties thereto intended to treat the personal property on the premises as separate from the real property, even though some of it was attached to the realty by various pipes, electrical and other connections and some items were bolted or screwed to the realty; (3) at the time of the making of the loan by Margolis this equipment was not on the premises and neither Margolis nor the Karps intended that such equipment was to become a part of the security for the loan, nor did Margolis rely upon it as security for the loan; and (4) said equipment "did not become a fixture."

Persuasive of this view is the statement of the case which appears in the fore part of the opening brief of the defendant-appellants Margolis upon their appeal from the judgment. They narrate the history of this transaction from beginning to end, including the loan from Margolis to Karps, the purchase of the equipment from Hoffman and its first installation in 1953, describing in detail the method of installation, its removal by Hoffman some ten months later because of the owner's delinquency in paying for the equipment, the purchase by Rosen, the resale to Karps and the reinstallation. Significantly the appellants say "in April, 1954, the machinery was reinstalled in the same manner as previously described * * *."

Accordingly, if the judgment becomes final as rendered, it well may be determinative, by way of collateral estoppel, of some of the issues in the case not yet tried. Also, until the appeal is finally determined the difficulty of fixing the amount of the damages seems insuperable. Should appellants prevail upon their appeal and recover the property, their damages, if any, from Hoffman would be quite different from what they otherwise might be.

Upon the basis of the record before us we can not say that it was an abuse of discretion to postpone the trial pending the outcome of the appeal from the judgment. We are mindful, too, of the fact that the judge who ordered the postponement is the judge who presided at the trial and rendered the judgment and therefore well may be cognizant of significant factors that the bare record before us may not fully disclose.

The alternative writ is discharged and the peremptory writ denied.

PETERS, P. J., and BRAY, J., concur.

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151 Cal.App.2d 250

The PEOPLE of the State of California, Plaintiff-Respondent,

v.

Otis WALKER, Defendant-Appellant.

Cr. 3295.

District Court of Appeal,
First Appellate District,
Division 1, California.
May 24, 1957.

Defendant was convicted of petty theft. From judgment rendered by the Superior Court, County of Alameda, Chris B. Fox, J., defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence sustained conviction.

Affirmed.

1. Larceny 🔑65

Evidence sustained conviction for petty theft. West's Ann.Pen.Code, § 484.

2. Criminal Law 🔑1159(4)

Credibility of witnesses was for trial court and could not be properly raised on appeal.

John S. Hartwell, Robert J. Wiles, Hayward, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with petty theft and with two prior petty theft convictions. He admitted the priors, and pleaded not guilty to the main charge. He was found guilty as charged. He appeals from the judgment of conviction and from the order denying his motion for a new trial, contending that the evidence does not sustain the verdict.

[1] The evidence in support of the verdict is substantial. Charles McNulty testified that he was standing just inside a restaurant at 12th and Broadway in Oakland, at about 1:45 a. m. on April 30, 1956, preparing to put four ten-dollars bills into his pocket when a man walked by, grabbed the money, and ran. The thief, with McNulty chasing him, ran down Broadway to 11th and turned east towards Franklin Street. On Franklin the thief turned south until he reached 9th Street. There a sailor took up the chase. On Franklin Street a cab driver picked up McNulty and drove him

down 9th and through a parking lot to 8th Street. There they found defendant in the hands of the sailor.

McNulty admitted that he did not see the face of the man who grabbed his money, but the man was a negro dressed approximately as was defendant, and was of the same size and weight. The thief was momentarily out of McNulty's sight when he turned into 11th Street, again when he turned into Franklin, and again when he turned into 9th Street, but there were few people on the street, and each time McNulty turned the corners there was but one man running away from him.

The sailor was about at 9th and Franklin when he saw McNulty chasing the defendant down Franklin. He saw defendant turn into 9th Street and he took up the chase and finally cornered the defendant on 8th Street, never losing sight of defendant until he caught him.

The taxi driver was parked at 11th and Broadway when he saw McNulty chasing a man down Broadway. He took up the chase and saw the man in front turn down Franklin. He drove his cab the wrong way on Franklin, hoping to catch the attention of an officer. He picked up McNulty on Franklin near 9th and chased defendant down 9th and across the parking lot to 8th Street where the sailor had captured the defendant. He then used his radio transmitter to call the police.

McNulty testified that when he caught up to the sailor and defendant he demanded the return of his money; that defendant at first denied any knowledge of the money, but finally took four ten-dollar bills from his mouth and gave them to McNulty. This was corroborated, in part, by the sailor, who testified that he saw defendant remove some paper money from his mouth and give it to McNulty, and recognized at least one was a ten-dollar bill.

The sailor testified that after the defendant had given the money to McNulty he said: "I give the guy back his money. Let me go before the law gets here, * * before the cops get here."

Appellant argues that there was insufficient evidence of identification. The facts speak for themselves. The evidence in this respect is not only substantial, but practically conclusive. The argument that there is no evidence that he took any money from McNulty is equally without merit. McNulty's and the sailor's testimony is ample on this issue.

[2] The major argument for a reversal consists of an attack on the credibility of the prosecution's witnesses. It is pointed out that prior to the claimed theft McNulty had been to a public dance hall where he had admittedly consumed six to eight beers. He also admitted that he had four felony convictions and was out on probation at the time of the claimed theft. These facts, as well as the attacks made on the evidence of the sailor and the taxi driver, were matters relating to credibility and were for the trial court, and may not properly be raised on appeal. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911; People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Pierson, —— Cal.App.2d ——, 307 P.2d 1026; People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613; People v. Kessler, 62 Cal.App.2d 817, 145 P.2d 656.

In the instant case all the elements of theft as defined by Penal Code, § 484 were established. The fact that defendant denied the charge and testified to facts contrary to those testified to by the prosecution witnesses merely created a conflict which was properly determined by the trial court.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

151 Cal.App.2d 126

Angela M. DE SPIRITO, Norma L. Clayton and Lynne Carter, Plaintiffs and Respondents,

v.

Drew ANDREWS, Gerard Sharkey, Lucas G. Politis, Jr., and S. Lee Vavuris, Defendants and Appellants.

No. 17162.

District Court of Appeal, First District, Division 1, California.

May 20, 1957.

Action by night club purchasers against the vendors to rescind the contract of purchase because of vendors' alleged fraudulent misrepresentation and concealment of material facts. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment for purchasers, and vendors appealed. The District Court of Appeal, Fred B. Wood, J., held that proof of vendors' misrepresentations and concealments concerning fitness of the premises for use as a night club did not vary terms of contracts or amounts to an admission of evidence of terms of the agreement other than the contents of the writing, in view of reference in the written contract to the restaurant and bar business involved as a designated club at stated location.

Judgment affirmed.

1. Fraud 🔑27

Fact that night club vendors were actually operating the club and represented that purchasers' professional entertainer would be a success at the club furnished a basis for an inference that vendors impliedly represented that the club premises were fit for legal occupancy and use as a night club and constituted actual fraud and deceit, in view of fact that vendors lacked requisite municipal permit for the night club. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

2. Fraud 🔑27

Where, upon receiving notice of lack of night club license, club purchasers inquired of vendors and were informed that the lack was due to absence of fire escape and were assured that landlord was going to build fire escape and that then the license would be issued, such representation constituted a specific misrepresentation as to issuance of the license and a concealment of the other reasons for lack of the license. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

3. Fraud 🔑22(1)

Mere fact that night club purchasers were operators of another night club did not impose upon them a duty not to rely upon night club vendors in regard to vendors' misrepresentations concerning reason for lack of night club license nor duty to make an independent investigation of their own. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

4. Fraud 🔑17

Generally, vendor, who is not in a confidential relation to the purchaser, is not under duty to make full disclosure concerning the object to be sold, but, if vendor undertakes to do so, he is bound not only to tell the truth but to refrain from suppressing or concealing facts which are within his knowledge and which materially qualify those stated. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

5. Vendor and Purchaser 🔑33

Night club purchasers were privileged to assume that vendors had complied with the law in securing building permits, if any were required, and in conforming to the building code in regard to the night club. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

6. Appeal and Error 🔑989, 1010(1)

Function of appellate tribunal begins and ends with determination of whether there is any substantial evidence which will support findings of the trier of fact, and, if, in action for fraud, there be substantial evidence to support the findings with respect to any one material representation or concealment, the judgment must be affirmed. West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

7. Evidence ⟹434(11)

In action by night club purchasers against the vendors to rescind contract of purchase because of alleged fraudulent misrepresentation and concealment of material facts, proof of vendors' misrepresentations and concealments concerning fitness of the premises for use as a night club did not vary terms of contracts or amount to an admission of evidence of terms of the agreement other than contents of the writing in view of reference in the written contract to the restaurant and bar business involved as a designated club at stated location. West's Ann.Code Civ.Proc., § 1856; West's Ann.Civ.Code, §§ 1572, subds. 1, 3, 1710, subds. 1, 3.

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William E. Ferriter, San Francisco, for appellants.

Charles Bagby, John F. Foley, San Francisco, for respondent.

FRED B. WOOD, Justice.

In this action to rescind a contract for the purchase of a certain business because of alleged fraudulent misrepresentation and concealment of material facts, the court found for the plaintiff-purchasers. The defendant-sellers have appealed. In support of their appeal the defendants urge insufficient evidence to support the findings of fraud, and violation of the parol evidence rule in admitting evidence of fraud.

Defendants owned the "181 Club" in San Francisco at which they served food and alcoholic beverages and conducted theatrical performances for the entertainment of patrons. They had the appropriate state license for such an establishment but lacked the requisite municipal permit. Their application for the latter was pending, but not acted upon for several reasons: They had not yet supplied the required drawings; the electrical installations did not meet municipal requirements; curtains and hangings had not been certified as flameproof; a sprinkler system had yet to be installed; and the means of egress were inappropriate because the stairs outside the fire door were on property belonging to or under the control of others.

With knowledge of these facts, defendants in June, 1954, visited plaintiffs at a similar establishment the latter were then operating, and discussed the sale of the 181 Club. First, defendant Andrews came and told plaintiff De Spirito he thought that one Carter (a professional entertainer in plaintiffs' employ) would make a success of the 181 Club with his following. Later, the same evening, Andrews returned with defendant Sharkey and repeated that statement, this time to both plaintiffs and Carter. Plaintiffs then agreed to meet the defendants next day at the 181 Club and look it over. They did so the next afternoon and found a stage with tables tiered and the bar so shaped that one could see the stage from any table and from any position along the bar. The defendants also showed them the kitchen, the rest rooms, storerooms, dressing rooms and office and how the lights and fans operated. That night or the next night plaintiffs returned to the 181 Club to see the floor show. They found it in progress and discussed the possibilities for Mr. Carter and how they could stage his show there. They did not inquire of the defendants whether the operations there complied with the law in the sense of having a permit to operate a night club, "because [said plaintiff De Spirito] running a night club myself, I just assumed and took for granted they had all permits and requirements of the law to run an establishment of this sort."

On July 2, 1954, plaintiffs and defendants entered into a buy and sell agreement which described the consideration as "the assumption by the Buyers of all outstanding obligations existing on said business or existing against either or both of the Sellers as a result of the operation of said business, and which said obligations are hereby represented by the Sellers not to exceed the sum of $17,100.00" The sale was conditioned on a composition of creditors. Possession was to be delivered on the same day, "subject to the State Board of Equalization approving the transfer of the liquor license to Buyers and the landlord consenting to the transfer or assignment of the existing lease on said premises."

On July 18 or 19, 1954, an inspector from the municipal Board of Health informed plaintiff Clayton she had to have a night club permit.[1] On July 21, there was a meeting at the Board of Trade at which plaintiffs learned that the obligations of defendants were in excess of $17,100.00.

On July 23, when asked about the lack of a night club permit, defendants assured Clayton that the difficulty was due only to the lack of a fire escape and the permit would be issued as soon as that was done. The same day, after this assurance the plaintiffs and defendants entered into a supplemental agreement. This agreement provided that the full purchase price was $17,100 for the premises "free and clear of all liens and encumbrances and including stock in trade, fixtures, equipment, on sale general liquor license, goodwill, signs, and everything else appurtenant to and used in the operation of said business but not including two certain National Cash Registers and a certain ice manufacturing machine * * *" The buyers agreed to enter into a limited partnership to secure the unpaid balance on a promissory note due Lucas G. Politis, Jr. The sum of $4,000 was deposited in escrow and the balance of $13,100 was to be evidenced by a promissory note, payable at the rate of $500 or more per month.

The fire escape was constructed. It was disapproved. The night club permit was not granted. The company that had made an electrical installation threatened to remove the installation if its bill were not paid. Clayton quit adding the bills that were coming in when they totalled $27,000. There was a chattel mortgage on the fixtures to the former owners. Sharkey and Andrews were without means. No composition of creditors was entered into The plaintiffs did not get a transfer of the liquor license to them. During the first week in September the police stopped the floor show. In the latter part of September, the plaintiffs demanded rescission and a return of the money that was in escrow. Mr. Politis asked them to keep it open a little longer because he had a buyer from Reno. They did so but finally closed during the first week in November. A written notice of rescission was given to the defendants on November 19, 1954.

1. As To Misrepresentation and Concealment

[1] The fact that defendants were actually operating a night club and represented that plaintiffs' professional entertainer would be a success at the new location, furnished a basis for an inference that the defendants impliedly represented that the premises were fit for legal occupancy and use as a night club.

This meets the test for "actual fraud" prescribed by Civil Code, section 1572 and for "deceit" by section 1710, particularly subdivisions 1 and 3 of each section. It has been applied, for example, in such cases as Curran v. Heslop, 115 Cal.App.2d 476, 252 P.2d 378, involving nondisclosure of nonconforming building alterations that had been made without municipal permit; and Milmoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273, and Unger v. Campau, 142 Cal.App.2d 722, 298 P.2d 891, involving similar concealments.

[2] Then, upon receiving notice of the lack of a night club license plaintiffs inquired of the defendants and were informed that it was due only to the lack of a fire escape and were assured that the landlord was going to build a fire escape and that as soon as that was done the permit would be issued. That was a specific misrepre-

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[1] There is evidence that such an establishment as that here described is commonly known as a "night club."

sentation as to the issuance of the permit in such event and concealment of the other reasons for lack of a license.

[3] Defendants suggest that plaintiffs had no right to rely upon such representations and concealments. We see no sufficient basis in the record for any such contention. The mere fact that plaintiffs were themselves night club operators did not impose upon them a duty not to rely upon defendants. That did not of itself require them to make an independent investigation of their own in respect to these matters.

[4, 5] "It is a general rule that a vendor not in a confidential relation to the buyer is not under a duty to make full disclosure concerning the object which he would sell. However, it is a universally recognized exception that if he undertakes to do so he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. If he speaks at all he must make a complete and fair disclosure. Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7; Macco Construction Co. v. Fickert, 76 Cal.App.2d 295, 299, 172 P.2d 951; Dyke v. Zaiser, 80 Cal.App.2d 639, 652, 182 P.2d 344; Boas v. Bank of America, 51 Cal.App.2d 592, 597, 125 P.2d 620. Certainly respondents were privileged to assume that appellants had complied with the law in securing building permits, if any were required, and in conforming with the building codes. Ehlers v. Bihn, 71 Cal.App. 479, 487, 235 P. 673; A. E. Bell Corp. v. Bell View Oil Syndicate, 24 Cal.App.2d 587, 611–612, 76 P.2d 167." Milmoe v. Dixon, supra, 101 Cal.App.2d 257, 260–261, 225 P.2d 273, 275. See also Gillespie v. Ormsby, 126 Cal.App.2d 513, 527–528, 272 P.2d 949.

Nor is there any basis for an inference that the failure to issue the permit was due to any personal disqualification of the plaintiffs. The ordinance (§§ 460–466, Chapter V, San Francisco Mun.Code), had solely to do with the condition of the premises "for the safety of the patrons and employees and other persons frequenting said establishment." (§ 465.) To that end, it required compliance with applicable regulations administered by such municipal agencies as the Department of Electricity, the Bureau of Building Inspection and the Bureau of Fire Prevention and Public Safety.

Nor were these representations and concealments of the nature of mere matters of opinion honestly entertained with a reasonable basis for entertaining them. They pertained to the physical condition of the premises and the fitness thereof for a particular use, with knowledge of the elements of unfitness.

[6] We are dealing here with questions of fact. "The function of the appellate tribunal begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of the trier of fact. Further, in the type of case with which we are here concerned, if there be substantial evidence to support the findings with respect to any one material representation or concealment, * * * the judgment must be affirmed." Kuhn v. Gottfried, 103 Cal.App.2d 80, 84, 229 P.2d 137, 140. See also Curran v. Heslop, supra, 115 Cal.App.2d 476, 481, 252 P.2d 378.

2. As To The Parol Evidence Rule

Defendants contend that the asserted misrepresentations and concealments concerning the fitness of the premises for use as a night club were made during the negotiation stage, were not included in the contract later written, would vary the terms of that contract if given credence, and therefore were not and are not available for any purpose.

Specifically, they say this contract by its very terms was for the sale of a "restaurant and bar [or tavern]," not a "night club."

The contract did not describe its subject matter so narrowly as that. True, it did not say "night club" but it did in the first paragraph of its recitals refer to defendants and the business in these terms: "Sellers are the owners and operators of a certain restaurant and bar business, commonly known and designated as the '181 Club' and located at 181 Eddy Street, San Francisco, California, and which said premises is licensed by the State Board of Equalization and there is issued to said premises an on sale general liquor license." Here we have a description of a "business" by reference to its name (181 Club) and location (181 Eddy Street), a business which the sellers are operating under that name and at that location. This seems like an invitation to go and take a look at this business in operation, for a more detailed description of it, perhaps indicating an invitation not to limit it narrowly to a "restaurant and bar" business even though the quoted words are used. Significant, also, may be the fact that we are referred to a "certain" restaurant and bar business, a possible additional suggestion that the words "restaurant and bar" were used merely to identify, not to limit or narrowly define, the business conducted under the indicated name at the address specified.

Then, in the body of the contract, sellers agree to sell to the buyers "all of their right, title and interest in and to those certain premises located at No. 181 Eddy Street, San Francisco, California, and which premises are more particularly an on sale general licensed premises, restaurant and tavern and is commonly designated as the '181 Club', including stock in trade, furniture, fixtures, goodwill, lease, on sale general liquor license and everything else appurtenant to and used in the operation of said business."

Here, again, we seem to find expressed the concept of certain premises and a business conducted thereat. The inclusion of "goodwill" and "everything else appurtenant to and used in the operation of said business," was not narrowly limiting in character. Also, the state on-sale liquor license mentioned was adequate for operation as a night club; no additional state license was needed.

[7] Accordingly, proof of defendants' misrepresentations and concealments concerning the fitness of the premises at 181 Eddy Street for use and occupancy as a night club did not vary the terms of the contract, did not amount to the admission of "evidence of the terms of the agreement other than the contents of the writing" as those words are used in section 1856 of the Code of Civil Procedure, especially in view of the provisions of that statute which declare: "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud." See Chastain v. Belmont, 43 Cal.2d 45, 51–52, 271 P.2d 498; Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 524–525, 297 P.2d 428; Pacific I. Co. v. California, etc., Ltd., 29 Cal.App.2d 260, 271–273, 84 P.2d 313.

We conclude that the judgment must be affirmed. It becomes unnecessary to consider other points discussed by the parties.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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151 Cal.App.2d 102

Jacob A. JESSUP, Petitioner,

v.

SUPERIOR COURT IN AND FOR The COUNTY OF SANTA CLARA and the Honorable Byrl S. Salsman, Respondents, Earnest Sanders, Real Party in Interest.

No. 17644.

District Court of Appeal, First District, Division 1, California.

May 17, 1957.

Hearing Denied July 12, 1957.

Petition for writ of prohibition, mandate, or other appropriate writ brought by chief of department of public safety, who had been found in contempt of court order requiring him to permit father of deceased child to inspect records obtained by department in connection with investigation of drowning of child in public swimming pool. The District Court of Appeal, Bray, J., held that where a dominant cause of investigation was preparation of defense of city attorney against possible litigation, father was not entitled to inspect reports, even though such reports were used in connection with accident prevention.

Writ issued.

1. Prohibition 🔑3(3)

Order of Superior Court issuing writ of mandate to compel chief of department of public safety of city to permit inspection of records of department was not appealable, and prohibition was proper form of remedy to be sought.

2. Records 🔑14

Reports and records of investigation, by department of public safety and department of parks and recreation of municipality, in connection with drowning of child in municipal swimming pool were "other matters" within statute providing that public records and other matters in office of any officer, except as otherwise provided, are open to inspection by any citizen. West's Ann.Gov.Code, § 1227.

See publication Words and Phrases, for other judicial constructions and definitions of "Other Matters".

3. Witnesses 🔑201(1)

Investigation reports made for use of attorneys in defense of possible litigation are "communications" within statute providing that an attorney cannot, without consent of his client, be examined as to any communication made by client to him. West's Ann.Code Civ.Proc., § 1881, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Communications".

4. Witnesses 🔑216

Fact that reports of investigations of accidents involving personal injuries or deaths, by department of public safety and department of parks and recreation could be and were used for accident prevention purposes in addition to their use in defense of possible litigation did not take away from their confidential aspect while they were being held for defense purposes and reports were privileged until possibility of litigation had ceased. West's Ann.Code Civ.Proc., § 1881, subd. 2.

5. Witnesses 🔑216

Communications are made to a public officer in official confidence when investigation is of such a type that disclosure of investigation would cause public interest to suffer, and public officer cannot be examined as to such communications. West's Ann.Code Civ.Proc., § 1881, subd. 5.

6. Witnesses 🔑216

Fact that investigations of department of public safety of city and department of parks and recreation into death of child in municipal swimming pool were routine did not destroy privilege of reports of such investigations. West's Ann.Code Civ.Proc., § 1881, subd. 5.

7. Witnesses 🔑216

In proceeding for writ of prohibition, mandate, or other appropriate writ brought by department of public safety chief, who had been found in contempt of court order requiring him to permit father of deceased child to inspect records obtained by department in connection with death of child in municipal swimming pool, evidence established that dominant purpose of investigation was preparation of defense of city attorney against possible litigation. West's Ann.Code Civ.Proc., § 1881, subd. 2.

8. Witnesses 🔑201(1), 205

Privilege of communication between attorney and client attaches where communication is made in confidence pursuant to client-attorney relationship, with respect to particular matter, and there is no privilege in communication which is not made to, or for further communication to an attorney, although the communication might have some connection with possible liability in future, such as reports submitted in regular course of business for study in accident prevention, nor does privilege attach to communication not intended to be of confidential nature. West's Ann.Code Civ. Proc., §§ 1881, subds. 2, 5; 1892.

9. Records ⚷14

Where dominant cause of investigation of department of public safety and department of parks and recreation in connection with drowning of child in municipal swimming pool was preparation of defense of city attorney against possible litigation, father of child was not entitled to inspect reports of such investigation for use in contemplated action against city, even though such reports were often used in connection with accident prevention. West's Ann.Code Civ.Proc., §§ 1881, subds. 2, 5, 1892; West's Ann.Gov.Code, §§ 1001, 1227.

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Campbell, Custer, Warburton & Britton, San Jose, for petitioner.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for respondent (real party in interest).

BRAY, Justice.

[1] The Superior Court of Santa Clara County issued a writ of mandate to compel petitioner, who is the Chief of the Department of Public Safety of the city of Sunnyvale, to permit Earnest Sanders (the real party in interest) to inspect certain records. Petitioner declined to do so. Thereafter petitioner was found in contempt of court for failing to comply with the court's order. Sentencing, however, was deferred until after the determination of this "Petition for Writ of Prohibition, Mandate, or Other Appropriate Writ." [1, 2]

Question Presented.

Are reports of investigations of accidents involving personal injuries or deaths, and possible municipal liability, of the Department of Public Safety and of the Department of Parks and Recreation of a municipality, privileged? Corollary to the question is the following: As to those reports, does section 1881, subdivisions 2 and 5, Code of Civil Procedure (attorney and client privilege, and confidential communications to a public officer) control over section 1892, Code of Civil Procedure (right to inspect public writings), and section 1227, Government Code (public records open for inspection)?

Facts.

The city of Sunnyvale operates and maintains a swimming pool. The 8-year-old son of Sanders was drowned therein. Sanders desires to present to the city a claim for his death. He demanded of Chief Jessup and of Director Menagh the records and reports made by the agents of each department in the course of their investigation of the drowning. His demand was denied. He claims that therefore he is unable to determine whether he has a meritorious claim against the city.

At the hearing, Chief Jessup testified that as a matter of routine of his department an investigation is made by the officer of the department in every accident in the city involving the death of a human being. The records and reports of such accidents are kept indefinitely in the department. Such investigation was made of the drowning of the Sanders boy. It included the questioning of a number of people who are not employed by the city as well as of city employees. His department is interested in the prevention of accidents involving human injury and death. There seemed to be some confusion in the chief's testimony as he was talking generally about investigations of all serious accidents in the city, including traffic accidents and other types in which the city itself would not be involved. The reports in this matter were delivered either to the city manager or the city attorney. When an accident occurs involving city property or employees the investigation is made for the purpose of advising the city attorney or other defense attorneys employed by the city, for use as a defense to a future law suit.

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[1] In the superior court proceeding Frank S. Menagh, as Director of the Department of Public Safety, was a respondent. As he had resigned as such director, the proceeding against him was abandoned.

[2] As the order of the superior court is not appealable, prohibition is the proper form of remedy to be sought. Holm v. Superior Court, 42 Cal.2d 500, 505, 267 P.2d 1025, 268 P.2d 722.

Director Menagh testified that in the event of the death of a human being in any facility under his department's control (the swimming pool was) reports are made to him and go into the files of his office. On serious accidents the reports are turned over to the city manager. In this matter the City manager requested them. The director is interested in seeing that the facilities are operated in a safe manner and when anything goes wrong the director wants to know about it. If the reports indicate something which caused the accident needs to be corrected, the director will take the action necessary to make the correction. The director is primarily concerned with the safe and efficient operation of his department. One of the purposes of making the investigation is to insure safety in the future; another purpose is to receive all the facts and information of the accident and turn those facts over to the city manager.

The city manager testified that both Jessup and Menagh and their departments are under his supervision; that one of his functions is to issue general orders of policy concerning accidents that might involve the city. The department head concerned with a particular accident that may involve the city's insurance carrier as a matter of standard practice is to report his special investigation to the city manager. In the past these reports were turned over by the city manager to the attorney for the city's insurance carrier, but now, as the city attorney is a full time employee, they are turned over to him. The purpose of these reports is to protect the city from liability and to enable the city to get more favorable bids on municipal liability insurance. Probably failure to make these investigations would make insurance difficult to get. One of the purposes in gathering the material in the reports is for defense of possible future litigation. The Sanders reports were reviewed by the city manager and then immediately turned over to the city attorney upon receipt. One of the reasons for the reports is to determine methods by which the recurrence of similar accidents can be prevented. The welfare of the people of Sunnyvale is concerned with both reasons for the report. The primary purpose is for use in possible litigation. There are records of the Public Safety Department concerning this accident which are open to the public and which would disclose any possible cause of the accident. The reason the investigation is made by the members of the departments is that the city attorney does not have any staff for investigative purposes. There is an altogether different procedure for handling safety than these special investigation reports. These reports would not be available to the safety council staff conference, which considers any matters which might have caused the drowning. The report would not be available to the Public Safety Department which created it. It has an official report which is open to the public. That department makes two separate investigations, one for their official report and one for a special report to the city manager.

Chief Jessup testified that he did not know that his department made two separate investigations; that the records and reports made by his department are kept there unless called for by the city manager.

Which Statute Controls?

Section 1892, Code of Civil Procedure, provides: "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute."

Section 1227, Government Code, provides: "The public records and other matters in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection of any citizen of the State."

The term "public officer" includes all officers who fill "offices created by or under the authority of charters or laws for the government of counties and cities." Gov. Code, § 1001. "In order that an entry or record of the official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' Cyclopedic Law Dictionary, p. 776." People v. Tomalty, 14 Cal.App. 224, 231, 111 P. 513, 515.

[2] We are of the opinion that these reports are "other matters" referred to in section 1227, Government Code. See Coldwell v. Board of Public Works, 187 Cal. 510, 202 P. 879. They would be open to inspection by a citizen were it not that they come within the exceptions "except as otherwise expressly provided by statute" in section 1892, Code of Civil Procedure, and "except as otherwise provided" in section 1227, Government Code. The "otherwise expressly provided" is section 1881, Code of Civil Procedure, subdivision 2: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity;" and subdivision 5: "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

[3, 4] That investigation reports made for the use of attorneys in the defense of possible litigation are "communications" under subdivision 2 is well settled. See New York Casualty Co. v. Superior Court, 30 Cal.App.2d 130, 132, 85 P.2d 965. Nor does the fact that these reports can be and are used additionally for accident prevention purposes take away from their confidential aspect while they are being held for defense purposes. The necessity of their being held privileged until the possibility of litigation has ceased, or litigation which ensued has terminated, is more necessary to the public welfare than the matter of leaving them open for citizen inspection. This case illustrates that fact. Here Sanders is not desirous of seeing these reports as a citizen primarily interested in protection of the public; he is desirous of seeing them in the hope that he may gain some advantage therefrom in his contemplated suit against the city, making disclosure a possible disadvantage to the city. Thus the public welfare requires that inspection be postponed until disclosure will no longer be of disadvantage to the city.[3]

[5] Subdivision 5[4] uses the language "communications made to * * * [a public officer] in official confidence." This does not mean, as respondents contend, that where officers interview witnesses the statements of such witnesses and the officers' reports thereof, only come within this subdivision if the witnesses expressly request that their statements be held in confidence. Communications are made to an officer in official confidence when the investigation is of such a type that disclosure of the investigation would cause the public interest to suffer. An apt illustration of this situation is the investigation of a crime by police officers. See Runyon v. Board etc. of Cal., 26 Cal.App.2d 183, 185, 79 P.2d 101; 23 R.C.L. p. 161; People v. Pearson, 111 Cal.App.2d 9, 18, 244 P.2d 35. It is not only where a witness requests that his statement be kept in confidence, but in all cases of crime investigation that the record and reports are privileged.

[6] Holm v. Superior Court, supra, 42 Cal.2d 500, 267 P.2d 1025, has determined, in effect, that the privilege under section

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[3] Of course, Sanders' personal interest would not deprive him of the right to inspect the records if they are not privileged. Harrison v. Powers, 19 Cal.App. 762, 127 P. 818.

[4] Although this subdivision has been in the Code of Civil Procedure since 1872, no direct judicial interpretation of it has been made.

1881, subdivision 2, controls in a situation of this kind. There one Bell sued the city and county of San Francisco and one of its employees for personal injuries alleged to have been received in the negligent operation of the city's municipal railway. The plaintiff obtained a court order for the inspection of her own signed statement given to the railway's claims investigator, written reports by the employee as to the facts of the accident, and photographs taken by the city's agents at the scene following the accident. These records after being obtained were kept in confidence in the city attorney's possession. The trial court ordered these to be produced. Except as to the plaintiff's statement, the Supreme Court reversed, holding that the documents were privileged communications between client and attorney. The plaintiff claimed that as the documents were recorded and preserved in the regular course of the business of the city in the operation of the municipal railway they could not be privileged. A similar contention is made here, namely, that the fact that these reports were made as routine investigation destroyed their privilege. "But there is no valid basis for a distinction between a communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents, and a communciation prepared for an identical purpose under standing rules in the case of all accidents involving personal or property injury. Because the scope of the operations of the defendant city's municipal railway is such as to require communications of this nature as a routine matter, it cannot be said that the attorney-client privilege did not attach.

"In any action for damages such as the pending one, it is of considerable importance to obtain all information available at the scene of the accident in order to safeguard the rights of the party likely to be charged with negligence. It is because of this fact that diligence is required in behalf of such party to avoid or prepare for litigation. In view of the imminent possibility that the city would be faced with a claim involving substantial liability for personal injuries far exceeding financial considerations in any other respect, it is unreasonable and unrealistic to say that the communication of the documentary information to the attorneys for use in their professional capacity was not foremost and predominately in the minds of those securing and transmitting the same." 42 Cal.2d at pages 508–509, 267 P.2d at page 1030.

[7–9] There can be no question under the evidence in this case that the dominant purpose of the investigation in death cases resulting from use of the city's property or where liability on the part of the city may possibly be charged, is for use of the city attorney for defense purposes, even though they may also be used for study in accident prevention. As said in Holm v. Superior Court, supra, 42 Cal.2d at page 507, 267 P.2d at page 1028: "The privilege attaches where the communication is made in confidence pursuant to a client-attorney relationship with respect to the particular matter. McKnew v. Superior Court, 23 Cal.2d 58, 65–66, 142 P.2d 1. Thus there would seem to be no privilege in a communication which is not made to or for further communication to an attorney, although the communication might have some connection with possible liability in the future, such as reports submitted in the regular course of business for study in accident prevention. Nor does the privilege attach to a communication not intended to be of a confidential nature. City & County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 234–235, 231 P.2d 26, [25 A.L.R.2d 1418]; McKnew v. Superior Court, supra, 23 Cal.2d 58, 66, 142 P.2d 1. To make the communication privileged the dominant purpose must be for transmittal to an attorney 'in the course of professional employment'. Code Civil Procedure, § 1881(2) * * *." The Holm case holds that what is the dominant purpose is for the trial court in the first instance. "Where it is clear that the communication has but a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld accordingly. If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney 'in the course of professional employment' and one not related to that purpose, the question presented to the trial court is as to which purpose predominates. The question then is whether the conclusion of the trial court on the facts is correct or has resulted in an abuse of discretion." 42 Cal.2d at page 507, 267 P.2d at page 1029.

What was said in the Holm case applies to the documents in our case. "As to the reports and photographs it is clear that from their character and content they fall within the privilege. Both originated with agents of the city and it is undisputed that they were forwarded in confidence to the defendants' attorneys for use in possible litigation. * * * It follows that where the communication is between corporate employees and is embodied in reports or photographic evidence for the purpose of redelivery to a corporate attorney the privilege attaches if the reports and photographs were created as a means of communicating confidential information to the attorney." 42 Cal.2d at page 508, 267 P.2d at page 1029.

Again applying language of the Holm case to our situation, "The court did not make specific findings of fact upon which its order for the production of the documents was based. However, in view of the undisputed evidence both as to the intended purpose and the actual practice followed any determination which would not accord greater importance to the purpose of communications to the attorneys in their professional capacities than to any other purpose would be an abuse of discretion. The attorney-client privilege is an important element in the effectiveness with which the counselor-at-law is to advise his client and safeguard the latter's interests. Where, as here, the right to the privilege is clearly established it should not be cast aside. The fact that the information contained in the communications might also be used for incidental purposes not entitled to the privilege is unimportant." 42 Cal.2d at page 509, 267 P.2d at page 1030.

Except upon the question that the reports are "other matters" under section 1227, Government Code, Coldwell v. Board of Public Works, supra, 187 Cal. 510, 202 P. 879, is not applicable here. There it was held that plans, specifications, reports, estimates and data concerning the Hetch Hetchy project prepared by the city engineer and Board of Public Works and turned over to the city attorney, while not "public records" were "other matters" which were of such great public interest as to require their inspection to be open to the public. Some of the data, the reviewing court apparently treated as privileged, originally, but because the city engineer had permitted the Civic League of Improvement Clubs to inspect them fully, it held that the data had lost its privilege.

There was no evidence in this case from which the trial court could have determined that the dominant cause of the investigation was anything but preparation for defense of possible litigation.

Let the writ issue compelling said superior court to vacate the writ of mandate issued by it and the order finding petitioner in contempt thereof, and commanding said court to refrain from further proceedings in contempt.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

KAUFMAN and DOOLING, JJ., pro tem., sitting in place of TRAYNOR and SCHAUER, JJ.

151 Cal.App.2d 96

F. M. SCHAFER and Helen M. Schafer, Plaintiffs, Cross-Defendants and Respondents,

v.

WHOLESALE FROZEN FOODS, Inc., a Corporation, Henry Hornstein, Henry E. Cornils, and R. F. Luce, Defendants, Cross-Complainants and Appellants.

Civ. 17171.

District Court of Appeal, First District,
Division 1, California.
May 17, 1957.

Action for overdue rent brought against assignees of a sublease and the sublessee's guarantors. From a judgment for plaintiff in the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence did not establish that the execution of the guaranty contract was conditioned upon the lessors giving written consent to the transfer of the sublease and that the contract of guaranty was supported by consideration.

Judgment affirmed and motion to take additional evidence denied.

1. Guaranty 🔑91

Evidence did not sustain contention that guaranty of a lease contract was conditioned upon the lessors giving written consent to transfer of the sublease which condition did not occur.

2. Guaranty 🔑42(1)

Where assignee of a sublease took possession of rented premises and guarantors of performance of sublease were the sole stockholders of the assignee, inference was authorized that parties by their conduct, interpreted the transaction as the making of a guaranty, without regard to obtaining the consent of the lessors to the transfer of the sublease from the sublessee to the assignee.

3. Pleading 🔑8(6)

An averment in answer to a cross-complaint that assignment of a sublease did not require the consent of either the cross-defendant nor the original sublessors was a legal conclusion.

4. Guaranty 🔑15

The fact that guaranty of performance of a lease was in writing imported a consideration. West's Ann.Civ.Code, §§ 1614, 2792.

5. Guaranty 🔑16(1)

Where lessee consented to an assignment from sublessee to assignee and released the sublessee from obligations under the sublease and gave the assignee an option for extension of the term and received from officers of the assignee a written guaranty of performance of the assignee's obligations under the sublease, guaranty contract was supported by consideration, where the officers received a benefit from the transaction, the lessee's consent to the assignment was an act he was under no duty to perform and a detriment to him, and the option to extend the term was a distinct benefit to the assignee. West's Ann.Civ.Code, §§ 1614, 2792.

6. Landlord and Tenant 🔑231(6)

In action to recover rent from assignees of sublease on a cold storage plant, evidence did not justify denial of recovery by lessee on the ground that he failed to effect certain improvements required of him by the lessors as expressed in the master lease.

7. Declaratory Judgment 🔑323

In action to recover rent, alleged failure of the trial court to declare the rights of the parties in accordance with the prayer of the assignees of the sublease in their cross-complaint for declaratory relief was proper where rights which assignees sought by their cross-complaint, were substantially the same claims asserted by them in their answer by way of defense to the complaint, which the court disposed of.

8. Landlord and Tenant 🔑198

In action for rent by lessee against assignee of sublease, where findings indicated that the master lessor exercised his right of reentry but did not indicate whether the master lessor terminated the lease, there was no sufficient basis for declaring the lease forfeited or canceled.

9. Judgment ⚷256(1)

If a finding is made upon a collateral matter, the court need not include in its judgment a declaration of the legal effect of the facts so found, especially where the evidence is insufficient to support the declaration sought upon appeal.

◆

Leuenberger & Feldman, Philip S. Ehrlich, Irving Rovens, San Francisco, for appellants.

Myers & Meehan, San Anselmo, for respondent.

FRED B. WOOD, Justice.

Judgment for overdue rent was rendered in favor of plaintiffs F. W. Schafer and wife against their sublessee (Wholesale Frozen Foods, Inc.) and the sublessee's guarantors (Luce, Cornils and Hornstein). All of the defendants have appealed.

The leasehold premises consisted of a cold storage plant which the owners (referred to as the "Tildens" or the "Tilden interests") leased to plaintiff in 1945 for a five-year term, later extended for a term ending December 31, 1955. Plaintiff operated the plant until 1950, when he sublet to Stapland, Inc. About March 18, 1952, he consented to an assignment from Stapland to defendant Wholesale, released Stapland from further obligations under the sublease, gave Wholesale an option for an extension of the term, and received from Luce, Cornils and Hornstein a written guaranty of performance by Wholesale of its obligations under the sublease.

[1] (1) *Defendant guarantors contend that their execution of the guaranty contract was conditioned upon the Tildens giving written consent to the transfer of the sublease, a condition which did not occur.*

They are mistaken in this regard, the trial court found against this contention and substantial evidence supports the finding.

First, no such condition is expressed or indicated in the contract of guaranty itself.

Second, plaintiff Schafer testified "I don't believe the signing * * * by the guarantors hinged at all upon receiving the signatures of the Tildens. It was not discussed in that manner, * * * It was discussed after the signatures were placed upon the document, except my wife's signature." He had no idea that the Tildens' consent "had any bearing on it." The guarantors testified to the contrary but that merely produced a conflict which the trial court resolved in plaintiffs' favor.

[2] We note, too, that Wholesale took possession and held possession for two years. That, plus the fact that the guarantors were the incorporators, the sole stockholders and also officers of Wholesale (Hornstein was a director, Cornils a director and president, and in a few months Luce became a director), furnished a basis for an inference that the parties by their conduct interpreted the transaction as the making of a guaranty without regard to obtaining the consent of the Tildens to the transfer of the sublease from Stapland to Wholesale.

Plaintiffs have moved to take additional evidence in support of their position on this point. We find the proffered evidence would be inconclusive if taken; also, unnecessary in view of our analysis of the evidence already in the record on this point.

[3] (2) *Defendants assert that the contract of guaranty was without consideration.* They question a finding to the effect that defendants Hornstein, Cornils and Luce executed the guaranty contract "as a part of the consideration for * * * [plaintiffs'] * * * consent to assignment of sublease" from Stapland to Wholesale.[1]

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[1] This was not the only finding on this subject. Plaintiffs also pleaded defendants' indebtedness in the form of a common count and the court found that the allegations thereof were true, also that there was not a failure of consideration for the guaranty contract.

They say that plaintiffs' consent was not legally necessary to effectuate the assignment and therefore incapable of constituting consideration for the guaranty contract. They predicate this statement upon an averment in plaintiffs' answer to the cross-complaint that "the assignment of said sublease did not require the consent of either the cross-defendants herein nor the original sublessors." That, of course, was a legal conclusion and apparently was disregarded by court and counsel at the trial. Both parties alleged that plaintiffs did execute the consent, in respect to which there was an issue whether or not plaintiffs' consent was conditioned upon the Tildens also consenting.

The sublease between Schafer and Stapland (it was pleaded in haec verba by the defendants) expressly declared that "Sublessee shall not, without the written consent of Sublessor, or either of Sublessors, assign this lease or any interest therein, or sublet the demised premises or any portion thereof except that Sublessee shall be permitted to enter into leases of storage space within said premises." Plaintiffs' counsel in his opening statement said that at the time of the signing of the documents he and counsel for defendants did not know whether or not plaintiffs' consent to the assignment of the sublease was necessary but felt it should be included. Defendants' counsel apparently agreed with that statement.

There is evidence that the assignment of the sublease by Stapland, the acceptance thereof by Wholesale, the consent thereto by plaintiffs, the option to Wholesale for extention of the term, and the guaranty contract were treated and handled by the parties as a single transaction. Luce testified that Schafer insisted he would not give the sublease to Wholesale unless he had personal guarantees on it and by that he meant the guaranteeing of payments of the rents by Cornils, Hornstein and Luce; he would not execute this consent unless the three persons mentioned signed as guarantors. Defendants' attorney testified that Mrs. Schafer was a party to the sublease "and I felt her signature was necessary." Luce said that he, Schafer, Cornils and Hornstein signed the several papers at the same time; i. e., at a meeting held in the office of defendants' counsel.

[4, 5] Under these circumstances we entertain no doubt that the trial court correctly found and concluded that there was sufficient consideration for the guaranty contract. The fact that it was in writing imported a consideration. Civil Code, § 1614; Security Commercial etc. Bank v. Seitz, 43 Cal.App. 353, 359, 185 P. 188. "Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist." Civil Code, § 2792. See also Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 112, 64 P.2d 138, 108 A.L.R. 1080; McDonald v. Gravenstein, etc., Ass'n, 42 Cal.App.2d 329, 332, 108 P.2d 936; Pacific States Sav. etc. Co. v. Stowell, 7 Cal.App.2d 280, 281, 46 P.2d 780; Hammond Lumber Co. v. Danziger, 2 Cal.App.2d 197, 201, 37 P.2d 517. Also, as officers and stockholders of Wholesale, the guarantors derived "a benefit from the transaction, of itself a good consideration for the guaranty." Mortgage Guarantee Co. v. Chotiner, supra, 8 Cal.2d 110, 112, 64 P.2d 138, 140, 108 A.L.R. 1080. Schafer's consent was given and received and his release of Stapland from further obligation, was an act he was under no duty to perform (see De Hart v. Allen, 26 Cal.2d 829, 832, 161 P.2d 453, a detriment to him and as such a significant element of consideration. And the option to extend the term for five years was a distinct benefit to Wholesale.

Helmick v. Holaday, 106 Cal.App. 380, 289 P. 224, invoked by defendants is not in point. It simply holds that the guarantee of a note secured by a mortgage on property sold, was without consideration and void because it was procured by misrepresentations that the holder's consent was necessary to effect subsequent sales of the property.

[6] (3) *Defendants claim that plaintiff failed to effect certain improvements required of him by the owners, as expressed in the master lease.*

In his lease from the Tildens plaintiff promised to effect certain improvements in the buildings, such as the installation of a meat processing room and loading dock and alterations that would make possible the maintenance of certain specified temperatures in various parts of the building. In his sublease to Stapland Schafer warranted that all these improvements had already been made. Defendants claim that he had not made them.

The court found against this contention, by finding "untrue" those allegations of the answer (by reference to paragraph numbers of the answer) which stated that Schafer's representations that he had effected these improvements were untrue and false. The fair intendment of such a finding is that those representations were true. Moreover, a finding that Schafer did effect the improvements seems necessarily implied from other findings expressly made.

The evidentiary support for such a finding is ample. Schafer testified that he did make those improvements, that they were fully completed within seven or eight months of the commencement of the terms (1945) of the master lease, and that thereafter during his occupancy and operation (into 1950) the temperatures were in accordance with the requirements of the lease. Defendants' own expert disclaimed any knowledge of the conditions that obtained in this building in 1945 and testified that with the present equipment, if in good shape and properly operated, it is mathematically possible to maintain the required temperatures.

[7] (4) *Defendants assign as error the asserted failure of the trial court to declare the rights of the parties in accordance with the prayer of their cross-complaint for declaratory relief.*

The rights which the defendants sought by their cross-complaint to have declared appear to have been substantially the very claims asserted by them in their answer by way of defense to the complaint. When the court finished disposing of their defenses, there was nothing of substance left to declare.

(5) *Was it error not to declare the sublease terminated?*

[8] The court found that in April of 1954 the master lessors served plaintiffs with notice to pay the rent or surrender possession [Wholesale had quit paying rent to Schafer in June of 1953], that an employee of defendants delivered the key to the master lessors on April 21, 1954, without the knowledge or consent of plaintiffs, and that thereafter the master lessors occupied and continued to occupy the premises.

Defendants claim that this finding compels the conclusion that the master lease was thereby terminated and that upon such termination the sublease also came to an end.

There is nothing in the finding which compels such a conclusion. The master lease provided that the master lessor, on default by the lessee, might reenter the premises and either terminate the lease or relet the premises as agent for the lessee. The findings indicate that the master lessor exercised his right of reentry, but do not indicate whether the master lessor terminated the lease or not. Accordingly, there was no sufficient basis for declaring the lease forfeited or cancelled. Burke v. Morton, 42 Cal.App. 705, 709–710, 184 P. 45; approved in Lawrence Barker, Inc. v. Briggs, 39 Cal.2d 654, 664, 248 P.2d 897.

Herman v. Campbell, 86 Cal.App.2d 762, 765–766, 195 P.2d 801, and City Investment Co. v. Pringle, 69 Cal.App. 416, 231 P. 355 cited by defendants are inapplicable. They hold that once the master lease is terminated the sublease is terminated, but in the instant case it does not appear that the master lease has been terminated.

[9] Defendants also cite cases which hold that if a case is tried on the theory that a matter is in issue and evidence is received without objection it is too late to attack a finding on such an issue upon appeal. These cases do not hold, however, that if a finding is made upon a collateral matter, it is error if the court does not include in its judgment a declaration of the legal effect of the facts so found, especially where the evidence is insufficient to support the declaration sought upon appeal.

The judgment is affirmed and the motion to take additional evidence is denied.

PETERS, P. J., and BRAY, J., concur.

151 Cal.App.2d 237

Jane SCARLETT, Plaintiff and Appellant,
v.
Lloyd C. SCARLETT, Jr., Defendant and Respondent.
Civ. 8983.

District Court of Appeal, Third District, California.
May 22, 1957.
Rehearing Denied June 10, 1957.

Proceeding to modify award for support of two minor children in custody of former wife under interlocutory decree granting divorce. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment reducing award and wife appealed. The District Court of Appeal, Peek, J., held that where property settlement agreement entered into between the parties, and confirmed and approved by the court, provided for payment of certain amounts to wife for support and maintenance of children and also a property division in lieu of alimony for support, court had jurisdiction to reduce support payments for children but court had no power to give order of modification retroactive effect.

Affirmed in part and reversed in part.

1. Divorce 🔑309

Where parties to divorce action entered into a property settlement agreement that was confirmed and approved by the interlocutory decree of divorce and such agreement provided for monthly payments for support and maintenance of children as well as property division to wife in lieu of alimony or support, monthly payments for support of children were not parts of the adjustment rights of property rights of parents and were within the power of the court to modify. West's Ann.Civ.Code, § 138.

2. Divorce 🔑309, 312.6(6)

Modification of monthly support payments for maintenance of children after entry of interlocutory decree of divorce, is a matter resting in sound discretion of the trial court, whose decision thereon will not be interfered with unless as a matter of law it can be said that there has been an abuse of discretion.

3. Divorce 🔑309

In proceeding to reduce monthly payments for support of children from the amounts provided for in property settlement agreement confirmed and approved by the court in its interlocutory decree of divorce, evidence supported reduction of award of $75 to $40 per month. West's Ann. Civ.Code, § 138.

4. Divorce 🔑309

While under proper circumstances court has power to modify interlocutory decree as to payments for support of children prospectively, it cannot give its order of modification a retroactive effect so as to modify the amount which has theretofore accrued.

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Lambert & Lemmon, Sacramento, for appellant.

Taft, Wright & Hopkins, Vallejo, for respondent.

PEEK, Justice.

Plaintiff appeals from an order modifying an award from $75 to $40 per month for the support of each of the two minor children of the parties, and from the further order providing that the accrued delinquent payments be paid at the rate of $10 per month. It is plaintiff's contention that the court erred in both instances.

The record shows that prior to the entry of an interlocutory decree of divorce which awarded to plaintiff the custody of the children, a property settlement agreement had been entered into between the parties. The court made no order respecting this agreement so far as property was concerned; but the interlocutory decree specifically "confirmed and approved" the provisions of the agreement relative to the amount to be paid plaintiff for the support and maintenance of their children "until his or her majority, unless sooner, deceased." This same language was contained in the provisions of the property settlement agreement on that subject. Subsequently defendant petitioned the court for a reduction in the amount payable to plaintiff for the children's support upon the ground that he was financially unable to make the monthly payments as provided or to pay the accrued delinquent payments; that his circumstances had changed substantially; and that the requested reduction would not jeopardize the welfare of the children. Following the hearing on his petition the court reduced the payments from $75 to $40 per month for each of the children and further ordered that defendant pay the arrearages at the rate of $10 per month.

[1] The factual situation so presented as it relates to the first contention made by plaintiff is quite similar to that which was before the court in Shepard v. Shepard, 116 Cal.App.2d 594, 254 P.2d 120; that is in each case a property settlement agreement had been entered into whereby the wife accepted the property coming to her in lieu of alimony or support. Likewise in each agreement the provisions for child support were separately stated and were to continue until the happening of certain expressed contingencies. Such provisions, the court said in the Shepard case, were "obviously for the benefit and use of the child, and not a part of the adjustment of the property rights of the parents." 116 Cal.App.2d at page 596, 254 P.2d at page 121. In both cases the adjustment of the property rights of the parents and the provisions for payment of monthly sums for the support of the children were separate and severable provisions of the contracts. Here, as in the Shepard case, we must conclude that the trial court in reducing the amount of the monthly payments impliedly found that the agreement and order for the support of the children were not parts of the adjustment of the property rights of the parents. It necessarily follows that since the provisions as to property rights and child support were severable, it was within the power of the court to reduce the monthly payments as it did. Civil Code, sec. 138.

[2, 3] Although we have concluded that a reduction in the monthly payments for the support of the children was within the power of the court, there remains for determination the further question of whether or not such order was an abuse of discretion. It is the rule that in a proceeding to modify a decree in this respect, it is in the first instance a matter resting in the sound discretion of the trial court, and a reviewing court will not interfere unless, as a matter of law, it can be said that there was an abuse of discretion. Primm v. Primm, 46 Cal.2d 690, 694, 299 P.2d 231. From our examination of the record before us, particularly in regard to the welfare of the children and the financial status of the parties, we cannot say that the evidence was insufficient as a matter of law to justify the modification order.

[4] Turning to plaintiff's final contention, it is well established that while under proper circumstances the court has the

power to modify a decree as to payments to be made prospectively, but it cannot give its order of modification a retroactive effect so as to modify the amount which has theretofore accrued. Keck v. Keck, 219 Cal. 316, 26 P.2d 300; Steele v. Steele, 108 Cal.App.2d 595, 239 P.2d 63.

That portion of the order reducing the monthly payments from $75 to $40 for each child is affirmed. That portion of the order allowing defendant to pay off the accrued delinquent payments at the rate of $10 per month is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

151 Cal.App.2d 59

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles CHAPMAN, Defendant and Appellant.

Cr. 3247.

District Court of Appeal, First District, Division 2, California.

May 16, 1957.

Hearing Denied July 10, 1957.

Defendant was convicted of forgery of two checks. The Superior Court, City & County of San Francisco, John B. Molinari, J., entered judgment, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law 🔑1043(1)

Where defendant in criminal proceeding was not a lawyer but conducted his own defense at trial, his objection that certain items had been obtained illegally and without his consent was sufficient to raise issue on appeal that the items had been obtained as result of an unlawful search and seizure.

2. Searches and Seizures 🔑3(1)

Fact that officers could have obtained a search warrant would not render illegal their search without one.

3. Arrest 🔑71

Where the arrest is lawful, search of person and premises is a reasonable incident of the lawful arrest.

4. Arrest 🔑63(4)

In prosecution for forgery of two checks, evidence was sufficient to indicate existence of probable cause for defendant's arrest without a warrant.

5. Arrest 🔑71

Where there was sufficient probable cause for defendant's arrest, without a warrant in his apartment, for forgery of two checks, items, which were taken from the apartment, and which consisted of shirt defendant wore at time of cashing the checks and a typewriter which defendant used in filling out the checks, were taken in a reasonable search incident to a lawful arrest.

6. Forgery 🔑44

Evidence sustained conviction for forgery of two checks. West's Ann.Pen.Code, § 470.

7. Criminal Law 🔑1144(13), 1160

Before verdict, which has been approved by trial court, can be set aside on appeal on ground of insufficiency of evidence, it must appear that, upon no hypothesis whatever, is there sufficient substantial evidence to support trial court's conclusion, and the reviewing court must assume, in favor of the verdict, existence of every fact which jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

8. Criminal Law 🔑393(1)

Bringing of witnesses to defendant's apartment for identification purposes did not constitute violation of defendant's privilege against self-incrimination. West's Ann.Const. art. 1, § 13.

9. Criminal Law ⚷393(1)

Only testimonial compulsion is within purview of privilege against self-incrimination. West's Ann.Const. art. 1, § 13.

10. Criminal Law ⚷393(3)

Establishing defendant's identity by having him stand up or wear certain articles of clothing is not violative of defendant's privilege against self-incrimination. West's Ann.Const. art. 1, § 13.

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Joseph Jedeikin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

The defendant, Charles Chapman, was found guilty by a jury on two counts of violation of Penal Code, Section 470 for forgery of two checks on October 27, 1955, as charged in the information. He appeals from the judgment, contending that the evidence is insufficient to support the verdict; that certain evidence used against him obtained as the result of an unlawful search and seizure; that the bringing of witnesses to his apartment for purposes of identification violated his privilege against self-incrimination; that the prosecution falsified evidence; that the conduct of the district attorney and of the court were prejudicial and resulted in an unfair trial. The defendant rejected the services of the Public Defender and conducted his own defense at the trial, however, we have carefully scrutinized the record and find no merit in any of these contentions.

The facts as disclosed by the record are: At about 11:00 a. m. on October 27, 1955, at the Market and Montgomery Street Branch of the Bank of America in San Francisco, a man who identified himself as Robert Weldon cashed a check in the amount of $180.12, drawn by Manpower, Inc. on the First National Bank of Milwaukee, signed by A. R. Crowder and made payable to Robert Weldon. In the presence of the teller, Miss Davies, who appeared as a witness and identified the defendant as the Robert Weldon for whom she had cashed a check, the defendant endorsed the check "Robert Weldon, 2400 Pacific" and produced as identification, a temporary driver's license issued in Hollywood to Robert Weldon. Miss Davies testified that the signature on the temporary license and the signature endorsed on the check were identical. Two other witnesses, Mrs. Ollerton and Mr. Reinberg, both tellers at the Anglo-California Bank at 1 Sansome Street, identified the defendant as Robert Weldon for whom they had cashed similar checks on October 25, 1955, on the strength of the temporary driver's license. All the checks were temporary payroll checks of Manpower, Inc. and were typewritten. At about 1:00 p. m. on October 27, 1955, the defendant appeared at Mrs. Ollerton's window and attempted to cash a similar Manpower, Inc. check, No. 3983 in the amount of $175.11. Mrs. Ollerton asked the defendant to have an officer of the bank to okay the check. The defendant then went in the direction of the bank officer and then to Mr. Reinberg's window. Mr. Reinberg cashed this check after the defendant had identified himself as Robert Weldon with the temporary driver's license, and had endorsed the check, "Robert Weldon." Mr. Reinberg testified that at this time the defendant was wearing a light green silk sport shirt with distinctive cuff links. A short while later Mr. Reinberg conversed with Mrs. Ollerton about the defendant's check. Mr. Reinberg then telephoned Manpower, Inc. and talked to Mr. Crowder, who established that the check in question along with 19 others (Check Nos. 3967 through 3989) were missing, as that set of check numbers had not yet been reached. Mr. Reinberg then consulted with Mr. Ovel, a security officer of the Anglo-California Bank. At about 2:00 p. m. on October 27, 1955, Mr. Ovel and Officer Torre of the fraud detail of the San Francisco Police

Department, were in the defendant's apartment at 1450 Clay Street. The record does not indicate how the connection was made between the man identified as Robert Weldon of 2400 Pacific and the defendant, nor how Officer Torre and Mr. Ovel entered the apartment. There is no evidence of an unlawful entry. The defendant came home at about 2:30, and according to his testimony asked the officer to leave as he had no arrest or search warrant; according to the officer's testimony, he and Mr. Ovel left as he wanted more positive identification. The officer also testified that at this time the defendant was wearing a light green silk shirt. About half an hour or an hour later, Officer Torre returned to the defendant's apartment with another police officer and Mrs. Ollerton and Mr. Reinberg, who identified the defendant. The defendant was placed under arrest. At this time the defendant was wearing a red shirt. The green shirt he had been wearing earlier was found in the closet and taken by the police officers. Officer Torre testified that at his first visit to the apartment he noticed a typewriter (which was also taken by the officers after the arrest) and a piece of yellow stationery with the name "A. R. Crowder" written on it twice. The piece of paper was not found in the apartment at the time of the arrest. The defendant denied the existence of this piece of paper. The defendant's roommate, however, testified to having seen such a piece of paper, as well as several checks. A. R. Crowder of Manpower, Inc. testified that the defendant had been temporarily employed as a clerk-typist from September 1955 until October 12th or 19th; that he had not signed the checks in question and that the defendant had no authority to sign checks for Manpower, Inc.; that there had never been a Robert Weldon employed by Manpower, Inc. in San Francisco. Mr. Schirtzinger, the defendant's roommate, testified that on the night of October 19, he had driven the defendant to the Manpower, Inc. office at around 11:00 p. m. to pick up a check that Manpower, Inc. owed to the defendant; that the defendant was gone about 30 minutes and returned to the car saying he had been unable to obtain his check. Mr. Schirtzinger further testified that on October 27, 1955, he and the defendant left their Clay Street apartment about noon and he drove the defendant to various banks, as the defendant wanted to negotiate a loan to enter the interior decorating business. The defendant, when he took the stand, admitted that he could have been at the bank in question on October 25th and October 27th; that the green shirt and cuff links were similar to a shirt and cuff links he had owned. He stated, however, that other persons than he and Mr. Schirtzinger had access to the apartment and had permission to use the typewriter.

Further testimony showed that the typewriter seized by the police officers had been rented by the defendant on October 11, 1955, and that the checks in question were typed on this typewriter. Mr. Schirtzinger further testified that after the defendant was arrested, he found in the apartment the envelope of a letter from Capitol Records addressed to "Robert Weldon, C/o Charles Chapman," at the Clay Street address; that this letter had arrived sometime before October 19th, that he had removed it from the mailbox and did not think anything of the strange name as the defendant was in the habit of using stage names. The defendant claims that the letter was addressed to him and that the district attorney or someone falsified a part of the name.

[1–5] This letter, the shirt, and typewriter seized by the police officers at the time of the arrest were introduced into evidence. These items, the defendant relying on the rule expressed in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, claims were the result of an unlawful search and seizure, and should not have been introduced against him. Respondent claims that the defendant cannot now raise this issue on appeal as he did not object properly at the trial on this ground. We find that as the defendant is not a lawyer, his objection that these items were obtained illegally and without his consent is a sufficient one. Merely because the officers could have obtained a search warrant does not render illegal their search without one. If the arrest is lawful, a search of the person and premises is a reasonable incident of a lawful arrest. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663. The facts as above stated indicate a sufficient probable cause for arrest without a warrant, so that it can be said that the shirt and typewriter were taken in a reasonable search incident to a lawful arrest.

[6, 7] Nor can we agree with the defendant that the evidence is insufficient to sustain the verdict. The rule as stated in People v. Daugherty, 40 Cal.2d 876, at page 885, 256 P.2d 911, at page 916 is "* * * before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.'" The evidence here abundantly establishes the fact of the defendant's guilt. The jury was properly instructed on the necessary elements of the crime of forgery and these elements were proven to their satisfaction.

[8–10] The defendant further contends that the bringing of witnesses to his apartment for identification purposes is a violation of the privilege against self-incrimination. As was pointed out by our Supreme Court in People v. Haeussler, 41 Cal.2d 252, at page 257, 260 P.2d 8, certiorari denied 347 U.S. 931, 74 S.Ct. 533, 98 L.Ed. 1082, only testimonial compulsion is within the purview of the privilege. It has long been the law in this state that establishing the identity of a defendant by having him stand up or wear certain articles of clothing is not a violation of Article I, Section 13 of the State Constitution; People v. Goldenson, 76 Cal. 328, 19 P. 161; People v. Ferns, 27 Cal.App. 285, 149 P. 802; People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681, certiorari denied Woodmansee v. People of State of California, 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 426; People v. Robarge, 41 Cal.2d 628, 262 P.2d 14.

We find no merit in any of the other numerous allegations made by the defendant.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

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151 Cal.App.2d 375

Horace M. JONES and Virginia M. Jones, his wife, Willard Q. Newell, Gyspert de Lespinasse and Myna de Lespinasse, his wife, Plaintiffs and Respondents,

v.

Raymond K. STIVERS and Annabelle Stivers, his wife, et al., Defendants and Appellants.

Civ. 5602.

District Court of Appeal, Fourth District, California.

May 28, 1957.

Rehearing Denied June 24, 1957.

Hearing Denied July 24, 1957.

Action for declaratory relief and to quiet title to spring water supplied to realty purchased by plaintiff from defendant, wherein vendors cross-complained for a declaratory judgment in their favor as to use of spring water on realty in question, and for certain other relief. The Superior Court, Tulare County, Robert K. Meyers, J., entered judgment for purchasers and vendors appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that water rights and spring in question were sold to purchasers by vendors along with realty.

Judgment affirmed.

1. Waters and Water Courses 🔑158½(1)

In action to quiet title to a certain spring water supplied to realty purchased by plaintiffs from defendants, evidence sustained finding that water rights in spring involved were sold to purchasers by vendors, along with realty.

2. Covenants 🔑122

In action wherein vendors sought damage for alleged violation of certain building restrictions contained in deed of realty to purchasers, evidence sustained findings that purchasers had not wrongfully removed a marker designating a subdivision, and that purchasers had an easement across vendor's property for a private telephone line of purchasers, and that vendors did not transfer to purchasers right to use certain branch names in connection with their sale of branch property, except for reasonable period, and such period had expired.

3. Appeal and Error 🔑1010(1)

Findings supported by substantial evidence are binding upon District Court of Appeal.

◆

Leonard H. McBride, Exeter, for appellants.

McKinney & Ballantyne, Visalia, for respondents.

MUSSELL, Justice.

This is an action for declaratory relief and to quiet title to spring water supplied to the real property purchased by plaintiffs from defendants. The defendants, in a cross-complaint, asked for a decree adjudging that the cross-defendants have no right, title or interest in the said spring water and that they be enjoined from further use thereof. They further allege violation of certain building restrictions by plaintiffs, seek damages therefor, and ask that certain orders be made by the court as to the use of the property involved. The trial court rendered judgment for plaintiffs. Defendants and cross-complainants appeal.

Defendants Raymond K. Stivers and his wife were the owners of real property located in the foothills of Tulare county. On January 13, 1954, they entered into an agreement with plaintiffs Jones and Newell to sell to them two parcels of this property. Parcel A, containing 57 acres, was business property on which was located a certain business known as "Stivers Guest Ranch" and consisted of a main ranch house, with kitchen, dining room, living room and several rental rooms, four motel units, a separate building known as the recreation room and a house consisting of several units. The second parcel (C) consisted of two lots, namely, 23 and 24, of Stivers Subdivision Tract No. 198, with a home and a guest house situated on lot 24.

The sole source of water for parcel A was and is a spring located on land south of parcel A, across state highway 198, on property which was retained by Stivers and his wife. Water was and is piped from the spring to parcel A and to the buildings thereon. The spring water is also used in one of two horse troughs located on the land retained by Stivers. The home on lot 24 is supplied with water from a pump which is located on the Stivers' property.

At the time of the sale Stivers was contemplating building the "Buckaroo Inn" immediately adjacent to the west of parcel A's frontage on highway 198. Stivers, during negotiations and after the escrow instructions were first signed, represented that he was going to extend the water line from (parcel C) the subdivision water system up to the Buckaroo Inn, and at that time he would connect said water supply to the spring line so that if the buyers experienced any difficulty with the spring supply, they could then open the valve from the subdivision water line and receive water for their property.

Plaintiffs took possession of the property and subsequently sold their interest in parcels A and C to plaintiffs Gyspert and Myna de Lespinasse. The conveyance of parcels A and C to Jones and his wife and Newell by Stivers and his wife was executed on August 10, 1954, and recorded September 14, 1954. No mention was made in this deed of water or water rights in the spring supplying water to the two parcels involved. At the time of the sale and during negotiations between the parties, the spring was visibly connected by pipes to parcel A and to all of the buildings thereon. It was the only source of water for parcel A and Stivers, prior to entering into the agreement of sale, represented to the vendees that the spring was to go with the property. The spring was located on a 200-acre tract of land owned by Stivers and this land was leased for four years to a packer who kept his horses on it and used the spring water from the two horse troughs on the property.

On November 30, 1954, the attorneys for Stivers and his wife wrote to Mr. and Mrs. Jones advising them, inter alia, that they had breached their agreements in several particulars. Subsequently, Jones and his wife sold the property to the de Lespinasses and they, having learned that there was a dispute as to the water rights, informed Jones and Newell that they would not consummate the sale until the dispute was settled.

Jones executed a note and deed of trust to insure the plaintiffs de Lespinasse that he would deliver the spring water to them or that he would drill a well. The de Lespinasses went into possession of the property on or about March 11, 1955 and on May 18, 1955, Stivers severed the pipeline leading from the spring.

[1] The principal question to be here decided is whether the water rights in the spring involved were sold to plaintiffs by defendants. Appellants admit that "The evidence is in conflict and dispute as to what were the intentions of the parties regarding the said spring; the plaintiffs Jones and Newell, on the one hand, claiming that they were given the right to the use of this water, and the defendants Stivers, on the other hand, declaring that it was understood and agreed upon between the parties that the water rights were not to go with the land conveyed."

In this connection plaintiff Horace M. Jones testified that on January 10, 1954, while he and Stivers were inspecting the property, he said, "Mr. Stivers, how about the water supply to the ranch?" That he (Stivers) "Pointed his hand and looked up across the road, and he said 'Right up across the road there is a spring which supplies ample water to take care of the guest ranch. Its been there for years and has never failed us yet'"; that "He (Stivers) also mentioned at that time, in case there was ever an emergency arose, about the water supply out of the spring, that he was going to build this Buckaroo building, and was going to extend the water line from the subdivision water supply up to the Buckaroo, what is known now as the Buckaroo Inn. And at that time he would connect our water supply onto that with a valve, whereby if we experienced any difficulty at all with the spring supply we could open this valve and get water from the subdivision water line"; that during the time that he had possession of the property and until he sold it to the de Lespinasses he received water from this spring and that during this period sufficient water was obtained therefrom.

Sarah A. Sjoberg testified that she was with Mr. Jones on January 10, 1954, and heard him ask Stivers about the water supply; that "Mr. Stivers pointed across the highway to the steep hill and said 'that is where we get the water supply. That is your supply and there is a spring there and that is the supply to the property.'"

Plaintiff Willard Newell testified that he was present when Jones asked Stivers about the water supply and that Stivers said "There was ample water. The source is a spring up on the hill" and that Stivers pointed to it. Mrs. Jones testified that "My husband asked Mr. Stivers about the water situation up there. 'Oh,' he said, 'we have plenty of water. The ranch is fed water from the spring across the way', which he pointed to up over the hill. And Mr. Jones said, 'Well, is there plenty of water for the ranch?' And he said, 'Oh, yes, there is an ample supply of water from the spring, a wonderful spring, wonderful drinking water.'"

The trial court found, inter alia, that the pipes and cistern were in open and apparent use in supplying water to parcel A from the spring; that Raymond K. Stivers during his negotiations and at the time of said sale to plaintiffs represented to them that the water from said spring constituted the water supply for the property described and purchased by said plaintiffs and that the right to the exclusive use of said water pipes and cistern passed with the said sale of said property and was a part of the consideration of the defendants for the purchase price paid by the plaintiffs for the said real property, save and except the fact that the court found that the defendants are entitled to water from said pipes to the lower horse trough and are entitled to water up to 17 head of horses from said trough from January 1st to June 30th of each year and that the spring was the only water supply in existence supplying water to the real property and dwellings thereon. These findings are supported by substantial evidence and cannot be here disturbed (Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557) and support the judgment that the defendants are entitled to the flow of water in and to one horse trough, providing that said defendants shall at no time allow more than 17 head of horses to drink from said trough on said premises between January 1st and June 30th of each year; that from July 1st to and including December 31st defendants shall have no right to any flow of water for said horse trough; and that with the exception of the right to a flow of water as limited above, the defendants are enjoined from interfering with the above easement and from asserting any right in connection therewith and that plaintiffs have an easement across said property.

Appellants allege in their cross-complaint that the cross-defendants violated certain tract restrictions in that they converted a garage located on parcel C to living quarters and used it as a rental unit, and also raised dogs commercially, contrary to said tract restrictions. However, the evidence shows that Stivers represented to the cross-defendants that the said garage could be rented as a guest house and Stivers agreed to convert it into a rental unit. The record also shows that Stivers made no objection to the dogs kept by Mrs. de Lespinasse. She testified in this connection that she had four dogs on the property and sold two litters of pups but that she was not engaged in the business of selling dogs. The trial court found that the cross-defendants had not violated any of the said building restrictions by reason of the conversion of the garage and that Mrs. de Lespinasse was not raising dogs commercially. These findings are sufficiently supported by the evidence.

Appellants claim that a marker designating a subdivision was wrongfully removed by the cross-defendants. However, the marker was shown to have been on lot 24, purchased by the vendees, and not on the road area as claimed by Stivers.

It is next claimed by Stivers that the cross-defendants strung a telephone line across his property between the two parcels of land purchased by the cross-defendants without obtaining his consent or permission and that the trial court should have ordered the cross-defendants to remove said line. In this connection the evidence shows that Jones and Newell expended time and money in erecting and installing a private telephone line from parcel A across Stivers' land to parcel C and that this was done at Stivers' suggestion and with his express permission. The court found in this connection that plaintiffs have an easement across the Stivers' property for said telephone line.

[2] Appellants further claim that they did not sell or transfer the right to use the name "Stivers Guest Ranch" or "Stivers Ranch" and that they were damaged by the unauthorized use by plaintiffs of said names. However, the court found in this connection that the defendants did not transfer to plaintiffs the right to use these names, except for a reasonable period and that such period had expired and that plaintiffs should be enjoined from using any such names.

[3] The findings of the trial court with respect to the matters alleged in the cross-complaint and in the complaint appear to be supported by substantial evidence and are binding upon us. The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

151 Cal.App.2d 317

Matter of the ESTATE of Aram ADAMS, also known as Aram C. Adams, A. C. Adams and A. Adams, Deceased.

Albert ADAMS and Adrian Adams, Appellants,

v.

Diana ADAMS and John H. Arakelian, Respondents.

Civ. 5618.

District Court of Appeal, Fourth District, California.

May 27, 1957.

In the matter of a decedent's estate. From so much of an order of the Superior Court of Kern County, R. B. Lambert, J., settling the executor's first account current and directing preliminary distribution, as required the executor to charge a family allowance paid to decedent's widow solely against portion of spouses' community property distributed to decedent's brothers under his will and relieved share thereof distributed to widow from payment of any part of allowance, the brothers appealed. The District Court of Appeal, Mussell, J., held that the widow's and brothers' agreement, approved by Superior Court, that family allowance was payable solely from estate and chargeable against entire property described in paragraph of will directing distribution of half of all other property of decedent than property held by him and wife in joint tenancy and as tenants in common to widow and remaining half to brothers and a specific legatee, finally settled that all such other property, not merely property distributed to brothers, was chargeable with payment of allowance.

Portion of order appealed from reversed.

1. Executors and Administrators 🔑181

The family allowance to decedent's widow is a charge against spouses' community property and a debt payable from community estate.

2. Executors and Administrators 🔑181

Family allowance to decedent's widow and amount of decedent's debts must be deducted from value of spouses' community assets before determination of community property available for distribution.

3. Executors and Administrators 🔑195, 271

A family allowance to decedent's widow is administration expense, and spouses' community property passing from husband's control because of his death or testamentary disposition by his widow, is subject to his debts and to administration. West's Ann.Prob.Code, § 202.

4. Executors and Administrators 🔑181

A decedent's widow's and brothers' agreement, approved by Superior Court, that family allowance to widow should be paid solely from estate and charged against entire property described in paragraph of decedent's will directing distribution of half of all his other property than property held by spouses in joint tenancy and as tenants in common to widow and remaining half to brothers and a specific legatee, finally settled that all such other property was chargeable with payment of allowance, so that court erred in charging allowance solely against property distributed to brothers.

5. Stipulations 🔑18(1)

Parties interested in decedent's estate may stipulate concerning amount thereof to be considered community property and widow's share thereof, and stipulation, if not illegal or contrary to public policy, must be considered by probate court as finally settling all matters therein agreed to, but reasonable interpretation of agreement must govern.

◆

William E. Swiney, Bakersfield, Eisner & Titchell, San Francisco, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondent.

MUSSELL, Justice.

On June 27, 1955, Aram Adams died testate, leaving a surviving widow and two brothers. The brothers are the appellants herein. The decedent's will, dated July 13, 1954, contained a declaration that all of the property of the decedent was community property and directed that his wife, Diana, should have her one-half of the estate as her share of the community property and that the decedent's one-half interest in the community property was subject to distribution, $15,000 cash to his nephew, and the remainder in equal shares to decedent's two brothers.

Decedent and his wife owned and held certain real and personal property in their names as joint tenants and interests in other real property as tenants in common. The rest of the property, both real and personal, was in the name of the decedent.

The will was admitted to probate and the widow was receiving a family allowance from the estate, when, on March 29, 1956, an agreement in writing was entered into by and between Diana Adams, as first party, and the two brothers, as second parties, wherein it was recited that a dispute had arisen between the parties as to the proper interpretation of the will and other matters and that the parties desired to compromise and settle their differences and arrange for the orderly distribution of the estate of Aram Adams, subject to the approval of the superior court. This agreement was approved by the court by order made and filed May 22, 1956. In paragraph one of the agreement it is agreed that "All property, real and personal, standing of record or held in the names of First Party and Aram Adams as joint tenants, shall for the purposes hereof be considered as true joint tenancy property and shall in its entirety belong to and be the property of First Party." In paragraph two it is provided:

> "All interests in real property, including fractional interests, held in the names of Aram Adams and First Party as tenants in common, shall for the purposes hereof be regarded and treated as being one-half of the property of First Party and one-half the property of Aram Adams, subject to his right of testamentary disposition. First Party shall retain her undivided one-half interest in said properties, or fractional parts thereof, under the deeds by which title was acquired. The one-half interest in said properties, or fractional parts thereof, considered herein as being subject to the testamentary disposition of Aram Adams, shall be distributed in undivided interests one-eighth to First Party and seven-eighths to Second Parties."

The controversy herein relates to the following two paragraphs of the agreement:

> "3. All other property standing in the name of Aram Adams and included in the inventory and appraisement on file in the above referred to estate is conceded to be the community prop-

erty of Aram Adams and First Party. One-half of such property shall be distributed to First Party as her share thereof and the remaining one-half to Second Parties and in payment of the specific bequest of $15,000.00 to Joseph Avakoff.

"With respect to the property to be distributed pursuant to this paragraph, it is understood that First Party's community interest is not subject to either California Inheritance Taxes or Federal Estate Taxes, and therefore, First Party shall bear no portion of such taxes on property herein conceded to be the community property of Aram Adams and of First Party, but such taxes shall be paid entirely by Second Parties and Joseph Avakoff.

"4. It is understood that First Party is presently receiving a family allowance from the estate of Aram Adams. The family allowance is payable solely from the estate, and is to be charged against the entire property described in Paragraph 3 hereof. To the extent that the family allowance is not allowed as a deduction but is included in the gross taxable estate for Federal Estate Tax purposes or is held to be subject to California State Inheritance Tax, First Party shall bear the portion of such taxes attributable to such inclusion."

On November 20, 1956, the executor of the estate filed herein his first account current, report of executor and petition for preliminary distribution and attached a copy of the aforesaid agreement thereto. On December 10, 1956, the court made and entered its order settling the first account current and for preliminary distribution and in it the court required the executor to charge the family allowance paid to Diana Adams, the widow, against that portion of the community property being distributed to the brothers of said decedent and relieving the share of the community property which was distributed to the widow of bearing any proportionate part of the family allowance. The brothers appeal from this part of the order and from that part of the order of preliminary distribution which reflects the assessment of the family allowance solely against the interests of the said brothers and which deducts from their distributive share the entire family allowance paid to the widow.

Appellants contend that the entire community property of a decedent and his spouse becomes part of the estate subject to administration; that the entire community property must bear the proportionate share of the expenses of administration, including family allowance, and that there is no authority to assess the family allowance against the community interest of the husband.

[1–3] In re Estate of Resler, 43 Cal.2d 726, 738, 278 P.2d 1, it is held that the rule is that the family allowance is a charge against the community property; that the charge is a debt payable from the community estate (In re Estate of Coffee, 19 Cal.2d 248, at page 252, 120 P.2d 661); and that allowance and the amount of the husband's debts must be deducted from the value of the community assets before the determination as to the community property available for distribution may be made. And in Re Estate of Hirsh, 122 Cal.App.2d 822, 824, 265 P.2d 920, the court held that a family allowance is an expense of administration and that the community property passing from the control of the husband, either by reason of his death or by virtue of the testamentary disposition of the wife, is subject to his debts and to administration (Prob.Code, Sec. 202).

[4, 5] In the instant case the parties, by agreement, specifically determined what property should be subject to the payment of the family allowance. This agreement was approved by the court and it clearly appears therefrom that "the family allowance is payable solely from the estate and is to be charged against the entire property described in paragraph three hereof." The entire property described in paragraph three of the agreement is all other property standing in the name of Aram Adams and

included in the inventory and appraisement on file in the estate, except the property held in joint tenancy and as tenants in common referred to in paragraphs one and two of the agreement. The question of what property was chargeable with the payment of the family allowance was clearly settled by the agreement of the parties and it was the duty of the court to consider it as finally settled thereby. As is said in Re Estate of Howe, 88 Cal.App. 2d 454, 458, 199 P.2d 59, 61:

> "That the interested parties possessed the right to stipulate concerning the amount to be considered community property and to determine the widow's share of such property, there can be no doubt. So long as the stipulation was not illegal nor contrary to public policy, it was the duty of the probate court to consider as finally settled all matters therein agreed to. There is no contention here that the stipulation in question is invalid. However, as in all contractual matters, the reasonable interpretation of the agreement must govern, and it is upon such an interpretation that the order made must stand or fall."

Paragraph three of the agreement provides that one-half of the property described therein shall be distributed to Diana Adams and the remaining one-half to the brothers of the decedent and in payment of a specific bequest. The property thus distributed is the property chargeable with payment of the family allowance. It follows that the court erred in charging the family allowance against only the property distributed to decedent's brothers.

Respondent contends that on an appeal from the judgment roll only, the contract construction most favorable to sustaining the judgment must be indulged, including the presumption that ambiguous language was prepared and formulated by appellants. However, the error complained of herein appears on the face of the record and we find no ambiguity in the language used in the agreement respecting the property to be charged with the payment of the family allowance.

The portion of the order from which this appeal is taken is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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150 Cal.App.2d Supp. 831

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
SOUTHERN PACIFIC COMPANY, etc.,
Defendant and Appellant.
C. A. 3585.

Appellate Department, Superior Court,
Los Angeles County, California.
May 6, 1957.

Prosecution for violating the smog law and rule of county air pollution control district. The Municipal Court of Los Angeles Judicial District, Harold C. Shepherd, J., rendered judgment of conviction. Defendant appealed from order granting probation. The Appellate Department of the Superior Court, Swain, J., held that evidence sustained conviction for violating the smog law, and that defendant could not also be convicted for violating the rule.

Partly affirmed and partly reversed with directions.

1. Health 🔑37

An owner or person in control of real property, who has notice or knowledge that a continuing condition exists on such property, which violates smog law, and who thereafter fails to use reasonable care to abate such condition is liable therefor in the same manner as the one who first created it. West's Ann.Health & Safety Code § 24242.

2. Health 🔑37

An owner or occupier of land becomes a person who "discharges" smoke in atmosphere if such owner does not abate smoke contaminant, after knowledge of fire on his property, under smog law providing criminal penalties for discharging smoke contaminant, even though owner or his agent did not start fire. West's Ann.Health & Safety Code, § 24242.

See publication Words and Phrases, for other judicial constructions and definitions of "Discharges".

3. Health 🔑41

In prosecution for violation of smog law by fire which started on defendant's premises, implied finding that defendant had notice or knowledge of the fire for period of time sufficient to enable defendant to abate smoke and that defendant failed to take any action to abate smoke was supported by evidence. West's Ann.Health & Safety Code, § 24242.

4. Health 🔑37

A defendant who was convicted for violating the smog law in the Health and Safety Code would not also be convicted for violating county air pollution control district rule prohibiting burning of combustible refuse in an open, outdoor fire. West's Ann.Health & Safety Code, § 24242.

E. D. Yeomans, John G. Thorpe, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

SWAIN, Judge.

The defendant was charged in count one of the complaint with violating Health and Safety Code, § 24242 and in count two with violating Rule 57 of the Rules and Regulations of the Air Pollution Control District of the County of Los Angeles. It was convicted on each count and sentenced to pay a fine of $250 on each. The execution of the sentence was suspended and probation granted. The appeal is from the order granting probation. This involves a review of the matters leading up to the judgment.

Health and Safety Code § 24242 reads as follows: "Discharge of air contaminants: Shade and opacity. A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is:

"(a) As dark or darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or

"(b) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section."

It is undisputed that the fire in question was on property of the defendant and that the smoke from it was of a shade and opacity forbidden by the section. There is no competent evidence that any employee or agent of the defendant started the fire. However, the defense witness, Dalzell, who was employed by the defendant as a signal maintainer, testified that he saw the fire burning when he came to work at 6:45 a. m. It is undisputed that the fire burned until after 11:00 a. m. There is no evidence that the defendant made any effort to control it.

[1] We hold it to be the law that the owner or person in control of real property who has notice or knowledge that a continuing condition exists on such property which violates the said smog law and who thereafter fails to use reasonable care to abate such condition, is liable therefor in the same manner as the one who first created it. Civil Code, § 3483 applies this rule to a nuisance created by a defendant's predecessor in title, although it does not extend to third persons generally. Health and Safety Code, § 13008 applies this rule specifically to damage by fire and reads: "Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned,

without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire." This, of course, deals with civil liability but extends to any fire even though not started by the owner or occupier. In City of Turlock v. Bristow, 1930, 103 Cal.App. 750, 284 P. 962, which involved an injunction, the same rule was applied to the subsequent owner of an easement in an open ditch which was unsanitary and a nuisance. At page 754 of 103 Cal. App., at page 964 of 284 P. the court said: "But appellants assert that the evidence fails to prove they created this situation. It was, however, a continuing nuisance, which they suffered to exist. [citing case] Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by the former owner, is liable therefor in the same manner as the one who first created it. Sec. 3483, Civ.Code. It was the duty of the defendants to maintain the ditch in a reasonably sanitary condition. * * * The appellants contend that the record is devoid of evidence that the defendants were served with notice to abate the nuisance, and that such notice is a prerequisite to the instituting of this action for abatement. This was a continuing, visible, public nuisance which was permitted by the defendants to exist for many years. Under such circumstances they will be deemed to have had knowledge of the nuisance and notice thereof."

[2, 3] Health and Safety Code, § 24242 does not limit liability to the one who lit the offending fire. It makes any one criminally liable who "discharges" the smoke contaminant into the atmosphere. The owner or occupier of land, after notice or knowledge of a fire on his property, has the right to control it and thereupon becomes a person who discharges the smoke into the atmosphere; in other words, a duty to control the contaminant is by this section placed on such property owner or occupier. The implied finding of the court is that the defendant had notice or knowledge of the fire for a period of time sufficient to enable it to abate the smoke and that it failed to take any action. This is supported by the evidence.

[4] The defendant was also convicted, count two, of violating Rule 57 of the Air Pollution Control District of the County of Los Angeles, which prohibits burning combustible refuse in an open, outdoor fire. Respondent admits that the conviction on both counts cannot stand. The order on count one is affirmed. The judgment and order on count two are reversed with directions to dismiss count two.

BISHOP, P. J., and KAUFFMAN, J., concur.

48 Cal.2d 606

Jessie L. REID and Robert W. Reid, Plaintiffs, Cross-Defendants and Respondents,

v.

VALLEY RESTAURANTS, Inc. (a Corporation), Defendant, Cross-Complainant and Appellant.

L. A. 24064.

Supreme Court of California,
In Bank.
May 28, 1957.

Suit against lessee for unlawful detainer and to quiet title to property covered by the lease. Lessee filed answer and a cross-complaint to recover attorney's fees in accordance with lease provisions. From judgment of Superior Court, Los Angeles County, Louis H. Burke, J., denying defendant's cross-complaint for attorney's fees, defendant appealed. The Supreme Court, McComb, J., held that where the parties stipulated that lessors' complaint would be dismissed upon fulfillment of certain conditions by lessee and that lease would be reinstated, stipulation was a compromise and defendant was not entitled to attorney's fees under lease which provided that successful party in any suit brought by either party would be entitled to reasonable attorney's fees.

Affirmed.

Opinion, 301 P.2d 918, vacated.

1. Appeal and Error ⚷846(2, 5)

In the absence of findings of fact and conclusions of law, every intendment is in favor of the judgment or order appealed from, and it is presumed that every fact or inference essential to the support of the order and warranted by the evidence was found by the court.

2. Stipulations ⚷14(6)

Judgment that defendant take nothing by its cross-complaint and that neither party recover costs against the other was not in conflict with and did not violate the stipulation in failing to provide for a dismissal of the complaint where parties had stipulated that plaintiffs would dismiss their complaint and that question of whether any relief should be granted to defendant on its cross-complaint for attorney's fees would be determined by the trial court.

3. Damages ⚷71

Attorney's fees are not recoverable from the opposing party in the absence of an express statutory provision or a contractual agreement that they be paid.

4. Stipulations ⚷14(6)

Stipulation which provided that lessors who had brought action for breach of lease would dismiss complaint upon fulfillment by lessee of certain conditions which would reinstate lease was a compromise and lessee could not recover attorney's fees under lease which provided that successful party in any suit brought by either party would be entitled to reasonable attorney's fees.

5. Costs ⚷48

In action for breach of lease where parties stipulated that lessors' complaint would be dismissed upon fulfillment of certain conditions by lessee and that lease would be reinstated, trial court did not abuse its discretion in denying costs to the lessee.

◆

Albert E. Isenberg and Don Lowry, Beverly Hills, for appellant.

Girard F. Baker and John W. Erpelding, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment denying defendant and cross-complainant attorney's fees, defendant and cross-complainant appeals.

Chronology

i. On or about July 14, 1953, plaintiffs leased to defendant a restaurant known as "The Goody-Goody Drive-In." The lease contained provisions (a) prohibiting assignment or subletting by lessee without the written consent of lessors first being obtained, and (b) that in case suit should be brought by either party against the other by reason of the breach of any of its provisions the successful party in such suit should be entitled to a reasonable attorney's fee and costs of said action in such amount as might be fixed by the court.

ii. On December 28, 1954, plaintiffs filed a complaint against defendant for unlawful detainer and to quiet title to the property covered by the lease, alleging that defendant had violated the terms of the lease in assigning it without first obtaining the written consent of plaintiffs and failing properly to account to plaintiffs for gross profits derived from the business.

iii. On January 3, 1955, defendant filed its answer and also a cross-complaint, by which it sought to recover attorney's fees in accordance with the provisions of the lease.

iv. During the course of the trial plaintiffs offered to reinstate the lease and to dismiss the action upon payment of back rents and an accounting being made for other rents, to which defendant's counsel replied: "We have no objection to the reinstating of the lease by virtue of the dismissal of the complaint. However, I see no reason why the defendant should be put to the burden of his *attorney's fees and costs in this matter and I believe we should proceed on the cross-complaint for fees.*" (Italics added.)

After further discussion plaintiffs' counsel stated to the court: "We have reached an understanding which I will endeavor to state to the Court. If counsel disagrees, he may interrupt me, otherwise there will be a stipulation that the matter of whether or not any attorney's fees should be paid by one party to the other, shall be determined by the Court based upon the files before the Court and the depositions; and that then the action be dismissed, the lease reinstated and the back rents paid up. * * *"

Thereupon the trial court made the following minute order: "It is stipulated that plaintiffs will dismiss their complaint and the question of whether any relief shall be granted to cross-complainant on its cross-complaint for attorney's fees, and if so the amount of same, may be determined by the Court based upon the files and depositions on file in this proceeding. The cause is ordered to stand submitted."

v. On May 27, 1955, written findings of fact and conclusions of law were waived by both parties.

vi. On June 6, 1955, the trial judge filed a judgment ordering that defendant take nothing by its cross-complaint, and that neither party recover costs against the other.

Defendant contends on this appeal:

First: The judgment, insofar as it fails to provide that the complaint be dismissed, is in conflict with and violates the stipulation of the parties;

Second: The judgment is against the law, insofar as it fails to award to defendant reasonable attorney's fees.

[1] These contentions are not sound. The applicable rule is thus accurately stated by Mr. Justice Schauer in Estate of Rule, 25 Cal.2d 1, 10 [3], 152 P.2d 1003, 1007, 155 A.L.R. 1319: "[I]n the absence of findings of fact and conclusions of law, every intendment is in favor of the judgment or order appealed from and it is presumed that every fact or inference essential to the support of the order and warranted by the evidence was found by the court. (Citations.)" If the evidence before the trial court is not in the record on appeal, it will be conclusively presumed that the evidence sustained the implied findings of fact.

The findings of fact and conclusions of law having been waived by the parties in the present case, this court will presume, in accordance with the rule above stated that the trial court found in favor of plaintiffs on all essential issues warranted by the evidence which are necessary to support the judgment and against defendant on such issues. This presumption, however, is not conclusive, and any statement to the contrary in Lahn v. Structural Pest Control Board, 135 Cal.App.2d 289, 287

P.2d 17, and any inferences to the contrary in any other case or cases are disapproved.

Viewing the record in accordance with the foregoing rule, we find:

(a) That the stipulation entered into by the parties was in part as follows: "It is stipulated that *plaintiffs will dismiss their complaint* and that the question of whether any relief shall be granted to cross-complainant on its cross-complaint for attorney's fees, and if so, the amount of same, may be determined by the Court based upon the files and depositions on file in this proceeding." (Italics added.)

[2] From the stipulation it is apparent that it was not the court but the plaintiffs who were to dismiss their complaint, and that therefore the judgment, in failing to provide for a dismissal of the complaint, was not in conflict with and did not violate the stipulation of the parties.

(b) In determining whether defendant was the successful party the trial court had these facts before it: Defendant assigned the lease without plaintiffs' consent, contrary to its written agreement with plaintiffs, and it instructed its manager to deliver possession of the leased property to the assignee.

[3] It is the general rule that attorney's fees are not recoverable from the opposing party in the absence of an express statutory provision or a contractual agreement that they be paid. (Viner v. Untrecht, 26 Cal.2d 261, 272 [13], 158 P.2d 3.) There is not any statute authorizing an attorney's fee to be paid to defendant under the facts as appear in this case. Therefore, we must look to the terms of the lease between the parties to see if there was any contractual liability upon the part of plaintiffs to pay defendant's attorney's fees. The lease provided that in case suit should be brought by either party against the other by reason of the breach of any of its provisions the successful party in such suit should be entitled to a reasonable attorney's fee in such amount as might be fixed by the court.

[4] The stipulation entered into by the parties was not a stipulation for judgment for defendant but was a conditional stipulation in the form of a compromise providing that upon the fulfillment of certain conditions by defendant the lease might be reinstated. For example, it required defendant to pay back rents and make an accounting and required that the question of whether or not defendant was entitled to attorney's fees was to be left to the discretion of the trial judge. The record supports the trial judge's implied finding that the situation was a compromise and that neither party was successful.

Since defendant was not the successful party, it was not entitled to attorney's fees under the express provisions of the lease.

Third: That the judgment is against the law, insofar as it fails to award costs to defendant.

[5] In this case the awarding of costs was discretionary with the trial court. Therefore, there was not any error in his denying costs to defendant.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

48 Cal.2d 570

Matter of the ESTATE of Merland Jose WOLFE, also known as Merland J. Wolfe, also known as M. J. Wolfe, also known as Joe Wolfe, Deceased.

Leanore L. WOLFE, Appellant,
v.
Troi C. WOLFE, Respondent.
L. A. 24167.

Supreme Court of California,
In Bank.
May 24, 1957.

Rehearing Denied June 19, 1957.

Proceeding to determine heirship. The Superior Court, Los Angeles County, Newcomb Condee, J., held that testator's wife was not required to elect between interest conferred upon her by deceased husband's will and her rights as surviving member of community, and testator's sister appealed. The Supreme Court, Shenk, J., held that where property was owned by husband and wife as community property, but husband's will purported to dispose of his own and his wife's share of community property as a separate property, assertion by wife of her rights under will and at same time of her interest in community property were inconsistent, and wife was required to elect.

Reversed.

McComb, J., dissented.

Opinion, 304 P.2d 1037, vacated.

1. Husband and Wife 🔑264, 279(3)

In proceeding to determine heirship, wherein it was shown that testator and wife had entered into property settlement agreement in connection with divorce proceedings, prior to reconciliation, evidence sustained finding that property settlement agreement was abrogated upon reconciliation and that all property in which testator had interest at time of his death was community property of the spouses.

2. Wills 🔑782(3)

Where testator purports to dispose of both his and his spouse's share of community property, and intent of testator will be thwarted by giving literal effect to the will while recognizing community property rights of surviving spouse, an election should be required, the purpose being to adjust distribution of property under will to conform to express or implied intention of testator.

3. Wills 🔑435

Where testator's intention cannot be readily determined from face of will, or will is ambiguous, rules of construction must be invoked to assist in determination of intent.

4. Wills 🔑577

Where an interpretation of will of testator who had community property is required, that construction which leads to conclusion that testator was disposing only of his interest in community property will be adopted.

5. Wills 🔑486

Where testator describes his property in general terms, that is, "all of my property", or "all of my estate", he will be presumed to have intended to dispose of only that interest which was subject to his power of testamentary disposition.

6. Wills 🔑577

An intention on part of testator to dispose of his wife's interest in community property will not be implied where another construction is permissible.

7. Wills 🔑782(3)

Where property owned by husband and wife was community property, but husband's will purported to dispose of his own and his wife's share of community property as his separate property, assertion by wife of her rights under will and at same time of her interest in community property were inconsistent, and wife was required to elect. West's Ann.Prob.Code, § 201.

◆

Church, Howard & Stevens and Charles F. Howard, Beverly Hills, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

SHENK, Justice.

Leanore L. Wolfe, the sister of the decedent, Merland J. Wolfe, appeals from a judgment in a proceeding to determine heirship. The court held that Troi C. Wolfe, the surviving wife, was not required to elect between the interests conferred upon her by her deceased husband's will and her rights as the surviving member of the community. The sister contends that this was error and that the surviving wife should have been required to make an election.

Merland and Troi Wolfe were married in 1935. In 1937 Mrs. Wolfe filed a complaint for divorce against her husband. The action did not go to trial and was dismissed in 1940 upon the filing, by Mrs. Wolfe, of a second complaint for divorce. Upon the trial of the second action, an interlocutory decree was entered in favor of Mrs. Wolfe. Shortly thereafter, she left California on a trip to New York. Upon her return, three weeks later, the parties agreed to a reconciliation. Thereupon, Mrs. Wolfe resumed living with her husband and continued to do so until he died on November 24, 1952. In 1943, the second divorce action was dismissed without the entry of a final decree.

In conjunction with the second divorce action two property settlement agreements were entered into between the parties. The first, which divided the community property, contained releases of after acquired property. The husband also waived all right, title and interest in and to four shares of stock in a corporation formed for the operation of his garage business. The second agreement, entered into after the entry of the interlocutory decree, provided that Mrs. Wolfe would sell and Mr. Wolfe would buy the shares of stock settled upon Mrs. Wolfe by the first agreement. Payment was to be made in installments. No payments were ever made. By 1942, when the corporation was dissolved, the stock had been transferred to the husband and the assets of the corporation were distributed to him. The garage was thereafter operated by the husband as sole proprietor. Mrs. Wolfe testified that the parties thereafter never discussed the property settlement agreements.

In 1941, the husband purchased certain real property, title to which was taken in the name of "Merland J. Wolfe, a married man." The property was purchased from the earnings of the garage business. It was subsequently sold and the husband took back a deed of trust in his own name. The proceeds of the sale were used to purchase ranch property in Northridge which is the principal asset of the estate. Title to the Northridge property was taken in the name of "Merland J. Wolfe, a married man." A deed of trust was executed by the husband and wife on the ranch property. The balance of the purchase price was paid from the earnings of the garage business.

In 1951, Mr. Wolfe brought an action for declaratory relief against Mrs. Wolfe in which he sought a judgment to determine the Northridge property to be his separate property. That action was dismissed in 1952 by mutual consent.

The will of the deceased husband contained the following provisions: "Third: All property in which at this date I have an interest is my separate property, pursuant to the provisions of a certain property settlement agreement heretofore entered into between my said wife and me. It is my intention to dispose of all property over which I have the power of testamentary disposition." Paragraph Fourth made specific bequests of "* * * my Cadillac automobile, jewelry, silver, books, pictures, paintings, works of art, household furniture and furnishings, clothing and other personal effects * * *" to Mrs. Wolfe. "Fifth: I give and bequeath the sum of Two Thousand Dollars ($2,000) to Angel Corona, in appreciation of his long and faithful service in my employ. It is my desire that my Executor and/or Trustee employ said Angel Corona to manage my ranch property in Northridge, California, so long as it shall remain and be a part of my probate estate or the trust estate hereinafter described." Paragraph Sixth provided: "I give, devise and bequeath all of the residue of my estate, real and personal, wherever situated, including all failed and lapsed gifts * * * in trust * * *" for the benefit of Leanore L. Wolfe, and Troi Wolfe, to terminate upon the death of the survivor, the remainder to be distributed to designated charities. The will further provided that the trustee distribute one half of the net income of the trust to Leanore L. Wolfe, the whole of the net income to be paid to the survivor for her life. The trustee was empowered to invade the corpus of the trust if the income should be found insufficient to pay each beneficiary $3,600 per annum. Finally, the trustee was empowered to invade the corpus for the support, care, and comfort of the beneficiaries if the income is insufficient to so provide. Paragraph Seventh provided: "During such time as my ranch property in Northridge, California shall remain and be a part of my probate estate or the trust estate, I direct that my wife, Troi C. Wolfe, shall, during her life, have the right to the use and occupancy of the residence located on said ranch property * * *" and the necessary surrounding area as determined by the trustee.

[1] The trial court found and concluded on sufficient evidence, that the property settlement agreement was abrogated upon the subsequent reconciliation of the parties and that all of the property in which the decedent had an interest at the time of his death was the community property of the spouses.

[2, 3] If the will expressly requires the wife to make an election, no substantial problem is presented. In re Estate of Dunphy, 147 Cal. 95, 81 P. 315. The testator may, however, so frame his will as to present the problem whether an election is required. If the testator purported to dispose of both his and his spouse's share of the community property, and it appears that the intent of the testator will be thwarted by giving literal effect to the will while recognizing the community property rights of the surviving spouse, an election should be required. The purpose of the election is to adjust the distribution of the property under the will to conform to the express or implied intention of the testator. Thus, it becomes necessary to examine the will for an expression of that intention, and if it cannot be readily determined from the face of the will, or if the will is ambiguous, rules of construction must be invoked to assist in the determination of that intent.

If the respondent be required to make an election, she may repudiate the will and claim her statutory share of the community property or she may reject her interest under the law and claim under the will. She cannot take under both. If no election be required, one half of the property found by the trial court to be community property would belong to the surviving spouse (Probate Code, § 201) and she would be entitled to the additional interests conferred upon her by the will. In re Estate of Rossi, 169 Cal. 148, 146 P. 430; In re Estate of Prager, 166 Cal. 450, 454, 137 P. 37; In re Gilmore's Estate, 81 Cal. 240, 22 P. 655; Morrison v. Bowman, 29 Cal. 337.

[4] Where an interpretation is required, that construction which leads to the conclusion that the testator was disposing only of his interest in the community property will be adopted. In re Estate of Moore, 62 Cal.App. 265, 271, 216 P. 981. The last sentence of the third paragraph of the will recites "It is my intention to dispose of all property over which I have the power of testamentary disposition." When read in the light of the constructional preference stated in the Moore case, this sentence supports the conclusion that the testator did not intend to dispose of any property over which he did not have the power of testamentary disposition.

[5] In settling the testamentary trust upon his sister and widow, the testator described the corpus of the trust in general terms. It was a gift of the residue of his estate and the property which composed the corpus was not designated. Where the testator describes his property in general terms, that is, "all of my property," or "all of my estate," he will be presumed to have intended to dispose of only that interest which was subject to his power of testamentary disposition. In re Prager's Estate, 166 Cal. 450, 137 P. 37; In re Gilmore's Estate, 81 Cal. 240, 22 P. 655; In re Estate of Silvey, 42 Cal. 210; La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426; Pom.Eq.Juris. § 489, 3d Ed., p. 429.

Although the testator's declaration that he intended to dispose of all of the property over which he had the power of testamentary disposition and his description of the estate in general terms support the trial court's construction, it becomes clear, from a reading of the will in its entirety, that an election is required.

The testator, in the third paragraph of the will, recited that the whole of the property in which he had an interest was his separate property. Obviously he believed that the property settlement agreement was still in force and that all of the property disposed of by the will, including the property conveyed in trust, was his separate property. This belief is supported by his references to the Northridge property as "my ranch property." Although the trial court was not bound to give effect to the testator's declarations that the property was his separate property, those declarations were entitled to consideration in determining the intended scheme of distribution.

In re Estate of Vogt, 154 Cal. 508, 98 P. 265, the testator expressly provided that all of the property in his estate except property of the value of $8,000 was his separate property. The will contained numerous references to the property as "my property." The testator's wife was a beneficiary under the will. The testator sought to dispose of the whole of the property as his estate, and without regard to his wife's community interest. This court held that his will must be construed to have disposed of the property accordingly, while protecting the testator's wife's community property interest. An election was required in order to carry out the legal effect of the terms of the will.

The respondent widow contends that the rules of construction enunciated in La Tourette v. La Tourette, supra, 15 Ariz. 200, 137 P. 426, apply here. In that case, the testator described the estate in general terms. The will did not show a mistaken belief as to the character of the property. The court correctly applied the rule that where the testator describes the estate in general terms such as "all of the property of which I may die possessed," the will is deemed to dispose only of that part of the property in which the testator in fact had an interest at the time of his death and no election should be required. The Arizona Supreme Court distinguished In re Estate of Vogt, supra, 154 Cal. 508, 98 P. 265, by reference to language in the Vogt will in which the testator declared that his estate consisted in part of separate property.

The language of the will in the present case, considered in the light of the cases construing similar provisions, would indicate that the trial court should have required Mrs. Wolfe to make an election. Estate of Vogt, supra, 154 Cal. 508, 98 P. 265; In re Stewart's Estate, 74 Cal. 98, 15 P. 445; Morrison v. Bowman, supra, 29 Cal. 337; and see In re Estate of Moore, supra, 62 Cal.App. 265, 216 P. 981.

[6, 7] An intention on the part of the testator to dispose of his wife's interest in the community property will not be implied where another construction is permissible. The third paragraph of the will purported to dispose of his own and his wife's share of the community property as his separate property and, after small bequests to his wife and Angel Corona, to divide the residue equally between his sister and his wife. Under the circumstances, the assertion by the wife of her rights under the will and at the same time of her interest in the community property under Probate Code, § 201 are inconsistent. A required election is clearly indicated.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

McCOMB, J., dissents.

Rehearing denied; McCOMB, J., dissenting.

48 Cal.2d 595

PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1953 FORD VICTORIA, TEXAS LICENSE NO. EY 8613, MOTOR NO. BPV 102617, Defendant,

Dean and Company, Claimant and Respondent.

S. F. 19686.

Supreme Court of California,
In Bank.

May 24, 1957.

Rehearing Denied June 19, 1957.

Proceeding by state for forfeiture of automobile used to transport marihuana. The Superior Court of Monterey County, Stanley Lawson, J., entered judgment of forfeiture subject to mortgagee's lien for unpaid balance of purchase price, and the People appealed from part of judgment recognizing lien. The Supreme Court, Traynor, J., held that statutory requirement that, to avoid forfeiture of his interest in event of prohibited use of mortgaged automobile the mortgagee must make reasonable investigation of character of purchaser, in absence of legislative direction to contrary, could not reasonably be applied to nonresident mortgagee which proved that its mortgage was bona fide and was created in another state without knowledge that automobile would be used unlawfully to transport marihuana in California, and that automobile was brought from county in another state to California in violation of contract.

Affirmed.

Opinion, 304 P.2d 37, vacated.

1. Appeal and Error ⇐839(1)

On appeal from a severable part of a judgment, other parts of judgment that have not been appealed from will not be considered.

2. Chattel Mortgages ⇐2

Chattel mortgage which was valid in Texas where it was executed was valid in California where the automobile was brought.

3. Forfeitures ⇐3

Statutory requirement that, to avoid forfeiture of his interest in event of prohibited use of mortgaged automobile, mortgagee must make reasonable investigation of character of purchaser, in absence of legislative direction to contrary, could not reasonably be applied to non-resident mortgagee which proved that its mortgage was bona fide and was created in another state without knowledge that automobile would be used unlawfully to transport marihuana in California and that automobile was brought from county in another state to California in violation of contract. West's Ann.Health & Safety Code, §§ 11610–11629.

4. Forfeitures ⇐3

Statutory requirement that, to avoid forfeiture of his interest in event of prohibited use of mortgaged automobile to transport narcotics, mortgagee must make reasonable investigation of character of purchaser, in effect regulates conduct of persons financing, and thereby facilitating, sales thereof. West's Ann.Health & Safety Code, § 11620.

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Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Severson, Davis & Larson, James B. Werson and George Brunn, San Francisco, for respondent.

TRAYNOR, Justice.

In this proceeding to forfeit an automobile for an unlawful transportation of narcotics (Health & Safety Code, §§ 11610–11629) the facts are undisputed.

On June 10, 1953, Willie Smith purchased the automobile from a dealer in Bexar County, Texas. Smith executed a note for the unpaid balance of the purchase price and gave the dealer a chattel mortgage on the automobile to secure payment. On the same day, the dealer assigned the note and mortgage to respondent, a Texas corporation engaged in the business of financing the sales of automobiles.

The mortgage prohibited the mortgagor from removing the automobile from Bexar County without the written consent of the mortgagee. In violation of this prohibition and without the knowledge of respondent, Smith brought the automobile to California.

On September 23, 1954, Smith used the automobile in California to transport marihuana, and the automobile was seized. Health & Safety Code, § 11611. On March 1, 1955, the attorney general filed a notice of seizure and intended forfeiture. Health & Safety Code, § 11612. Respondent answered, asserting its mortgage.

The hearing disclosed that Texas has no law providing for the forfeiture of automobiles used in the unlawful transportation of narcotics; that at the time respondent accepted the assignment of the note and mortgage it had no information that would place it on notice that the vehicle was to be used unlawfully; and that respondent made no investigation of Smith's moral responsibility, character, and reputation. See Health & Safety Code, § 11620, infra.

[1] The trial court concluded "[t]hat the validity and effect of the lien of * * * [respondent] * * * is governed by the laws of the State of Texas, which do not require an investigation of the moral responsibility, character and reputation of the purchaser," and entered judgment providing that the automobile be forfeited to the state of California subject to respondent's lien for the unpaid balance of the purchase price, $722.84. The People appeal from the part of the judgment recognizing respondent's lien.[1]

[2] The validity of respondent's mortgage is not in question. Admittedly the mortgage was valid in Texas, and it is valid here. Atha v. Bockius, 39 Cal.2d 635, 639, 248 P.2d 745. The People contend that despite the validity of the mortgage, respondent's interest in the automobile should be forfeited because respondent failed to investigate Smith's moral responsibility, character, and reputation.

[3] Section 11610 of the Health and Safety Code provides: "A vehicle used to unlawfully transport * * * any narcotic * * * shall be forfeited to the State." Section 11620 provides: "The claimant * * * may prove his * * * mortgage * * * to be bona fide and that his * * interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged * * *." Section 11622 provides: "In the event of such proof, the court shall order the vehicle released to the * * * innocent * * * mortgagee, * * * it being the intention of this section to forfeit only the * * * interest of the purchaser." The statute makes it clear that it does not contemplate the forfeiture of the interest of an innocent mortgagee. People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 302, 231 P.2d 832. To prove his innocence, however, a mortgagee whose interest arises out of a transaction in California must show not only that his mortgage is bona fide and that his interest was created without any

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[1] Assignees of the registered owner defended against the forfeiture, and judgment was entered against them. They have not appealed. The trial court restricted the People's recovery of costs to the proceeds of the sale of the automobile remaining after the payment of respondent's lien. See Health & Safety Code, § 11625. The People contend that they should have recovered costs generally against the unsuccessful parties (see Code Civ.Proc. § 1032), and that the trial court erred in limiting the recovery of costs to the proceeds of the sale of the automobile. See People v. One 1950 Ford Sedan, 140 Cal.App.2d 647, 649, 295 P.2d 486. The People did not appeal, however, from the part of the judgment pertaining to costs, and it is settled that on an appeal from a severable part of a judgment, other parts of the judgment that have not been appealed from will not be considered. American Enterprise, Inc., v. Van Winkle, 39 Cal. 2d 210, 216, 246 P.2d 935.

knowledge that the vehicle was to be used unlawfully but also that he made the required "reasonable investigation." Respondent has proved that its mortgage is bona fide; that it was created in another state without any knowledge that the vehicle was to be used unlawfully or even that it was to be taken to California; and that the automobile was brought here in violation of an express contractual prohibition against removing the vehicle not only from Texas but from a specified county therein. The question is whether under these circumstances the "reasonable investigation" required of a California mortgagee to avoid forfeiture of his interest applies to respondent.

[4] By requiring a "reasonable investigation" to avoid forfeiture of their interests in the event of prohibited use of automobiles, section 11620 in effect regulates the conduct of persons financing, and thereby facilitating, the sales thereof. People v. One 1940 Ford V-8 Coupe, 36 Cal.2d 471, 477, 224 P.2d 677; People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d at page 302, 231 P.2d 832; People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 421, 424, 147 P.2d 49. To avoid forfeiture such persons are required to investigate the moral responsibility, character, and reputation of prospective purchasers and mortgagors to diminish the possibility that automobiles will be placed in the hands of persons likely to use them to transport narcotics unlawfully. As applied to persons financing the sales of automobiles in California, a forfeiture for failure to make the required investigation is not unreasonable. Such persons may reasonably be expected to be familiar with California statutes regulating their activities and to make the "reasonable investigation" necessary to protect their interests from forfeiture. In the absence of a plain legislative direction to the contrary, however, the statute cannot reasonably be interpreted as requiring such investigation when the sales are financed in other states and the vehicles are taken to California, not only without the knowledge of those financing the sales, but in violation of express contractual prohibitions. See Atha v. Bockius, supra, 39 Cal.2d at pages 639, 640, 643, 248 P.2d 745; Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 487, 491, 265 P. 190, 57 A.L.R. 696; North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 4, 162 P. 93, L.R.A.1917E, 642. A person financing the sale of an automobile in Texas for use exclusively in that state will look to the laws of Texas for the determination of his rights and duties. He cannot reasonably be expected to familiarize himself with and comply in Texas with the statutes of the forty-eight or more jurisdictions into which the automobile could possibly be taken without his consent and in violation of express contractual prohibitions. Not only is section 11620 not made expressly applicable to an innocent mortgagee financing the sale of an automobile in another state for exclusive use there, but the statutory enumeration of relationships between the mortgagor and the state of California in the 1955 amendment to that section (Stats.1955, ch. 1209, § 5), plainly indicates that in requiring a "reasonable investigation" to avoid forfeiture, the Legislature was preoccupied with California mortgagors and mortgagees.[2]

It is contended that a holding that the "reasonable investigation" requirement is not applicable to respondent will subvert the enforcement of California's narcotics laws. We are not persuaded that such dire consequences will ensue. The state may still forfeit the interest of the wrongdoer. It has done so in this case. Moreover, the

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[2] That amendment provides that if certain other circumstances are shown, a "reasonable investigation" shall be deemed to have been made if the mortgagee ascertained that: "(a) The * * * mortgagor was * * * the holder of any occupational or business license issued by the State of California, or (b) * * * an employee with tenure of the * * * State of California or of any political subdivision thereof or of any municipal corporation, or (c) * * * a commissioned or noncommissioned officer * * * of the State Militia, * * *".

Legislature has made plain its purpose not to forfeit the interests of innocent mortgagees. It has not made plain that "reasonable investigation" of the purchaser is such an essential element of innocence that it must be made even by an out-of-state mortgagee although such mortgagee could not reasonably be expected to make such investigation.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SPENCE, and McCOMB, JJ., concur.

SCHAUER, Justice (concurring).

I concur in both the judgment and the reasoning upon which it is based, with the qualification that I do not join in any implication, if there be such, that California could constitutionally (by "a plain legislative direction," or otherwise) require as a condition of upholding contracts made in other states by residents of those states that the parties to such contracts comply with California's "reasonable investigation" statute.

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48 Cal.2d 638

Application of Abel GONSALVES for a Writ of Habeas Corpus.

Cr. 5986.

Supreme Court of California,
In Bank.

May 31, 1957.

Rehearing Denied June 26, 1957.

Prisoner's original habeas corpus proceeding for determination that he had instituted a timely appeal. The Supreme Court, Schauer, J., held, inter alia, that prisoner, when he deposited a properly stamped and addressed notice of appeal in proper place for outgoing prison mail, did not assume risk of nondelivery, and where he timely deposited such a notice, though it thereafter disappeared and was not delivered, he had made a proper constructive filing of notice of appeal.

Petition denied.

1. Habeas Corpus 🔑1

Habeas corpus was an appropriate proceeding to enable petitioner to obtain declaration that he had instituted an appeal by a timely constructive filing of notice of appeal, so that he might be able to have record prepared. West's Ann.Rules on Appeal, rules 31, 53(b).

2. Habeas Corpus 🔑1

Habeas corpus is available not only to secure relief from illegal imprisonment but to secure relief from illegal conditions of imprisonment.

3. Habeas Corpus 🔑44

Prisoner seeking declaration that he had instituted timely appeal from judgment of conviction by timely constructive filing of notice of appeal could properly proceed by original habeas corpus proceeding in Supreme Court and was not required to seek habeas corpus in trial court or to seek mandate.

4. Habeas Corpus 🔑90

Where Supreme Court, in original habeas corpus proceeding, submitted factual matters to referee, referee's findings were not binding on the court, but it would consider them together with transcript of evidence in an independent examination of the record.

5. Criminal Law 🔑1081

Notices of appeal are liberally construed to preserve right of review unless it appears that respondent has been misled by the description. West's Ann.Rules on Appeal, rules 31, 53(b).

6. Criminal Law 🔑1081

Letter, which convicted defendant wrote, from prison, to judge and clerk of Superior Court, stating that he was dissatisfied with judgment of conviction and requesting that they accept his notice of appeal and inform him if there was anything else that he should do, constituted a sufficient notice of appeal, even though it did not specifically refer to the case in which he was convicted, date of rendition of judgment from which he took appeal or date of judgment. West's Ann.Rules on Appeal, rules 31, 53(b).

7. Criminal Law ⚷1068½

State has no duty to see that every convicted prisoner perfects an appeal, but courts are alert to protect rights of imprisoned defendants, acting in propria persona, in their attempts to appeal from judgments of conviction when they diligently attempt to timely initiate and prosecute such appeals.

8. Criminal Law ⚷1081

A prisoner, when he deposits a properly stamped and addressed notice of appeal in proper place for outgoing prison mail, does not assume risk of nondelivery, and where a prisoner timely deposited such a notice, though it thereafter disappeared and was not delivered, he had made a proper constructive filing of notice of appeal. West's Ann.Rules on Appeal, rules 31, 53(b).

9. Criminal Law ⚷1081

One who has access to post office for deposit of notice of appeal is properly charged with risk of nondelivery since he also has access to clerk's office. West's Ann.Rules on Appeal, rules 31, 53(b).

10. Criminal Law ⚷1083

Lack of record does not affect jurisdiction of appellate court.

11. Criminal Law ⚷1081

Where prisoner had properly constructively filed notice of appeal by leaving it in proper place for outgoing prison mail, though it thereafter disappeared and was not delivered, since lack of a record would not affect jurisdiction of reviewing court, reviewing court had jurisdiction of the appeal. West's Ann.Rules on Appeal, rules 31, 53(b).

Abel Gonsalves, in pro. per., and Jerome A. Duffy, San Rafael, under appointment by the Supreme Court, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner in this habeas corpus proceeding seeks a determination that he instituted an appeal by the timely constructive filing of a notice of appeal from the judgment under which he is held. This notice was not received by the clerk of the superior court which rendered the judgment. We have concluded that habeas corpus is an appropriate proceeding to enable petitioner to obtain a declaration to that effect so that he will be able to have a record prepared (see In re Byrnes (1945), 26 Cal.2d 824, 161 P.2d 376) and that petitioner has shown that he has an appeal pending under the doctrine of constructive filing (see People v. Slobodion (1947), 30 Cal.2d 362, 181 P.2d 868).

Petitioner is imprisoned under a judgment of conviction of illegal sale of narcotics (Health & Saf. Code, § 11500). The Los Angeles superior court rendered such judgment on December 19, 1955. So far as the superior court file of the proceedings against petitioner discloses, the judgment became final without timely filing of a notice of appeal. After such judgment had apparently become final, petitioner in propria persona filed his petition for habeas corpus. He alleges in substance that because he was without funds he could not employ counsel to represent him on appeal; that on December 20, 1955, the day after rendition of judgment, he attempted to appeal by placing a notice of appeal, stamped and properly addressed, in the proper place for deposit of outgoing mail in the Los Angeles county jail, where petitioner was then confined; and that jail officials "concealed" the notice and "refused" to mail it. This asserted notice of appeal did not reach the file of the clerk of the court by which the judgment was rendered.[1]

After issuance of an order to show cause directed to the warden of the state prison having custody, and the filing of his return, we appointed counsel for petitioner and submitted to a referee the questions quoted in the margin.[2] Such referee has made the following "findings of fact":

"1. Petitioner did not prepare a valid written notice of appeal from the judgment under which he is now held in custody.

"2. (a) Petitioner did write a letter to Judge Walker [3] and to the Clerk of the Superior Court and placed it in an envelope addressed to Clerk of the Superior Court, 306 North Broadway, Los Angeles, California,[4] with a three-cent stamp. In substance the letter stated: 'I am dissatisfied with the judgment', 'Please accept my notice of appeal', 'Please inform me and instruct me if there is anything else I should do. Your immediate reply will be appreciated', 'Respectfully' and signed it Abel Gonsalves. He did not make any reference to the case of People vs. Gonsalves, or make any other reference of that nature.

"(b) Petitioner placed the stamped envelope with the letter enclosed in the clip at the front of the cell for outgoing mail (c) on December 20, 1955, at about 11:00 A.M., and watched a man in Sheriff's uniform pick it up. (d) The Petitioner in taking such steps complied with jail rules regarding outgoing mail.

"3. The jail rules were that outgoing mail be placed in clips at the gate of the tanks, that prisoner's name and address be placed on the upper left corner, and also on the flap at the back of the envelope, properly addressed and stamped. The envelope remain_ open for censorship. The rules were not unreasonable and they did not affect the attempted filing.

"4. No jail official refused or neglected to mail or file the purported notice.

"5. The referee finds that no purported notice of appeal was filed or placed in the file of People vs. Abel Gonsalves, No. 175607, in the office of the Los Angeles County Clerk within the ten day period, expiring on December 29, 1955; that the letter of December 20, 1955, was an insufficient notice of appeal in that it did not identify the case or any portion thereof sought to be appealed from; that Petitioner did not talk to any State, County or jail official from time of judgment until the expiration of the ten day notice of appeal period; that there was no constructive filing or cause for extension of time and there was no evidence of fraud, inadvertence or neglect on the part of the adverse party; (People v. Delaney [(1955), 132 Cal.App.2d 838, 283 P.2d 287], People v. Riser [(1956), 47 Cal.2d 594, 305 P.2d 18]) that Petitioner bore the risk of filing by mail (People v. Martiz [(1955), 130 Cal.App.2d 602, 279 P.2d 568]) and that Petitioner was not lulled into a false feeling of security by anyone."

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[1] Other allegations of petitioner which attempt to state a case for habeas corpus are insufficient to bring him within established rules, or any suggested reasonable extension of such rules, and need not be discussed.

[2] "1. Did petitioner prepare a written notice of appeal from the judgment under which he is now held in custody?

"2. If such a notice was prepared: (a) What, in substance, did it state? (b) What steps, if any, did petitioner take toward causing such notice to be filed with the clerk of the superior court? (c) When were such steps, if any, taken? (d) Did petitioner in taking such steps comply with jail rules?

"3. If it is contended that jail rules were unreasonable and operated to preclude timely filing, what were the rules and how did they affect the attempted filing?

"4. Did a jail official refuse or neglect to mail or file the notice, if any such notice was delivered to him?"

[3] The Honorable Herbert V. Walker, who tried and sentenced petitioner, was the only "Judge Walker" who was a judge of the Los Angeles county superior court at the time of petitioner's attempted appeal.

[4] 306 North Broadway was the address of the Hall of Justice; the office of the criminal division of the county clerk was in this building.

[1] The attorney general argues that habeas corpus will not lie where the petitioner's purpose is to determine that an appeal is pending and to effect preparation of a record so that he can perfect such appeal. This contention is refuted by In re Byrnes (1945), supra, 26 Cal.2d 824, 161 P.2d 376, where we determined, on habeas corpus, that "By the timely notices of appeal from the judgments of conviction under which Byrnes is now in custody, the District Court of Appeal acquired jurisdiction over the two actions, and * * * lack of a record on appeal does not affect its jurisdiction," and where we directed the appropriate court "to hear any motion or motions made within 90 days after the date of the filing of this opinion for the purpose of securing relief from default in the presentation of the record upon appeal in either or both of the actions referred to" (at page 828 of 26 Cal.2d [2, 3] at page 378 of 161 P.2d).

[2, 3] The attorney general suggests that petitioner should have sought relief in the trial court, as did the prisoner in People v. Cato (1955), 136 Cal.App.2d 503, 289 P.2d 119, or mandate as did the prisoner in Brown v. Superior Court (1955), 136 Cal.App.2d 28, 288 P.2d 144. In both the Cato case (at pages 506–507 of 136 Cal.App.2d, 289 P.2d at pages 121–122) and the Brown case (at page 31 of 136 Cal.App.2d, 288 P.2d at page 146) it was determined, without any discussion of the appropriateness of the form of remedy sought, that the prisoner was not entitled to relief enabling him to effect a belated appeal because he had not shown a "constructive filing." In view of our decision in Byrnes that habeas corpus is the appropriate remedy, we do not regard the Cato and Brown cases as persuasive in relation to the question of what form of relief one in petitioner's situation should seek. In this connection it appears undesirable to relegate a prisoner who would assign violation of fundamental rights to the task and the hazard of selecting among the technicalities of an assortment of forms of writs, motions, and petitions. In this state, where habeas corpus is available not only to secure relief from illegal imprisonment but also to secure relief from illegal conditions of imprisonment (see In re Chessman (1955), 44 Cal.2d 1, 9, 279 P.2d 24, and cases there cited), such technical niceties are inappropriate.

[4] The foregoing "findings of fact," insofar as they are actually findings, carefully determine the submitted questions of fact. The specific findings as to petitioner's attempt to mail the letter of December 20, 1955, are supported by ample, credible evidence. The findings are not binding on this court, but we have considered them, together with the transcript of the evidence before the referee, in our independent examination of the record. (See In re Wallace (1944), 24 Cal.2d 933, 937, 152 P.2d 1; In re Atchley (1957), 48 Cal.2d —, 310 P.2d 15.)

[5, 6] Insofar as the "findings" purport to determine that "Petitioner did not prepare a *valid* written notice of appeal" and that his writing was "an *insufficient* notice of appeal" (italics added), they are conclusions of law which are out of harmony with the specifically found facts and with the Rules on Appeal and the decisions which require liberal construction of documents which are manifestly intended as notices of appeal. (Rule 31 ["The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency"]; People v. Robinson (1954), 43 Cal.2d 143, 145–146 [3, 4], 271 P.2d 872; People v. Saad (1951), 105 Cal.App.2d Supp. 851, 852–853 [2], 234 P.2d 785, and cases there cited; Kellett v. Marvel (1936), 6 Cal.2d 464, 471 [2], 58 P.2d 649 ["notices of appeal are liberally construed to preserve the right of review unless it appears that the respondent has been misled by the misdescription"]; see West's Annotated Cal.Codes, Civil and Criminal Rules (1955), p. 53, note 9, pp. 54–56, notes 11–13, pp. 58–60, notes 17–20, pp. 352–353, note 2, p. 356, notes 11–12; Witkin, New Rules on Appeal (1944), 17 So.Cal.L.Rev. 79, 82.)

Respondent People would not have been misled by the attempted notice of appeal which petitioner sought to forward to the clerk on December 20, 1955, and which did not reach the file of the action. According to the testimony of the chief clerk of the criminal division of the superior court, such notice, had it been received, "in all probability" would have resulted in the preparation of a record on appeal;[5] such record, we may assume, would have been disposed of in usual course in accord with the Rules on Appeal and without prejudice to anyone on account of the inartificiality of the notice.

Petitioner's letter of December 20, 1955, did not state the name or number of the case in which he sought to appeal, nor the date of rendition of the judgment from which he undertook to appeal. However, it would be unnaturally harsh to construe the letter as anything other than an expression of a desire that the clerk accept the letter as "my notice of appeal" from a judgment which had been rendered against the author of the letter in a criminal case which had been decided at some time not distant from the date of the letter. It does not appear that Judge Walker rendered a number of judgments against a number of persons named Abel Gonsalves during the period to which the letter of December 20, 1955, could have applied. It has often been held that inaccuracies in designation of the judgment or order appealed from and of the date of rendition or entry do not vitiate a notice of appeal even where the notice has been prepared by counsel (who, of course, are better able than imprisoned laymen to obtain and to formulate specifications identifying the precise judgment or order from which they would appeal). (E. g., Adams v. Talbott (1942), 20 Cal.2d 415, 417 [1], 126 P.2d 347; Kellett v. Marvel (1936), supra, 6 Cal.2d 464, 471 [1, 2], 58 P.2d 649; Hoogbruin v. Atchison etc. Ry. Co. (1931), 213 Cal. 582, 596 [7], 2 P.2d 992; Oberkotter v. Woolman (1921), 187 Cal. 500, 502 [1], 202 P.2d 669.)

In People v. Delaney (1955), supra, 132 Cal.App.2d 838, 839, 283 P.2d 287, upon which the referee relied for his rather strict construction of the letter by which petitioner attempted to notice an appeal, a convicted defendant filed in the court which rendered the judgment of conviction a document which named such court, the department and the judge, designated the case by title and number, and stated, "Petitioner hereby makes known his intentions to file an appeal for a new trial, rehearing or modification upon the grounds that his constitutional rights have been abused." The District Court of Appeal held that the document was not a notice of appeal because it "does not state that defendant appeals nor does it specify any judgment or particular part thereof from which he appeals. All that the document does is state that defendant intends to file an appeal for a *new trial, rehearing or modification.*" (Italics of District Court of Appeal.) The Delaney case, however, is clearly distinguishable in that, as shown by the language emphasized by the appellate court, the defendant there by the wording of his notice indicated an intention to apply for relief in the trial court rather than to "appeal" to an appellate court.

The United States Supreme Court has expressed the view that, where state law provides for an opportunity to appeal but prison officials by suppression of a prisoner's appeal papers deprive the prisoner of the opportunity, there is a denial of equal protection (Dowd v. U. S. ex rel. Cook

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[5] The clerk's testimony shows that he properly took a liberal view as to what constituted notices of appeal, that it was his practice to consult with the judge who had tried the case if he thought that there was any doubt whether a communication was intended to be a notice of appeal, that "I have never had one come in yet, no matter how crudely worded it was, where there is any indication in words or effect, that we have neglected to recognize a notice of appeal, * * * provided it is received within the statutory time." The clerk frankly recognized, however, that "there is the margin of human error."

(1951), 340 U.S. 206, 208 [71 S.Ct. 262, 95 L.Ed. 215, 19 A.L.R.2d 784, 787]; Cochran v. Kansas (1942), 316 U.S. 255, 257, 62 S.Ct. 1068, 86 L.Ed. 1453; see Brown v. Allen (1953), 344 U.S. 443, 485–486, 73 S.Ct. 397, 97 L.Ed. 469; Griffin v. Illinois (1956), 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891.) Where there has been such denial of equal protection and state remedies have been exhausted, the United States Supreme Court on habeas corpus will require the state, within a reasonable time, to afford the prisoner "the full appellate review he would have received but for the suppression of his papers, failing which he shall be discharged." (Dowd v. Cook (1951), supra, at page 210 of 340 U.S. at page 264 of 71 S.Ct.)

[7] Although the state has no duty to see that every convicted prisoner perfects an appeal (People v. Riser (1956), 47 Cal. 2d 594, 305 P.2d 18), the courts of this state are alert to protect the right of an imprisoned defendant, acting in propria persona, to appeal from a judgment of conviction of crime where he diligently attempts to timely initiate and prosecute such an appeal. Illustrating this alertness, and relied upon by petitioner here, are People v. Slobodion (1947), supra, 30 Cal.2d 362, 365–368, 181 P.2d 868 and In re Byrnes (1945), supra, 26 Cal.2d 824, 827–828, 161 P.2d 376.

In Slobodion, on motion of the People to dismiss an appeal, we determined (at page 365 [1] of 30 Cal.2d at page 870 of 181 P. 2d) that "Both reason and justice compel a negative answer" to the question, "Should appellant—who was incarcerated by the state, who desired to appeal, who took every step he could possibly take to perfect his appeal, who delivered his notice of appeal to the prison authorities well within the statutory period with the request that they mail it but they carelessly and negligently failed to forward the notice so that it would be received by the 'clerk of the superior court' within the time limitation specified by law—be deprived of his right of appeal?" Accordingly, we held (at pages 367–368 of 30 Cal.2d at pages 871–872 of 181 P.2d) that "appellant's delivery of his notice of appeal to the state prison employees for forwarding six days prior to the expiration date for the taking of his appeal constituted a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law."

In Slobodion's case the action or inaction of state prison officials resulted in the prisoner's notice of appeal reaching the clerk after expiration of the ten days within which a notice of appeal should have been filed. In the present case, according to the specific findings of the referee, petitioner did all that he could in compliance with jail rules to institute an appeal. He saw his properly stamped and addressed notice of appeal taken from the proper place of deposit by a person in sheriff's uniform. Then, so far as the evidence discloses, the notice simply vanished; it did not reach the clerk at all. Petitioner, by showing that the properly stamped and addressed notice was last seen in the custody of one who wore the uniform of a jail official, has done all that he could and should be expected to do by way of showing that inadvertence of jail officials was the cause of the notice not reaching the clerk. Neither petitioner nor the People produced evidence that petitioner's notice of appeal was handled—either carefully or carelessly—by any particular jail official; the evidence was only that such a notice, if it had been handled in accord with usual jail procedure, would have been mailed to (and, hence, presumptively would have reached) the clerk. In the circumstances petitioner with plausibility asserts that the "constructive filing" was completed when he had acted with all possible diligence, and that specific proof of lack of diligence by identifiable representatives of the People is not an element essential to proof of such "constructive filing."

[8, 9] As stated, the referee drew the conclusion of law, adverse to petitioner, that "Petitioner bore the risk of filing by

mail," and cited People v. Martiz (1955), supra, 130 Cal.App.2d 602, 279 P.2d 568, in support of this conclusion. Insofar as the Martiz opinion contains statements or implications contrary to our views herein expressed, it is disapproved. A prisoner, when he deposits a properly stamped and addressed notice of appeal in the proper place for outgoing prison mail, does not assume the same risk of nondelivery as a person not imprisoned who deposits such a notice in the United States mail. One who has access to the United States post office for deposit of his notice of appeal is properly charged with the risk of nondelivery for the practical reason that he also has access directly to the clerk's office and therefore he could assure himself, by depositing his notice directly with the clerk, that it was in fact filed. But a prisoner is not properly chargeable with the risk of nondelivery, either through failure of the prison mail system or failure of the federal mail system, because the prisoner is helpless to do anything other than to deposit his notice in accord with prison rules.

[10, 11] Despite the fact that no record on appeal was prepared, the appeal is still pending in the appropriate appellate court (the District Court of Appeal, Second Appellate District), for, as stated, lack of a record does not affect the jurisdiction of the appellate court (In re Byrnes (1945), supra, 26 Cal.2d 824, 828 [2], 161 P.2d 376). Since the court in which the appeal is pending is the court which can relieve from default (Rule 53 (b)), the District Court of Appeal, Second Appellate District, is directed to hear any motion made by or on behalf of petitioner within 90 days after the date of filing of this opinion for the purpose of permitting relief from default in the preparation of a record.

The petition for habeas corpus is denied and the order to show cause, having served its function, is discharged.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, Justice (concurring).

I concur only in the order denying the petition for a writ of habeas corpus and discharging the order to show cause.

48 Cal.2d 564

Ida LEWIS, Plaintiff and Respondent,

v.

Wm. H. NEBLETT, as Administrator of the Estate of Eddie Will Sellers, Sr., Deceased (substituted as defendant in place and stead of Harry Aides, the former Administrator of said estate), Defendant and Appellant.

L. A. 23998.

Supreme Court of California,
In Bank.

May 24, 1957.

Action to establish trust in realty standing in decedent's name at time of death. The Superior Court, Los Angeles County, John Gee Clark, J., entered judgment for plaintiff and administrator appealed. The Supreme Court, Traynor, J., held that where former administrator entered into a stipulation extending time for trial before expiration of statutory five-year period for bringing action for reason that there was a possibility of a settlement which might have been advantageous to the estate, entry into such stipulation was within his authority, and such stipulation, together with further stipulation extending trial time entered into before antecedent stipulations had expired, were effective to except action from operation of statute requiring dismissal of actions not brought to trial within five years after filing unless parties have stipulated for extension.

Judgment affirmed.

Opinion, 302 P.2d 859, vacated.

1. Executors and Administrators ⚷213

Reason an administrator is not empowered to waive defense provided by a statute of limitations in an action against estate in his charge is that he acts as a trustee for creditors of the estate and for the heirs and is not at liberty to deplete the assets of the estate by failing to assert a valid, existing defense.

2. Executors and Administrators ⚷269

When it is questionable whether an action against an estate is barred by statute of limitations, the administrator may enter into an agreement compromising the action, since it might be advantageous to the estate to do so.

3. Dismissal and Nonsuit ⚷60(6)

In view of fact that it might be to the advantage of the estate, an administrator, before the expiration of five-year period prescribed by statute for bringing an action to trial, might enter into a stipulation extending the time within which an action against the estate must be brought to trial beyond such period. West's Ann.Code Civ. Proc., § 583.

4. Dismissal and Nonsuit ⚷60(6)

In order to avoid dismissal of an action for failure to bring same to trial within five years provided by statute, all that is required, with respect to filing a stipulation extending time for trial, is that it be filed prior to a motion to dismiss on such ground. West's Ann.Code Civ.Proc., § 583.

5. Dismissal and Nonsuit ⚷60(6)

Where former administrator entered into a stipulation extending time for trial before expiration of statutory five-year period for bringing action expired, for reason that there was a possibility of a settlement which might have been advantageous to the estate, entry into such stipulation was within his authority, and such stipulation, together with further stipulations extending trial time entered into before antecedent stipulations had expired, were effective to except action from operation of statute requiring dismissal of action not brought to trial within five years after filing unless parties have stipulated for extension. West's Ann.Code Civ.Proc., § 583.

6. Stipulations ⚷14(1)

Where a stipulation extending time for trial provided case might be continued until May 23, 1955 or as soon after as might be convenient to the court, court's order setting May 3 as date for trial did not exhaust stipulation and subsequent order setting case for trial on May 26, and one day later to May 27, on which date trial commenced, were within stipulation, and therefore precluded applicability of statute requiring action be brought to trial within five years of date of filing. West's Ann.Code Civ.Proc., § 583.

7. Limitation of Actions ⚷197(2)

In action to establish trust in real property standing in decedent's name at time of death, evidence did not establish that plaintiff was put on notice of decedent's fraud within such time that her action was barred by limitations. West's Ann.Code Civ.Proc., § 338, subd. 4.

8. Trusts ⚷372(3)

In action to establish trust in real property standing in decedent's name at time of death, evidence sustained findings favorable to plaintiff.

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Harry W. Dudley, Los Angeles, for appellant.

Leonard D. Nasatir, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action against the estate of Eddie W. Sellers to establish a trust in certain real property standing in Sellers' name at the time of his death. The trial court denied a motion to dismiss the action for plaintiff's failure to bring it to trial within five years and, after trial without a jury, made findings of fact and conclusions of law favorable to plaintiff and entered judgment accordingly. Defendant appeals.

Defendant contends that the action should have been dismissed for plaintiff's failure to bring it to trial within the five-year period prescribed by section 583 of the Code of Civil Procedure. A chronology of the events bearing upon the applicability of section 583 follows:

October 19, 1949. Plaintiff filed her complaint naming as defendant Bessie Sellers as administratrix of the estate of Eddie W. Sellers.

March 9, 1954. On plaintiff's motion, trial of the case was postponed to July 7, 1954.

June 4, 1954. Bessie Sellers was removed as administratrix by court order.

July 7, 1954. On defendant's motion, trial of the case was postponed to October 28, 1954.

August 4, 1954. Harry Aides was appointed administrator.

October 13, 1954. Aides was substituted for Bessie Sellers as defendant in the action.

October 14, 1954. Plaintiff's attorney and the attorney for Aides entered into a written stipulation providing that the case "be continued for trial from the 28th day of October, 1954 * * * to such time after the 1st of January, 1955, as may be set by the Presiding Judge," reciting as the reason for the stipulation that "there is pending the possibility of settlement of said above matter and that the Superior Court will be asked to approve a Petition for Settlement of same, * * *"

October 19, 1954. The five-year period within which an action must be brought to trial under section 583 of the Code of Civil Procedure expired.

October 21, 1954. Bessie Sellers filed a complaint in intervention alleging that she and the decedent's minor son were the real parties in interest, denying the charging allegations of plaintiff's complaint, and praying that plaintiff take nothing by her action.

October 28, 1954. The stipulation entered into on October 14 was filed, and on defendant's motion trial was postponed to February 16, 1955.

February 15, 1955. Plaintiff's attorney and the attorney for Aides entered into and filed a written stipulation providing that the case "be continued to a date subsequent to the hearing on the petition for authority to compromise claims against the estate now pending. * * *"

February 16, 1955. The court ordered the case continued to April 4, 1955.

April 4, 1955. Plaintiff's attorney and the attorney for Aides entered into and filed a written stipulation providing that the case "be continued until May 23, 1955, or as soon thereafter as may be convenient to the court," and the court ordered the case continued to May 3, 1955.

April 15, 1955. The intervenor filed notice of a motion to dismiss for failure to bring the action to trial within five years.

April 28, 1955. The motion to dismiss was denied.

April 29, 1955. Harry Aides resigned as administrator with court approval. William Neblett, attorney for the intervenor, was appointed administrator and substituted as defendant in the action.

May 3, 1955. On plaintiff's motion, trial of the case was postponed to May 26, 1955.

May 27, 1955. Trial commenced, and the court granted the intervenor's motion that her complaint be dismissed as moot.

Section 583 of the Code of Civil Procedure provides: "Any action heretofore or hereafter commenced shall be dismissed * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *."

Relying upon the stipulations entered into by her attorney and the attorney for Harry Aides, who was then administrator and defendant, plaintiff contends that "the parties have filed a stipulation in writing that the time may be extended," and that the trial court correctly denied the motion to dismiss.

Defendant contends that the five-year time limit prescribed by section 583 of the Code of Civil Procedure is a statute of limitations within the meaning of section 708 of the Probate Code, which provides: "No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator," that an administrator has no power to waive the defense provided by a statute of limitations in an action against the estate (Reay v. Heazelton, 128 Cal. 335, 338–339, 60 P. 977; Fontana Land Co. v. Laughlin, 199 Cal. 625, 636–637, 250 P. 669, 48 A.L.R. 1308), and that Aides therefore had no power to enter into a stipulation extending the time limit prescribed by section 583.

[1–3] It is unnecessary to determine whether or not the five-year period prescribed by section 583 is a statute of limitations, for even if it is, it does not follow that an administrator cannot enter into a stipulation extending the time for trial when the statutory period has not expired or when, because of a prior valid stipulation by the administrator, section 583 constitutes no bar to further prosecution of the action. The reason an administrator is not empowered to waive the defense provided by a statute of limitations in an action against the estate is that he acts as a trustee for creditors of the estate and for the heirs and is not at liberty to deplete the assets of the estate by failing to assert a valid, existing defense. Fontana Land Co. v. Laughlin, supra, 199 Cal. at pages 636–637, 250 P. 669. When it is questionable whether an action against the estate is barred by the statute of limitations, the administrator may enter into an agreement compromising the action, for it may be advantageous to the estate to do so. In re Estate of Lucas, 23 Cal.2d 454, 466–467, 144 P.2d 340. Since it may also be to the advantage of the estate, an administrator, before the period prescribed by section 583 has expired, may enter into a stipulation extending the time within which an action against the estate must be brought to trial. See Union Savings Bank v. Barrett, 132 Cal. 453, 455, 64 P. 713, 1071.

[4, 5] The foregoing chronology discloses that Aides, as administrator, entered into the first stipulation extending the time for trial five days before the five-year period expired. The reason for the stipulation was that there was pending the possibility of a settlement, which might well have been advantageous to the estate. It appears, therefore, that Aides, as administrator, was authorized to enter into the stipulation of October 14. It is immaterial to the question of his authority that the stipulation was not filed in the action until October 28. Once the stipulation was validly executed, either party could file it. The stipulation was filed prior to the motion to dismiss, and that is all with respect to filing that section 583 requires. In re Estate of Thatcher, 120 Cal.App.2d 811, 814, 262 P.2d 337 and cases there cited.

The second stipulation postponing the time for trial was entered into and filed on February 15, 1955 and the third on April 4, 1955. On both occasions the extended time under the antecedent stipulation had not expired and therefore section 583 did not bar further prosecution of the action.

[6] Defendant contends that even if Aides was authorized to enter into these stipulations, a stipulation extending the time to a specified date does not authorize postponements beyond that date (City of Los Angeles v. Superior Court, 185 Cal. 405, 409–410, 197 P. 79); that the stipulation of April 4, 1955 was exhausted by the court's order fixing May 3, 1955 as the date for trial; that no further delay was stipulated to; and that when trial was not commenced on May 3, the court should have dismissed the action on its own motion. Defendant relies on Hunt v. United Artists Studio, 79 Cal.App.2d 619, 622, 180 P.2d 460, 463. The stipulation in that case authorized a continuance to "such time as suits the court," and it was held that the subsequent order of the court fixing Janu-

ary 3, 1945 as the date for trial exhausted the stipulation and that subsequent postponements were unauthorized by that stipulation. Not every stipulation for an extension of time, however, is exhausted by the first succeeding court order fixing a date for trial. Cf. Mercantile Invest. Co. v. Superior Court, 218 Cal. 770, 773, 25 P.2d 12. The stipulation of April 4 provided that the case might be "continued until May 23, 1955, or as soon thereafter as may be convenient to the court." Obviously, the court's order setting May 3 as the date for trial did not exhaust the stipulation, for there remained twenty days to the earliest date mentioned in the stipulation. The subsequent order setting the case for trial on May 26 and the one-day delay to May 27, on which date trial commenced, were within the stipulation.

[7] Defendant also contends that the action is barred by the statute of limitations. Code Civ.Proc. § 338(4). The trial court found that plaintiff cannot read, write, or figure and that she relied on the decedent for personal and business advice; that in 1941 the decedent accepted a sum of money from plaintiff and agreed to use it to purchase for plaintiff the real property in question; that the decedent fraudulently took title to the property in his own name and concealed that fact from plaintiff; and that plaintiff had no information to put her on inquiry as to the state of the title until the decedent's death in July 1949, three months before the filing of this action. Defendant relies on the testimony of one of plaintiff's witnesses that in 1943 or 1944 plaintiff's sister and her husband came to California and that at that time in the presence of plaintiff there was a violent argument between the decedent and plaintiff's relatives during which the relatives demanded that the decedent produce proof that the property was held in plaintiff's name and that the decedent refused to produce such proof. Defendant contends that as a matter of law this incident was sufficient to put plaintiff on notice of the decedent's fraud. The same witness, however, testified that the decedent explained his refusal to produce proof that the property was in plaintiff's name, apparently to plaintiff's satisfaction, on the ground that the relatives, who had never before shown any concern for plaintiff's welfare, were trying to take the property from her and that since plaintiff knew the property was in her name, it was unnecessary to prove that fact to the relatives. In view of plaintiff's lack of education and her reliance upon the decedent for advice, it cannot be said as a matter of law that the recited incident was sufficient to put plaintiff on notice of the decedent's fraud. Seeger v. Odell, 18 Cal.2d 409, 415, 418, 115 P.2d 977, 136 A.L.R. 1291.

[8] Defendant contends that the court's findings favorable to plaintiff are not supported by the evidence on the ground that the testimony given by plaintiff in her own behalf is inherently improbable. We have reviewed the evidence and find defendant's contention without merit.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 577

Ross HARDY, Appellant,

v.

James Leslie VIAL et al., Respondents.

L. A. 24292.

Supreme Court of California,
In Bank.
May 24, 1957.

Action for malicious prosecution, wherein college professor named as defendants officials of college and state department of education and three persons who had no connection with college or department. The Superior Court, Los Angeles County, Beach Vasey, J., sustained demurrers of school defendants and one other defendant, and professor appealed. The Supreme Court, Gibson, C. J., held that school defendants who aided non-school parties in making and filing affidavits containing charges against college professor were immune from civil liability when charges were found to be untrue, but that professor's complaint alleging that other defendant acted without probable cause and made such charges in pursuance of conspiracy was sufficient.

Judgment in favor of school defendants affirmed, and judgment in favor of other defendant reversed.

Carter, J., dissented in part.

Opinion, 299 P.2d 973, vacated.

1. Malicious Prosecution ⚷1

An action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency, and this rule is in no way dependent upon type of judicial review which is allowed after decision of administrative agency involved.

2. Malicious Prosecution ⚷1

In considering availability of action for malicious prosecution, no distinction should be made between proceedings commenced before administrative agencies having adjudicatory powers and those commenced before agencies whose findings of fact are subject to trial de novo in a judicial proceeding.

3. Colleges and Universities ⚷8

State Personnel Board has adjudicatory powers in proceedings before it relating to discipline or dismissal of professors of state college and board's findings of fact will not be disturbed if supported by substantial evidence.

4. Malicious Prosecution ⚷1

Where affidavits charging college professor with commission of acts of a base and depraved nature were filed with college, and State Board of Personnel, after hearing, found that charges were untrue, professor could maintain action for malicious prosecution.

5. Malicious Prosecution ⚷42

Officials of state college and department of education, who held positions which embrace duties relating to investigation of charges which could lead to discipline or dismissal, acted within scope of their duties when they aided nonschool parties in making and filing affidavits containing charges against college professor, and officials were immune from civil liability when charges were found to be untrue, and fact that school officials had acted in concert with nonschool parties who were not immune, did not destroy immunity.

6. Officers ⚷114

Absolute immunity of public officer from civil liability when performing within scope of his power is equally applicable whether he acts by himself or with others who are not immune.

7. Malicious Prosecution ⚷49

Complaint, which alleged that defendant acted without probable cause in conspiring to make false charges against college professor and that defendant made such charges in pursuance of conspiracy, stated cause of action for malicious prosecution although it did not specifically allege that the defendant knew or should have known that charges were false, and it was unnecessary to add a statement of facts which tended to prove the averment.

Desmond & Desmond and Walter Desmond, Jr., Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., and George H. Chula, Santa Ana, for respondents.

GIBSON, Chief Justice.

Plaintiff was discharged from his employment as a professor at Long Beach State College as the result of charges made by defendants, and, after reinstatement to his position by the State Personnel Board, he commenced this action for damages for malicious prosecution. He named as defendants seven persons, hereafter referred to as the school defendants, who are officials of the college or of the state Department of Education, and three persons, Vial, Pond, and Egolf, who apparently have no connection with the college or the department.[1] General demurrers of Vial and the school defendants were sustained without leave to amend, and plaintiff has appealed from the ensuing judgments. The remaining two defendants are not involved on this appeal.

The allegations of the complaint may be summarized as follows: Defendants wrongfully, maliciously and without probable cause conspired to accuse plaintiff falsely of gross immorality and unprofessional conduct during the period of his employment for the purpose of procuring his dismissal. In pursuance of the conspiracy, defendants Vial, Pond, and Egolf, aided and abetted by the other defendants, made and filed with the college affidavits which charged plaintiff falsely with the commission of acts of a base and depraved nature. By reason of the acts alleged in the affidavits plaintiff was dismissed from his employment at the college effective March 27, 1953. After a hearing the State Personnel Board found that the charges were untrue and that the grounds for the dismissal were not sustained by the evidence. The board revoked the dismissal and ordered defendant Simpson to return plaintiff to his position at the college. No review of the board's decision was sought, and plaintiff was returned to his position.

It is the general rule that a malicious prosecution action may be founded upon a proceeding before an administrative body. Section 680 of the Restatement of Torts declares: "One who initiates or procures the initiation of civil proceedings against another before an administrative board which has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if (a) the proceedings are initiated (i) without probable cause to believe that the charge or claim on which the proceedings are based is well founded, and (ii) primarily for a purpose other than that of securing appropriate action by the board, and (b) the proceedings have terminated in favor of the person against whom they are brought." In accord, Melvin v. Pence, 76 U.S.App.D.C. 285, 130 F.2d 423, 425 et seq., 143 A.L.R. 149; National Surety Co. v. Page, 4 Cir., 58 F.2d 145, 148; Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734, 740–741; Rivers v. Dixie Broadcasting Corp., 88 Ga.App. 131, 76 S.E.2d 229, 223; Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 895–896; see Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671, 673–674, certiorari denied 350 U.S. 887, 76 S.Ct. 141, 100 L.Ed. 782, 143 A.L.R. 157.

The theory of these authorities is that the same harmful consequences may result from the malicious institution of administrative proceedings as from judicial proceedings maliciously begun, whether criminal or civil in nature. As pointed out in the Melvin case, 130 F.2d 423, 426, it makes little difference to a person whether his rights are violated by the institution of proceedings before a court or before an administrative body, and his right to redress for malicious conduct should not depend upon the form of the proceeding by which the injury is inflicted. The court further stated: "The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty. * * * When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes." 130 F.2d at pages 426, 427.

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[1] Defendant Peterson is president of the college, defendants Rhodes and Bryant are deans, and defendant Johnson is head of the division of the college in which plaintiff is employed. Defendant Roy E. Simpson is Director of Education of the State of California, defendant Vasche is assistant director of education of the Department of Education in charge of state colleges, and defendant Dresser is a special agent and field representative of the department.

[1-4] We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency. This rule is in no way dependent upon the type of judicial review which is allowed after decision of the administrative agency involved, and we do not agree with defendants' contention that plaintiff cannot maintain this action because the State Personnel Board assertedly cannot exercise adjudicatory powers and has no authority to make a final determination of a question of fact. In considering the availability of an action for malicious prosecution, no distinction should be made between proceedings commenced before agencies having adjudicatory powers and those commenced before agencies whose findings of fact are subject to trial de novo in a judicial proceeding. Such a distinction is unsound in principle and if adopted would result in unnecessary complexity and confusion. Moreover, it is settled that the State Personnel Board has adjudicatory powers, and its findings of fact will not be disturbed if supported by substantial evidence. Shepherd v. State Personnel Board, 48 Cal.2d 41, 307 P.2d 4.

The cases of Vargas v. Giacosa, 121 Cal. App.2d 521, 263 P.2d 840; Lorber v. Storrow, 22 Cal.App.2d 25, 70 P.2d 513; Hayashida v. Kakimoto, 132 Cal.App. 743, 23 P.2d 311; and Cosulich v. Stempel, 81 Cal. App. 278, 253 P. 344, which, without mentioning the authorities listed above or their reasoning, reached a contrary conclusion, are disapproved insofar as they are in conflict with the views expressed in this opinion.

The seven school defendants contend that the judgment should be affirmed because, they assert, they are immune from civil liability. In White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636, we held that an investigator for the State Fish and Game Commission, who had the duty to investigate crime and to institute criminal proceedings, was immune from civil liability for the malicious prosecution of a criminal action against the plaintiff. A similar conclusion was reached in Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876, which involved deputy sheriffs and city policemen. The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in *criminal* actions. First recognized for the protection of judges (Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646), it has been extended by the federal decisions to all executive public officers when performing within the scope of their power, acts which require the exercise of discretion or judgment. Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780; Standard Nut Margarine Co. of Florida v. Mellon, 63 App.D.C. 339, 72 F.2d 557; United States, to Use of Parravicino v. Brunswick, 63 App.D.C. 65, 69 F.2d 383; Jones v. Kennedy, 73 App.D.C. 292, 121 F. 2d 40; Farr v. Valentine, 38 App.D.C. 413; De Arnaud v. Ainsworth, 24 App.D.C. 167, 5 L.R.A.,N.S., 163; see Papagianakis v. The Samos, 4 Cir., 186 F.2d 257, 260-262. In this state Downer v. Lent, 6 Cal. 94, and Oppenheimer v. Arnold, 99 Cal.App.2d 872, 874, 222 P.2d 940, recognize the same wide immunity. Cf. also Wilson v. Sharp, 42 Cal.2d 675, 679, 268 P.2d 1062.

The policy underlying the doctrine of absolute immunity is well stated by Judge Learned Hand in Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581, as follows: "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

[5] The seven school defendants occupied positions which would ordinarily embrace duties relating to the investigation of charges which could lead to the discipline or dismissal of persons such as plaintiff, and it is not claimed that the school defendants were without authority to investigate and prosecute charges made against employees. Plaintiff contends, however, that the school defendants are not entitled to the protection of the immunity rule because they assertedly acted beyond the scope of their employment when they conspired with the non-school defendants and aided them in making and filing affidavits containing false charges. It should be noted in this connection that "What is meant by saying that the officer must be acting within his power [to be entitled to immunity] cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Gregoire v. Biddle, 177 F.2d at page 581. The alleged purpose of the conspiracy, and, accordingly, the purpose of the school defendants in aiding the non-school defendants in making the affidavits, was to accomplish the dismissal of plaintiff from his employment. This purpose, of course, was clearly within the scope of the official duties of the school defendants and within the protection of the immunity rule. The policy on which the rule is based would be defeated if it were held that whenever an officer uses his office for a personal motive not connected with the public good he acts outside his power.

[6] The fact that the school defendants sought to attain their objective by acting in concert with other persons cannot properly be treated as destroying the immunity which they would have if each of them had acted individually and independently of any other person to secure the same result. The underlying theory of absolute immunity is equally applicable whether the employee acts by himself or with others who are not immune. Cf. White v. Brinkman, 23 Cal.App.2d 307, 310 et seq., 73 P.2d 254 [public officers treated as acting in their official capacities even though they acted in concert with other persons]; Yaselli v. Goff, 2 Cir., 12 F.2d 396, 406–407, 56 A.L.R. 1239; Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780, 790, 173 A.L.R. 819; Linder v. Foster, 209 Minn, 43, 295 N.W. 299, 301–302. Since the seven school defendants have immunity, the judgment in their favor must be affirmed.

[7] The complaint does not allege facts which would entitle Vial to immunity, and we are of the view that a cause of action is stated against him. While it is not specifically alleged that Vial knew or reasonably should have known that the affidavits were false, it is alleged that he acted without probable cause in conspiring to make false

charges against plaintiff and that the making of such charges was in pursuance of the conspiracy. This meets the usual rule that a general averment of want of probable cause is sufficient and that it is unnecessary to add a statement of facts which tend to prove the averment, such as knowledge of falsity. See Pulvermacher v. Los Angeles Coordinating Committee, 61 Cal.App.2d 704, 707, 143 P.2d 974; Eustace v. Dechter, 28 Cal.App.2d 706, 710, 83 P.2d 523; 2 Witkin, California Procedure (1954) 1357; 54 C.J.S. Malicious Prosecution § 77, p. 1043; 14 A.L.R.2d 264, 282.

The judgment in favor of Vial is reversed. The judgment in favor of the other respondents is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I agree with that portion of the majority opinion which holds that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency, and that the judgment in favor of Vial, a non-school defendant, should be reversed.

I cannot agree with that portion of the opinion which holds that the seven school defendants are entitled to hide behind the outmoded cloak of immunity from civil liability. Furthermore this is an appeal from a judgment entered upon the sustaining of a demurrer to a complaint without leave to amend. "[T]he only issue involved in a demurrer hearing * * * [is] whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." Griffith v. Department of Public Works, 141 Cal.App.2d 376, 381, 296 P.2d 838, 842. The rule is well established that the allegations of the complaint must be taken as true. The question is then one of law only and if the plaintiff has stated a cause of action on any theory he is entitled to a trial on the factual issues involved.

Plaintiff's complaint charged that the ten defendants, seven of whom were school officials,[1] had engaged in a conspiracy for the purpose of procuring his dismissal from his employment; that in aid of such conspiracy the school defendants aided and abetted the nonschool defendants in preparing affidavits falsely accusing plaintiff of certain vile and depraved acts. Plaintiff also alleged that because of these affidavits and the acts constituting the conspiracy, he was dismissed from his employment; that after a hearing it was unanimously found by the State Personnel Board that the charges against plaintiff were *untrue*. Plaintiff also sets forth in detail the damages suffered by him as a result of the charges made by the defendants. Plaintiff has set forth all the necessary elements of an action for malicious prosecution.

The following statement from the majority opinion is clearly without basis in fact or in law: "The alleged purpose of the conspiracy, and, accordingly, *the purpose of the school defendants in aiding the non-school defendants in making the affidavits, was to accomplish the dismissal of plaintiff from his employment. This purpose, of course, was clearly within the scope of the official duties of the school defendants* and within the protection of the immunity rule." (Emphasis added.)

It will be recalled that plaintiff charged that the conspiracy was *malicious;* that defendants agreed between themselves to *falsely* charge plaintiff with vile and depraved acts to procure his dismissal. The majority opinion informs us, however, that "The policy on which the rule [immunity from civil liability] is based would be defeated if it were held that whenever an officer uses his office for a *personal motive* not connected with the public good he acts outside his power." (Emphasis added.) It will also be recalled that three of the defendants were *not* school or department personnel. The majority, however, states that this does not remove the protective "immunity" from the school defendants. It is difficult for me to imagine how public officials acting with malice aforethought and swearing to falsehoods in conspiracy with outsiders can possibly be considered as acting within the "scope of their authority." The undeniable scope of the authority of school officials is to protect students *from those found unfit to teach* by reason of lack of ability or immoral character. The scope of authority of such school officials is most certainly not to procure the dismissal of teachers by entering into a conspiracy with outsiders to defame and assassinate a teacher's character without justification or probable cause for believing the defamatory remarks to be true. *The question of probable cause cannot be tried on a demurrer hearing* inasmuch as for the purpose of determining the sustainability of the demurrer *every single allegation of plaintiff's complaint must be taken as true.* Aside from the doctrine of governmental immunity, which I will hereinafter discuss, plaintiff was entitled to a trial on the merits since governmental immunity does not apply when the official is acting outside the scope of his authority. A majority of this court held, in White v. Towers, 37 Cal.2d 727, 733, 235 P.2d 209, 213, 28 A.L.R.2d 636,[2] that "It is also well established that a public officer is liable for injuries caused by acts done outside the scope of his authority." In cases of this character liability for damages cannot be made to rest on mere conspiracy. *The gravamen of the action is the malicious prosecution of the criminal charge without probable cause.* Dowdell v. Carpy, 129 Cal. 168, 171, 61 P. 948; Andrews v. Young, 21 Cal.App.2d 523, 69 P.2d 891. If any public official, under the guise of investigation, may conspire with persons having no official standing to injure others by maliciously and falsely accusing them of base and vile conduct and in so doing escape all liability, it would appear to me that such a result would lead to more, rather than less, dishonesty on the part of public officials. In the other cases in which I have dissented (White v. Towers, 37 Cal.2d 727, 734, 235 P.2d 209, 28 A.L.R.2d 636; Coverstone v. Davies, 38 Cal.2d 315, 324, 239 P.2d 876; Talley v. Northern San Diego County Hospital Dist., 41 Cal.2d 33, 41, 257 P.2d 22; Turner v. Mellon, 41 Cal.2d 45, 49, 257 P.2d 15; Peterson v. Robison, 43 Cal.2d 690, 698, 277 P.2d 19; dissenting opinion on denial of hearing, Madison v. City & County of San Francisco, 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141) a majority of this court had not reached the peak of injustice that it has reached in the case at bar.

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[1] Two of the non-school defendants are not involved on this appeal.

In my dissent in the Talley case, supra, 41 Cal.2d at page 43, 257 P.2d at page 28, I pointed out that "The government obviously cannot insure the citizen against all defects and errors in administration, but there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts [in this instance a malicious one] of governmental officers and employees, *should be allowed to rest at the door of the unfortunate citizen alone.* The entire doctrine of governmental immunity rests upon a rotten foundation, and professors, writers and liberal minded judges are of the view that it should be placed in the judicial garbage can where it belongs. See Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480; 75 A.L.R. 1196; Brooklyn Law Review, April, 1932, 'Should the Liability of Municipalities in Tort be Extended to Include Injury and Damage Caused in the Negligent Performance of a Governmental Function?'; 120 A.L.R. 1376; 54 Harvard Law Review, pp. 437–462, 'Municipal Tort Liability in Operation'." I also pointed out that I had thought when People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1, 6, 40 A.L.R.2d 919, was decided in 1947, that we had begun to revamp our ideas. It was there said that "The considerations of an asserted subversion of

[2] (which I believe was incorrectly decided).

public interests by embarrassments, difficulties and losses, which developed the doctrine of non-liability of the sovereign in former times, are no longer persuasive in relation to an industrial or business enterprise which by itself may be looked to for the discharge of all appropriate demands and expenses growing out of operation." A majority of this court has gone to greater lengths here in sustaining the outmoded doctrine than ever before. If the archaic doctrine of governmental immunity were annihilated once and for all by this court, situations such as we have here where, according to the allegations of the complaint, dishonest public officials conspired with private persons would become non-existent. The very thought that they might be found guilty of malicious prosecution would be a deterrent to conduct not based on probable cause.

I would reverse the judgment in favor of all defendants.

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48 Cal.2d 588

EVELYN, Incorporated, a corporation, also known as Evelyn, Inc., also known as Evelyn Cleaners; Evelyn M. Morris and Ernest M. Govela, Appellants,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al., Respondents.

Sac. 6673.

Supreme Court of California,
In Bank.
May 24, 1957.

Corporation and sole stockholders brought action against the California Employment Stabilization Commission and others to recover unemployment insurance taxes paid under protest, on ground that sole stockholders could not be considered employees of corporation and that therefore corporation did not have a minimum of four employees required by the Unemployment Insurance Law to render it applicable. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment adverse to the corporation and the sole stockholders, and they appealed. The Supreme Court, Shenk, J., held that evidence sustained finding of the Superior Court that compensation received by sole stockholders from the corporation was wages subject to taxes under the Unemployment Insurance Law.

Judgment affirmed.

Opinion, 304 P.2d 799, vacated.

1. Taxation 🔑543(7)

In action by corporation and sole stockholders to recover unemployment insurance taxes paid under protest, on ground that sole stockholders could not be considered employees of corporation and that therefore corporation did not have a minimum of four employees required by Unemployment Insurance Law to render it applicable, evidence sustained trial court's finding that compensation received by sole stockholders from corporation was wages subject to tax under the Unemployment Insurance Law. St.1937, p. 2055, § 9; St.1945, pp. 1082, 1776, § 9.

2. Taxation 🔑111.16

Where sole stockholders of corporation had asserted that they were employees of the corporation in order to obtain benefits conferred by law, including coverage under the Federal Social Security Program, they could not deny that they were employees of corporation in order to avoid unemployment insurance taxes under the Unemployment Insurance Law. St.1937, p. 2055, § 9; St. 1945, pp. 1082, 1776, § 9.

3. Taxation 🔑318

A bona fide but mistaken belief of corporation and sole stockholders that the Unemployment Insurance Law did not require payment of unemployment insurance taxes by corporation did not constitute "good cause" for a failure to pay such taxes within meaning of provision of the Unemployment Insurance Law that there is no limitation on assessments for delinquencies due to a failure without "good cause" to file a return. St.1943, p. 3054, § 45.5; St.1945, p. 1097, § 45.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Good Cause".

4. Taxation ⚷318

Unemployment insurance taxes becoming due on October 1, 1945, for third calendar quarter in 1945, and taxes becoming due on January 1, 1946, for the fourth calendar quarter of 1945, were subject to the 1945 provisions of the Unemployment Insurance Law, and were not subject to the 1943 provisions under which three year statute of limitation would have been in effect to bar recovery of taxes. St.1943, p. 3037, § 44.6, p. 3054, § 45.5; St.1945, p. 1095, § 45, p. 1097, § 45.5.

5. Limitation of Actions ⚷3(1)

Generally, extension of statutory period within which an action must be brought, is valid, if made before cause of action is barred.

6. Taxation ⚷318

Unemployment insurance taxes of corporation for first two calendar quarters of 1942 did not become due and payable until after September 20, 1942, and three-year limitations under the 1943 provisions of the Unemployment Insurance Law had not expired on September 15, 1945, the effective date of 1945 provisions under which there was no limitation of assessments for delinquencies due to failure without good cause to file a return, and the limitation period was properly extended as to taxes for those quarters and succeeding quarters. St. 1943, p. 3037, § 44.6, p. 3054, § 45.5; St. 1945, p. 1095, § 45, p. 1097, § 45.5.

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Homer E. Geis and Robert A. Waring, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and William L. Shaw, Deputy Atty. Gen., for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment for the defendants in an action to recover unemployment insurance taxes paid under protest.

The plaintiff corporation, Evelyn, Incorporated, was organized in 1939 and the plaintiffs Evelyn Morris and Ernest Goveia became the sole stockholders. Thereafter, and during the years involved, 1942 through 1945, they conducted a dry cleaning business. They were elected as officers of the corporation and operated and managed the business by mutual consent, but the usual corporate meetings were not held, nor were the usual corporate records maintained. However, the corporate franchise tax and both state and federal corporate income taxes were paid each year. No salaries or dividends were officially declared, but the stockholders withdrew profits on an agreed basis and advanced personal funds when necessary to maintain the business. Both business and personal bills were paid from the business income. A payroll account was kept but the names of neither Ernest Goveia nor Evelyn Morris appeared thereon. However, in filing federal income withholdings and social security returns, the corporation made payments in behalf of Mr. Goveia and Mrs. Morris as if they were employees.

Prior to 1946 the corporation made no state unemployment insurance tax returns, but beginning that year returns were made in which Mr. Goveia and Mrs. Morris were named as employees. In 1950 a deficiency assessment was imposed by the defendant California Employment Stabilization Commission for unemployment insurance contributions for the years 1942 through 1945. During the entire period involved an employer must have had a minimum of four employees in order to be subject to the provisions of the unemployment insurance law. Unemployment Insurance Act, § 9, as amended Stats.1937, ch. 740, § 1, p. 2055; Stats.1945, ch. 545, § 1, p. 1082, ch. 942, § 1, p. 1776. Unless Mr. Goveia and Mrs. Morris are to be considered as employees during that period the corporation did not have four employees and the assessment was improperly levied.

[1, 2] The trial court found that "each of Goveia and Morris received compensation from the corporation for their services; that such compensation received by Goveia and Morris from the corporation is wages. * * *" This finding is supported by substantial evidence and the court properly concluded that the compensation received constituted "wages with reference to the provisions of the Unemployment Insurance Act and subject to tax or contribution under the said Act." To hold now as a matter of law that Mr. Goveia and Mrs. Morris were not employees would be to disregard the corporate entity to suit the convenience and purpose of the stockholders. Certainly they should not be permitted to assert the employer-employee relationship in seeking benefits conferred by law, including coverage under the federal social security program and at the same time to deny the existence of such a relationship in order to avoid obligations imposed by other laws. See Higgins v. Smith, 308 U.S. 473, 477, 60 S.Ct. 355, 84 L.Ed. 406; California Employment Comm. v. Butte County etc., Ass'n, 25 Cal. 2d 624, 636–637, 154 P.2d 892.

The plaintiffs next contend that the assessment or at least a portion thereof was barred by the statute of limitations. As stated, the tax was assessed in 1950 for taxes due for the years 1942 through 1945. The law in effect prior to September 15, 1945, provided for an assessment against employer units which had failed to make the required returns, but limited such assessments as follows: "* * * provided, that in the absence of an intent to evade the provisions of this act such assessment must be made and notification given to the employer as hereinafter provided within three years from the date on which the contribution liability included in the assessment became due." Gen.Laws, Act 8780d, § 45.5; Stats.1943, p. 3054. In 1945 section 45.5 was amended, effective September 15, 1945, to provide in subparagraph (f) as follows: "Except in the case of failure without good cause to file a return, fraud or intent to evade this act or the authorized rules and regulations, every notice of assessment shall be made within three years. * * *" Stats.1945, p. 1097.

[3] As no intent to evade was put in issue it appears that under the 1943 act a three year statute of limitation would have been in effect. But under the 1945 act there is no limitation on assessments for those delinquencies due, among other things to a "failure without good cause to file a return." In the present case the trial court expressly found that there was no good cause why the plaintiff corporation failed to file a return. The plaintiffs contend that good cause exists for their failure and they refer to decisions which define "good cause" as to applications such as here not involved. The record in this case reveals no set of circumstances which would justify a finding of good cause for failure to file the returns. A bona fide but mistaken belief that the law does not require a particular course of conduct does not constitute good cause for a failure to comply therewith.

From the foregoing it is apparent that if the 1943 act is applicable to any portion of the period in question, the assessment cannot be enforced as to that portion. But if the 1945 act is applicable to all or any portion of the period, that portion of the assessment to which the act applies can and should be enforced.

[4] Under the provisions of the acts both before and after September 15, 1945, the contributions required from an employer subject to the tax became due on the first day of the calendar month following the close of each calendar quarter. Stats.1943, p. 3037; Stats.1945, p. 1095. It is clear, therefore that the contribution becoming due on the first day of October, 1945, for the third calendar quarter in 1945, and the contribution becoming due on the first day of January, 1946, for the fourth calendar quarter of 1945, were subject to the 1945 act and the assessment was properly levied as to those contributions.

[5] The theory by which the defendants seek to make the 1945 act applicable to the remainder of the assessment is that before any action is barred by the statute the Legislature has the power to extend the period prescribed therein. The extension of the statutory period within which an action must be brought is generally held to be valid if made before the cause of action is barred. Weldon v. Rogers, 151 Cal. 432, 90 P. 1062. The party claiming to be adversely affected is deemed to suffer no injury where he was under an obligation to pay before the period was lengthened. This is on the theory that the legislation affects only the remedy and not a right. Mudd v. McColgan, 30 Cal.2d 463, 183 P.2d 10; Davis & McMillan v. Industrial Acc. Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; 31 Cal.Jur.2d 434. An enlargement of the limitation period by the Legislature has been held to be proper in cases where the period had not run against a corporation for additional franchise taxes (Edison California Stores, Inc., v. McColgan, 30 Cal.2d 472, 183 P.2d 16), against an individual for personal income taxes (Mudd v. McColgan, supra, 30 Cal.2d 463, 183 P.2d 10), and against a judgment debtor (Weldon v. Rogers, supra, 151 Cal. 432, 90 P. 1062). It has been held that unless the statute expressly provides to the contrary any such enlargement applies to matters pending but not already barred. Mudd v. McColgan, supra, 30 Cal.2d 463, 183 P.2d 10.

The foregoing statement of the law is not disputed by the plaintiffs. They contend, however, that the change was more than a mere extension of the period of time in which an assessment might be levied; that the change required that the corporation be able to establish that it had good cause for not filing a return; that while it might have been able to show good cause had it been required to do so during the period in question it could not conveniently do so at the time of the assessment and after the events which gave rise to the obligation; that the change therefore constituted the creation of new obligations and the imposition of new duties, the exaction of new penalties not specifically provided for in the new legislation and the impairment of vested rights which they might assert in an action for the recovery of the assessment.

It should be borne in mind that the obligation which the Commission sought to enforce was not one which arose out of the 1945 act in altering the applicable statute of limitations, but rather one which arose out of provisions of the Unemployment Insurance Act existing at the time the corporation failed to comply therewith. And where, as here, the Legislature properly could have extended the period of limitations as to all obligations surviving on September 15, 1945, certainly it could have imposed a less onerous burden on those obligors by providing a means of escape to those who had good cause for their failure to comply with existing law. The plaintiffs cannot be heard to complain that because they now can make no showing of good cause they have thus been deprived of vested rights which would enable them to successfully maintain this action. They were never possessed of rights, vested or otherwise, which were entitled to the protection asserted by the plaintiffs. Furthermore, no showing is made by them as to the manner in which the corporation's failure to comply with the law might have been justified at the time the obligations were incurred, or why such a showing became an added burden by lapse of time.

The plaintiffs seek to establish the impropriety of the assessment for the first two calendar quarters of 1942 for an additional reason. They contend that the contributions for those quarters became due on the first days of April and July of that year. (See Stats.1943, p. 3037.) It may be assumed that in such a case the three year period of limitations would have run prior to the effective date of the 1945 act on September 15 of that year and the collection of the amounts due would have been barred. The Commission contends, however, that the contributions for those two calendar quarters did not become due until after the 15th day of September 1942, and that the obligations still survived at the time the period was extended on the 15th day of September, 1945. This contention is based on provisions of the law which define employers subject to the Unemployment Insurance Act, and it is claimed that the plaintiff corporation did not become subject to the act until the 20th of September, 1942, for all prior contributions otherwise due for the year 1942.

Section 9 of the Unemployment Insurance Act as it read prior to September 15, 1945, provided that "'Employer' means: (a) Any employing unit, which for some portion of a day, * * * in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day * * *." Stats.1937, p. 2055. It appears from the record that the plaintiff corporation completed its twentieth week of qualifying employment on September 20, 1942. There is nothing to indicate that prior to that time the corporation was an employer subject to the tax. Accordingly, it could not have incurred any tax liability prior to that time, and on the first days of the months following the first two calendar quarters in 1942 no tax could have become due and payable on which the statute might have run. The plaintiffs claim that the corporation was qualified from the beginning of the year 1942 because of its employment record in the prior calendar year. But there is no evidence to show the corporation's employment record in 1941, and the plaintiffs were required to make such a showing if reliance were to be placed thereon as controlling.

It is contended by the plaintiffs that the provision relied on by the Commission is one dealing only with the definition of "employer" and has no bearing on the question of when a contribution becomes due and payable. The contention may not be sustained. Obviously a contribution cannot become due and payable from a corporation before it qualifies as an employer. A construction in accord with this view was incorporated by the Employment Commission in its Rule 37.6, wherein it was provided: "An employing unit upon becoming a subject employer during any calendar year shall file with the Commission within fifteen days thereafter, quarterly contributions and earnings reports for each completed quarter in that calendar year.

"Contributions for these quarters are due at the end of the quarter in which the employer became subject. * * *" (Rules and Regulations on the California Unemployment Insurance Act, Rule 37.6, [1940].) The Employment Commission was expressly authorized to "adopt, amend or rescind regulations for the administration of this act * * *." Stats.1939, p. 3007. The foregoing rule would appear to be within the power thus granted.

[6] In recognition of the weight which may be accorded administrative interpretations and practices, as well as the plain meaning of the statutory language itself, it must be concluded that contributions from the plaintiff corporation for the first two calendar quarters of 1942 did not become due and payable until after the 20th of September, 1942; that the three year period of the statute of limitations had not expired on the 15th day of September, 1945, as to those contributions, and that the period was properly extended as to contributions for those quarters as well as all other quarters involved in the assessment.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 600

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Foster Seth DEMENT, Defendant and Appellant.

Cr. 6016.

Supreme Court of California,
In Bank.
May 24, 1957.

Prosecution for murder of wife by husband, who broke into her apartment and fired five shots into her body. From adverse judgment of the Superior Court, Los Angeles County, Clement D. Nye, J., the husband appealed. The Supreme Court, Shenk, J., held that the evidence was sufficient to support implied finding that husband had a deliberate, preconceived intent to kill his wife.

Judgment affirmed.

1. Homicide 🔑230

In prosecution for murder of wife by husband, who broke into wife's home, sought her out, and fired five shots into her body, evidence was sufficient to support implied finding of jury that husband had a deliberate, preconceived intent to kill his wife. West's Ann.Pen.Code, § 189.

2. Homicide 🔑28

In prosecution of husband for murder of his wife, husband's claim of voluntary intoxication at time of murder was not an excuse for offense. West's Ann.Pen.Code, § 22.

3. Homicide 🔑270

In prosecution of husband for murder of his wife wherein husband claimed that he had been drinking heavily and as result thereof was incapable of formulating and carrying out deliberate plan of action, whether defendant's state of intoxication was such that he was incapable of forming necessary intent was question for determination of trier of facts.

4. Criminal Law 🔑1036(5)

In prosecution of husband for murder of his wife wherein police officer testified as to telephone conversation about six months prior to murder between husband and wife in which husband threatened wife, husband could not assign as error admission of such testimony on ground that it was hearsay, that threats were too remote in time and that defendant was not sufficiently identified as speaker, in absence of seasonable objection in trial court.

5. Criminal Law 🔑1036(5)

Objections to evidence unless made are waived and cannot be urged for first time on appeal, especially in case of hearsay evidence.

6. Telecommunications 🔑495

Statute making it criminal act to tap or to make any unauthorized connection with any telegraph or telephone wire is a prohibition against what is commonly known as "wire tapping" and disclosure of information wrongfully obtained thereby, and such section has no application to situation where one of parties to telephone conversation invites third person to listen in. West's Ann.Pen.Code, § 640.

7. Telecommunications 🔑495

Where wife invited police officer to listen in on threatening telephone conversation with her husband, there was no violation of federal statute which provides that no person not being authorized by sender shall intercept any communication and divulge or publish contents of such communication to any person. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

◆

Westrum & Harvey and George R. Harvey, Maywood, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was charged by information with the murder of Nina Sue Dement

The jury found him guilty of murder of the first degree and expressly fixed the penalty at death. He appeals from the judgment of conviction. There was no motion for a new trial.

[1] The deceased obtained an interlocutory decree of divorce from the defendant in September 1955. He had not become reconciled with the requirement imposed by the divorce decree that he live apart from his former wife and the three children of the marriage. A police officer testified that in February 1956 he was present in Mrs. Dement's home in response to a call. Mrs. Dement informed him that she had been receiving telephone calls every 15 or 20 minutes from a person she identified as her husband. She gave the officer permission to listen in if another call came in from her husband. Shortly thereafter the telephone rang and was answered by Mrs. Dement. The officer placed his ear close to the receiver and heard the following statement: "This is your old man. * * * If you don't come back to me, I'll cut your God damn ears off and stick them in your mouth and make you swallow them, and I'll cut my initials across your face. I'm going to come over and shoot you. When and where do you want it—in the guts, in front of the kids. There are four ways I can get at you. I'll kill Peggy and the kids, or some day I'll get you on the way home from work. Send the kids to the show, and I'll come over and give it to you right in the God damn guts." The further statement was made that "I tried to kill you before once with a butcher knife, and if you don't come back to me, I'll kill you." Mrs. Dement stated that the voice was that of her husband.

More than six months after the foregoing threat was made, in the early morning hours of August 22, 1956, the defendant broke into Mrs. Dement's home. In addition to Mrs. Dement there were in the house and asleep two teenage daughters, a teenage son, and a sister of Mrs. Dement. All were aroused by the noise created by the defendant's entrance. Mrs. Dement and her two daughters took refuge in a bedroom, pushing against the bedroom door. The defendant forced his way in and fired five shots into Mrs. Dement's body. She died almost immediately. The defendant stated to his eldest daughter in response to her questions as to why he had killed her mother that "he couldn't take it any more" and that the "kids didn't write to him."

The defendant pleaded "Not Guilty" and "Not Guilty by Reason of Insanity." As defensive matter he introduced evidence to the effect that on the evening prior to the homicide he had been drinking heavily and as a result thereof was incapable of formulating and carrying out a deliberate plan of action. He testified that in his recollection of the events which took place while he was in his wife's home he was not a participant but a spectator only. He also testified that while the gun with which he killed Mrs. Dement was one he had purchased earlier in the year, he did not have it with him earlier in the evening and did not recall going to his apartment to obtain it, as he presumed he had. Expert medical witnesses agreed that the defendant's ability to think reflectively, to plan and premeditate, would be lessened by the amount of alcohol he claimed to have consumed but that he still retained the ability to premeditate and deliberate and would be capable of carrying out a preconceived plan. The police officer who arrested the defendant immediately after the homicide and before the defendant left the premises testified that the defendant was not under the influence of alcohol at the time of the arrest.

After the jury's verdict of conviction on the plea of not guilty, a trial by jury was waived on the plea of not guilty by reason of insanity. That issue was submitted to the court by stipulation on the testimony taken at the trial and the reports of the doctors appointed by the court under the provisions of section 1027 of the Penal Code. The court found the defendant to be sane at the time of the commission of the offense.

[2, 3] It is contended by the defendant that the evidence is insufficient to support the implied finding of the jury that he had a deliberate, preconceived intent to kill his wife. However, apart from the evidence of threats made against the deceased's life, it may reasonably be inferred from the circumstances surrounding the killing that the defendant was carrying out a preconceived plan to kill his wife. He deliberately broke into her home, sought her out, fired five shots into her body, and gave as his reason that "he couldn't take it any more." It was stated in People v. Eggers, 30 Cal.2d 676, at page 686, 185 P.2d 1, at page 6: "No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation; each case depends upon its own facts. These elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law. However, the nature of the weapon used, or acts of malice which, in the usual course of things, would cause death, or great bodily harm, tend to provide a reasonable basis for a conviction of murder in the first degree. In arriving at the intention of the defendant, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time." There is substantial evidence in the present case to support the determination by the jury that the killing was one which was "wilful, deliberate, and premeditated" (Pen.Code, § 189). The defendant's claim of voluntary intoxication is not an excuse for the offense. People v. Burkhart, 211 Cal. 726, 730, 297 P. 11; Pen. Code, § 22. "The weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, * * * are matters essentially for the determination of the trier of the facts." People v. De Moss, 4 Cal.2d 469, 474, 50 P.2d 1031, 1033. In this case the evidence of the defendant's state of intoxication is insufficient to require a determination as a matter of law that he was incapable of forming the necessary intent.

[4] It is next contended by the defendant that the testimony of the police officer who listened to the telephone conversation between the defendant and Mrs. Dement was inadmissible hearsay; that there was not sufficient identification of the defendant as the speaker, and that the threats made therein were too remote in time to be admissible.

[5] It appears from the record that none of the foregoing objections to the admission of the evidence was made during the trial. In the absence of a seasonable objection in the trial court the defendant should not now be permitted to assign as error the admission of this testimony. People v. Ferlin, 203 Cal. 587, 600, 265 P. 230. Particularly in the case of hearsay evidence objections unless made are waived and cannot be urged for the first time on appeal. People v. Cole, 141 Cal. 88, 91, 74 P. 547; People v. Bennett, 119 Cal.App.2d 224, 226, 259 P.2d 476; People v. Brown, 145 Cal.App.2d 778, 303 P.2d 68. As to the remoteness of the threats, this court stated in the early case of People v. Cronin, 34 Cal. 191, at pages 205–206: "The testimony as to the threats made by the defendant was competent, notwithstanding they were made a long time prior to the commission of the homicide. Testimony of that character was admissible for the purpose of showing malice, and its competency is unaffected by the lapse of time, though its weight may be impaired. As was said in the case of State v. Ford, 3 Strob., S.C., 517, note, 'remoteness of time, where the party has made declarations pointing to a guilty intention, cannot render the evidence incompetent. For [sic] years may roll over a felon's head while he is arranging his schemes or while the guilty thought conceived in his mind is ripening into the deliberate purpose with which crime is committed.' In that case there had been a lapse of two and four years." See, also, People v. De Moss, supra, 4 Cal.2d 469, 474, 50 P.2d 1031.

[6] It is further contended in connection with the admission of the evidence of the telephone conversation that in listening to the conversation the police officer per-

formed an illegal act, and that the evidence concerning the message should have been excluded under the rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. The officer's conduct is claimed to have been improper under section 640 of the Penal Code, as well as section 605 of the Federal Communications Act, 47 U.S.C.A. § 605. When the testimony of the telephone conversation was offered in evidence the only objection interposed by the defendant was on the ground that under section 640 of the Penal Code the witness would be guilty of a felony if he disclosed the content of a telephonic communication clandestinely overheard. The objection was overruled.

Section 640 of the Penal Code makes it a criminal act to tap or to make "any unauthorized connection with any telegraph or telephone wire" when done by "means of any machine, instrument or contrivance, or in any other manner * * *." Section 640 and the sections immediately preceding and following it are prohibitions against what is commonly known as "wire tapping" and the disclosure of information wrongfully obtained thereby. People v. Trieber, 28 Cal.2d 657, 662, 171 P.2d 1. The section has no application to the circumstances of the present case. See People v. Malotte, 46 Cal.2d 59, 64, 292 P.2d 517; People v. Channell, 107 Cal.App.2d 192, 200, 236 P.2d 654.

[7] Section 605 of the Federal Communications Act provides: "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *." The federal courts have generally held that there is no interception within the meaning of section 605 when the intended receiver consents to or directs the overhearing of the communication at the moment it reaches him. Goldman v. United States, 316 U.S. 129, 134, 62 S.Ct. 993, 86 L.Ed. 1322; United States v. Yee Ping Jong, D.C., 26 F.Supp. 69, 70; United States v. Sullivan, D.C., 116 F.Supp. 480, 482; United States v. Pierce, D.C., 124 F.Supp. 264, 267; cf. United States v. Polakoff, 2 Cir., 112 F.2d 888, 889, 134 A.L.R. 607. Accordingly there was no violation of either the federal or state statutory provision. See People v. Malotte, supra, 46 Cal.2d 59, 63–64, 292 P.2d 517; People v. Cahan, 141 Cal.App.2d 891, 901–902, 297 P.2d 715.

Finally, the defendant contends that he is entitled to a reversal or to a reduced sentence because of his claims of error and because the testimony relating to the telephone conversation was inherently improbable. But inherent improbability is not shown by any test suggested by the defendant or otherwise appearing. See People v. Simpson, 43 Cal.2d 553, 562–563, 275 P.2d 31; People v. Johnston, 73 Cal.App.2d 488, 493, 166 P.2d 633.

No errors have been shown and an examination of the record discloses nothing which would justify a reversal.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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48 Cal.2d 419

FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation, Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES, City of Los Angeles, H. L. Byram, County of Los Angeles Tax Collector, and John R. Quinn, County of Los Angeles Assessor, Defendants and Respondents.

L. A. 23847.

Supreme Court of California.

April 24, 1957.

Rehearing Denied May 22, 1957.

Action brought to recover taxes paid under protest and for declaratory relief. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment for defendants, following sustention of general demurrer to complaint without leave to amend, and plaintiff appealed. The Supreme Court, Shenk, J., held that the state Constitution section, making nonadvocacy of overthrow of government by unlawful means a condition to tax exemption, and statute implementing it, were not repugnant to federal Constitution.

Affirmed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

1. Taxation 🔑517

Owner of property must pay tax legally assessed.

2. Taxation 🔑191

To provide for exemption from taxation under laws of California requires constitutional, or constitutionally-authorized statutory, authority.

3. Taxation 🔑210

Exemption from taxation is bounty or gratuity on part of sovereign, and even when once granted may be withdrawn.

4. Taxation 🔑204(4)

Exemption from taxation may be granted with or without conditions, but where reasonable conditions are imposed they must be complied with.

5. Taxation 🔑244

Provisions of Constitution subsection, proscribing tax exemption for any person or organization advocating overthrow of government by unlawful means, are mandatory, and applicable to church property exemption provided elsewhere in Constitution; and such subsection was properly incorporated in Constitution as a matter of state policy and is a valid enactment under state law. West's Ann.Const. art. 1, § 22; art. 13, § 1½; art. 20, § 19.

6. Constitutional Law 🔑38

Notwithstanding fact that particular constitutional provision may be self-executing, legislation enacted in aid thereof is not invalid.

7. Taxation 🔑251

Even assuming that statute, requiring property tax exemption claim to contain nonsubversive declarations, were invalid, taxpayer, under general provisions of state law, would not be relieved from its obligation otherwise to disclose facts required by that section. West's Ann.Rev. & Tax. Code, § 32.

8. Taxation 🔑251

Presumption of innocence, available to all in criminal prosecutions, does not relieve or prevent assessor from making investigation enjoined upon him by law to see that exemptions are not improperly allowed; and while his administrative determination is not binding on tax exemption claimant, it is sufficient to authorize assessor to tax property as nonexempt and to place burden on taxpayer to test validity of administrative determination in action at law. West's Ann.Rev. & Tax.Code, §§ 32, 254.

9. Constitutional Law 🔑48

Where any state of facts can reasonably be conceived which would sustain legislative classification, existence of those facts will be presumed. U.S.C.A.Const. Amend. 14.

10. Taxation 🔑194

Statute requiring property tax exemption claim to include nonsubversive declarations, was not rendered invalid, on grounds of unlawful classification and lack of uniformity, because of exception therefrom of householders entitled to exemption under Constitution. West's Ann.Const. art. 13 § 1½; West's Ann.Rev. & Tax.Code, § 32.

11. Taxation 🔑194

Legislature could properly require nonsubversive declarations as condition to property tax exemption while making no such requirements for exemptions from income tax. West's Ann.Rev. & Tax.Code, § 32; West's Ann.Const. art. 20, § 19.

12. Constitutional Law 🔑208(1)

Legislature is at liberty to select one phase of a problem for appropriate action without necessity of including all others which might be affected in same field of legislation.

13. Constitutional Law 🔑84

The First Amendment reflects philosophy that church and state should be kept separate; but of the two concepts embraced therein, only freedom to believe is absolute, and conduct remains subject to regulation for protection of society. U.S.C.A. Const. Amend. 1.

14. Taxation 🔑195

"Advocacy" constitutes action and the instigation of action, not mere belief or opinion; and the Constitution inhibition against tax exemption for those advocating overthrow of government by unlawful means imposes only a restriction on action, and not an unconstitutional limitation on belief. U.S.C.A.Const. Amends, 1, 14; West's Ann.Const. art. 20, § 19.

See publication Words and Phrases, for other judicial constructions and definitions of "Advocacy".

15. Constitutional Law 🔑84

Advocacy of overthrow of government by unlawful means is against local public policy and has been made criminal by Congress; and even if such advocacy were a part of religious teaching of church, First Amendment would afford no protection therefor. U.S.C.A. Const. Amend. 1.

16. Constitutional Law 🔑84

Nonsubversive declarations, required to be included in property tax exemption claim, do not constitute a test of religious opinion, and church claiming exemption is not excused from making them. West's Ann.Rev. & Tax.Code, § 32.

17. Constitutional Law 🔑90

Despite the fact that the First Amendment is cast in terms of the absolute, it is not to be applied literally, and there is no absolute right of free speech or unqualified liberty to speak. U.S.C.A.Const. Amend. 1.

18. Constitutional Law 🔑90

Courts must declare when individual or group does or does not have a right to speak freely, after balancing individual's right to speak out against harm or injury society may suffer as result of such speech; and, in each case, court must ask whether gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger. U.S.C.A.Const. Amend. 1.

19. Constitutional Law 🔑283
Taxation 🔑193

State Constitution section, making nonadvocacy of overthrow of government by unlawful means a condition to tax-exemption, was not repugnant to the "free speech" guarantees of the federal Constitution. West's Ann.Const. art. 20, § 19; U.S.C.A.Const. Amend. 1.

20. States 🔑4.13

Federal government's pre-exemption of anti-sedition field, to exclusion of state legislation, is limited to imposition of criminal penalties; and state law requiring nonsubversive declarations from tax exemption applicants did not improperly intrude into federal government's domain. West's Ann.Rev. & Tax.Code, § 32.

William B. Murrish, Los Angeles, George T. Altman, Beverly Hills, and Robert L. Brock, Hollywood, for appellant.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, and Alfred C. DeFlon, Deputy County Counsel, Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendants following an order sustaining a general demurrer to the complaint without leave to amend.

The action was brought to recover taxes paid under protest and for declaratory relief. The plaintiff is a duly organized non-profit religious organization with its principal office in the City of Los Angeles. It is the owner of real property devoted exclusively to religious purposes and located within the jurisdiction of, and subject to property taxation by, the County and

City of Los Angeles. It presented to the assessor of Los Angeles County an application for the exemption of its property, particularly described, for the fiscal year 1954–1955. The application was denied by the assessor on the ground that the plaintiff had not qualified for an exemption because it had failed and refused to include in the application for exemption the nonsubversive declarations required by section 32 of the Revenue and Taxation Code. The application was otherwise complete. Thereafter the real property of the plaintiff was assessed as property not exempt, and within the time prescribed by law the plaintiff paid the tax under protest and brought this action for the recovery of the sum so paid. The assessor refused to allow the exemption because of the provisions of section 19 of article XX of the Constitution[1] and section 32 of the Revenue and Taxation Code.[2]

Section 19 of article XX was adopted at the general election on November 4, 1952, and was placed as a new section in that article under the heading "Miscellaneous Subjects." The section reads:

"Sec. 19. Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section." Stats.1953.

Following the amendment to the Constitution section 32 was added to the Revenue and Taxation Code in 1953. It is as follows:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." Stats. 1953, p. 3114.

The plaintiff contends that both the constitutional provision and the code section are invalid. It is argued that the imposition and collection of taxes sought to be recovered and the denial of the church property tax exemption provided for in section 1½ of article XIII of the Constitution, as applied to the plaintiff church and all other churches similarly situated, was and is in violation of the provisions of the state and federal constitutions which require reasonable and proper classifications for purposes of taxation and provide for freedom of religion, freedom of speech and the protection of other rights specified in the protest a copy of which is attached to and made a part of the complaint. The provisions of the protest will be referred to later on in this opinion.

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[1] Hereinafter referred to as section 19 of article XX.

[2] This and all other code sections hereinafter referred to will be to sections of the Revenue and Taxation Code unless otherwise indicated.

It is noted that section 19 of article XX does not specifically mention churches or any other organizations or individuals which are subject to its provisions. Its terms are general and apply to all owners of property as to which exemption from taxation might be claimed.

[1-4] It is fundamental that the payment of taxes has been and is a uniform if not a universal demand of government, and that there is an obligation on the part of the owner of property to pay a tax legally assessed. An exemption from taxation is the exception and the unusual. To provide for it under the laws of this state requires constitutional or constitutionally authorized statutory authority. It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn. It may be granted with or withont conditions but where reasonable conditions are imposed they must be complied with.

A church organization is in no different position initially than any other owner of property with reference to its obligations to assist in the support of government by the payment of taxes. Church organizations, however, throughout the history of the state, have been made special beneficiaries by way of exemptions. A brief reference to the constitutional and statutory background relating to this and other exemptions in this state will be made.

We find in the Constitution of 1849 the following provisions: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed proportion to its value, to be ascertained as directed by law * * *." Art. XI, § 13, Laws of California, 1850-53, p. 57. No provision for exemption from taxation is found in that Constitution. In 1853 the Legislature passed an act entitled "An Act *to provide Revenue for the Support of the Government of this State.*" Laws of California, 1850-53, p. 669. In section 1 of article I it was provided that all land in the state owned or claimed by any person or corporation shall be listed for taxation. In section 2 of the same article it was provided that "The following property shall not be listed for taxation." Then followed several paragraphs where numerous classifications of property are named, such as publicly owned property, town halls, public squares, colleges, schoolhouses, public hospitals, asylums, poor houses, cemeteries and graveyards. In paragraph 5 it was provided that the following also shall not be listed for taxation: "Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground appurtenant thereto and used therewith, so long as the same shall be used for that purpose only." Laws of California, 1850-1853, p. 671.

This statutory method of providing for exemptions continued until the adoption of the Constitution of 1879. Section 1 of articel XIII of the new Constitution required constitutional authority for exemptions. It was there provided that "All property in the State except as otherwise in this Constitution provided, * * * shall be taxed in proportion to its value, to be ascertained as provided by law * * *." In subsequent sections of the same article the exemption of numerous classes of particularly described property is provided for. Section 1½ of article XIII provides for the church exemption as follows: "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship * * * shall be free from taxation * * *."

In 1944 section 1c was added to article XIII which provides that "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes * * *." This provision did not have the effect of changing existing laws with reference to the exemption of church property except to authorize the Legislature to extend the exemption of that property as provided for in section 1½ of article XIII to its personal property. Whether that section is self-executing is of no concern for in 1903 the Legislature added section 3611 to the Political Code, repeating the constitutional language which exempted church real property and providing among other things that "any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building * * *." Stats.1903, p. 21. The reference in that section to property which "is listed for taxation" was in contemplation of section 8, article XIII of the Constitution, which has provided since 1879 that "The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian, on the first Monday of March."

Section 3611 of the Political Code was carried into the Revenue and Taxation Code in 1939 as section 254, which provides that any "person claiming the church * * * exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the" State Board of Equalization. The form prescribed by the State Board of Equalization includes the non-subversive portion of the affidavit, which the plaintiff has refused to include in its return.

[5] No meritorious argument has been or can be advanced to the effect that section 19 of article XX is not a valid enactment under state law or that it is inapplicable to the church property exemption provided for in section 1½ of article XIII. Section 19 of article XX was adopted in accordance with the procedures required by the Constitution for an amendment to that document by vote of the electors of this state. Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions. In direct terms it provides that no person or organization included in the proscribed class shall receive an exemption from any tax imposed by the state or any taxing agency of the state. It applies to all tax exemption claimants. Its prohibitions are declared by its own terms and are mandatory and prohibitory. Const. § 22, art. I. By its enactment the people of the state declared the public policy of withholding from the owners of property in this state who engage in the prohibited activities the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats.1919, p. 281)* and the act of Congress known as the Smith Act (54 Stat. 670) † makes it unlawful to advocate the overthrow of the government by force and violence.

It may properly be said that the primary purpose of the people of the state in the enactment of section 19 of article XX was to provide for the protection of the revenues of the state from impairment by those who would seek to destory it by unlawful means. It contains no exceptions. It applies to churches when it provides that "Notwithstanding any other provision of this Constitution" its prohibitions shall apply to all tax exemption claimants, and declares in effect that the tax revenues of the state shall not be depleted by those who would seek to destroy it in violation of the criminal laws of the state and the nation. It is clear that section 19 of article XX is a valid enactment under the Constitution of the state. That it was properly incorporated in the Constitution as a matter of state policy may not be questioned.

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* Pen.Code, § 11400 et seq.

† 18 U.S.C.A. § 2385.

[6] It is then to consider whether section 32 is a valid implementation of section 19 of article XX. Section 32 declares that "This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." Notwithstanding the fact that a particular provision may be self-executing, legislation enacted in aid thereof is not invalid. Chesney v. Byram, 15 Cal.2d 460, 463, 101 P.2d 1106. The code section declares within itself its purpose but that purpose is obvious without the declaration.

[7–10] The plaintiff contends that section 32 is void for several reasons. First, because of the exception from its requirements of householders who are entitled to an exemption of $100 of assessed value of their personal property as provided for in section 10½ of article XIII of the Constitution. It is contended that this exception renders the section lacking in uniformity and thus provides for an unlawful classification of taxable property under the law. Secondly, that it violates the federal constitutional guarantees of separation of church and state and freedom of speech, Amend. 1. The first contention will be considered in advance of the others for the reason that it involves the application of the Constitution and laws of the state relating to taxation.

If it be assumed for the moment that section 32 is invalid for any of the reasons stated, still the plaintiff, under the general provisions of state law, is not relieved from its obligation otherwise to disclose the facts required by section 32. In this connection the powers and duties of the assessor and the obligations of the plaintiff as the owner of real and personal property must be considered in the light of state law. Those powers, duties and obligations are set forth generally in the Revenue and Taxation Code.

It is the duty of the assessor to see that all property within his jurisdiction is legally assessed and that exemptions are not improperly allowed. He is liable on his bond "for all taxes on property which is unassessed through his wilful failure or neglect." § 1361. By section 441 it is provided in accordance with section 8 of article XIII of the Constitution that "Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p. m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination." For use by the assessor and the property owner the State Board of Equalization is required to prepare the forms of blanks for the property statement. § 452. The assessor may subpoena and examine any person in relation to any statement furnished by him. § 454. Any person who wilfully states to the assessor anything which he knows to be false, in any oral or written statement, even not under oath, but required or authorized to be made and relating to an assessment, is guilty of a misdemeanor. § 461. Section 462 provides that every person is guilty of a misdemeanor who, after proper demand by the assessor, refuses to give the assessor a list of his taxable property or "Refuses to swear to the list." By section 463 it is provided, among other things, that every person shall forfeit $100 to the people of the state, to be recovered by action brought in their name by the assessor, for each refusal to furnish the property statement or to fail to appear and testify when requested to do so by the assessor.

It thus appears that under the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the facts with reference to the taxability or exemption from taxation of property within his jurisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath.

With particular reference to the many and various tax exemptions, the Revenue and Taxation Code provides for the ascertainment of the facts as a prerequisite to qualification for exemptions. Those facts in many instances must be made known to the assessor by the affidavit of the tax exemption claimant. They include, among others, veterans exemptions, church exemptions, welfare exemptions, college exemptions and orphanage exemptions. In the case of the church exemption the affidavit shall give "any information required" to carry the exemption into effect. § 254. It is significant to note that nowhere in the law of the state is there a requirement for the property owner to make a showing for tax exemptions in the case of householders, cemeteries, game refuges and a few others. It thus appears that the Legislature in addition to the exception of householders from the requirements of section 32 has made no requirement otherwise for any showing on their part of their right to the exemption, either by affidavit or otherwise. If the exclusion of householders from the requirement of section 32 renders that section void as discriminatory or lacking in uniformity it would seem to follow that the entire Revenue and Taxation Code with reference to procedures to qualify for exemptions would be void for the same reason. But obviously no such claim is made.

As stated it is the duty of the assessor to see that exemptions are not allowed contrary to law and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX. With the aid of section 32 his task is facilitated by the means therein supplied. Without that aid he is nevertheless required to acertain the facts with reference to tax exemption claimants. Those facts may be disclosed in several different ways. In the instances in which he is without the assistance or cooperation of the tax exemption claimant and he is relegated to his own devices in discovering the facts he may do so by the examination under oath of the exemption claimant. § 454. If he is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section 19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His administrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law. For the obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method of ascertaining the facts. The Legislature could take these factors into consideration. It could also take into account the fact that the segment of householders in this state is so overwhelmingly large as compared with others chosen for exemptions that the cost of processing them would justify their separate classification. Where any state of facts can be reasonably conceived which would sustain legislative classification the existence of those facts will be presumed. Lelande v. Lowery, 26 Cal.2d 224, 232–233, 157 P.2d 639, 175 A.L.R. 1109. Furthermore, aside from the power of the Legislature to classify for the purpose of general legislation, see Reclamation District v. Riley, 192 Cal. 147, 156, 218 P. 762; 24 Cal.Jur. 432, there is another and more conclusive reason why it may classify the personal property of householders. Section 14 of article XIII of the Constitution was amended in 1933 to provide that the Legislature "shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property * * * may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property." Of this constitutional provision this court said in Roehm v. County of Orange, 32 Cal.2d 280, at pages 283–284, 196 P.2d 550, at page 553: "Article XIII of the California Constitution as first adopted provided for a uniform property tax upon real and personal property alike. This requirement of uniform taxation of real and personal property, however, has been abandoned by subsequent amendments. Under these amendments the legislature may classify personal property for purposes of taxation or exempt all personal property or any form, type, or class thereof", and 32 Cal.2d on page 285, 196 P.2d at page 553 the court declared that this authorization to the Legislature to classify tangible personal property is "all inclusive" and covers "all forms" of tangible personal property. The personal property of the householders falls within the kind of personal property which the Legislature was constitutionally authorized to classify for purposes of taxation.

[11, 12] There is therefore no merit in the plaintiff's contention that the exception of householders from the requirements of section 32 renders that section invalid. There is likewise no merit in the contention that the section is invalid because of the failure of the Legislature to include within its requirements those who are entitled to exemptions under income tax laws and numerous other tax laws wherein certain exemptions are taken into consideration in arriving at the amount of the tax to be paid. Those taxes are in categories which are subject to different treatment by separate classification. The Legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563, and cases there cited. Section 32 applies to all exemption claimants to which it relates and supplies appropriate means for carrying out the purposes of section 19 of article XX. The foregoing application of tax laws of the state is peculiarly a matter of state concern. Chanler v. Kelsey, 205 U.S. 466, 27 S.Ct. 550, 51 L.Ed. 882; Orr v. Gilman, 183 U.S. 278, 22 S.Ct. 213, 46 L.Ed. 196; 24 Cal.Jur. 434–435.

[13, 14] We turn now to the question of the validity of the constitutional amendment and implementing legislation under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that section 19 of article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure. However,

the plaintiff has taken the position that this constitutional provision is in reality an unlawful limitation on its constitutional rights which are protected by the federal Constitution. This question is extensively argued on behalf of the plaintiff.

It is claimed that section 19 of article XX imposes an unconstitutional condition on the right to a tax exemption in that it violates the First and Fourteenth Amendments of the federal Constitution which prohibit, among other things, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof * * *." See People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 68 S.Ct. 461, 92 L.Ed. 649; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213.

Without the slightest doubt the First Amendment reflects the philosophy that church and state should be kept separate. Zorach v. Clauson, 1952, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954; Everson v. Board of Education, 330 U.S. 1, 59, 67 S.Ct. 504, 91 L.Ed. 711. However, the First "Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society * * *." Cantwell v. State of Connecticut, supra, 310 U.S. 296, 303–304, 60 S.Ct. 900, 903, 84 L.Ed. 1213; see also United States v. Ballard, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148. In the present case it is apparent that the limitation imposed by section 19 of article XX as a condition of exemption from taxation, is not a limitation on mere belief but is a limitation on action—the advocacy of certain proscribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion. See Gitlow v. People of State of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; Leubuscher v. Commissioner of Internal Revenue, 2 Cir., 54 F.2d 998, 999.

We are concerned then, not with the freedom to believe but with the limited freedom to act. The exercise of religious activity has long been recognized as subject to some limitation if that exercise is deemed detrimental to society. In Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244, the plaintiff was a church member and a conscientious practitioner of its established doctrine which encouraged polygamy. The Supreme Court in holding that such religious activity was subject to legislative limitations, stated, 98 U.S. at page 167 that to permit exceptions based on religious doctrine "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." See also Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12; Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645. There are decisions wherein statutory provisions having some effect on religious activity have been upheld on the ground that their effect was only incidental. In Zorach v. Clauson, 1952, supra, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, the Supreme Court sustained the New York "released time" statutory provisions whereby public schools were permitted to release children for religious purposes during a part of the normal school day. Contentions were made to the effect that those provisions prohibited the "free exercise" of religion or were "respecting an establishment of religion" within the meaning of the First Amendment. The court concluded, 343 U.S. at pages 312–313, 72 S.Ct. at page 683, that the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. * * * We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds."

[15] In the present case there is nothing in the new enactments, either constitutional or statutory, which interferes with the free exercise of religion. The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption. Those tenets and doctrines are set forth in a document attached to the protest of the payment of its taxes and is made a part of the complaint. It announces to the world the plaintiff's high principles and purposes. The prohibited activity cannot, with any reason whatsoever, be consistent with or be tolerated by the religious doctrines there published and subscribed to by the plaintiff. As against a claim that such advocacy might be included within religious teaching the Supreme Court has disposed of the contention. In Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, at page 109, 63 S.Ct. 870, at page 873, 87 L.Ed. 1292, the court stated that "we do not intimate or suggest * * * that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States, 98 U.S. 145, 161, 167, 25 L.Ed. 244, and Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate." In Davis v. Beason [133 U.S. 333, 10 S.Ct. 300], cited in the Murdock case, the court said of the advocacy of plural marriages: "To call their advocacy a tenet of religion is to offend the common sense of mankind. * * * The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to His will. * * * It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. * * * [I]t does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" As above noted the advocacy of the conduct prohibited has been made criminal by Congress, Smith Act, 54 Stat., Part I, p. 670 (1940), and through numerous statutory provisions by state legislatures it is well established that such advocacy is against local public policy. See Levering Act, Stats.1951, 3rd Ex.Sess. 1950, ch. 7, p. 15, Government Code, § 3100 et seq. In upholding the validity of the Levering Act this court in Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267, 273, stated that the oath required there and similar in effect to the present one, was "obviously not a test of religious opinion."

[16] It is further claimed by the plaintiff that section 32 imposes unconstitutional limitations upon the exercise of religion. As possibly affecting religion section 32, in addition to the limitations imposed by the Constitution, requires the making of an oath. Since this oath is "obviously not a test of religious opinion" the plaintiff is not excused from making it any more than any other taxpayer. It appears that an oath was subscribed on behalf of the plain-

tiff by one of its officers when it filed its affidavit with the claim for exemption and its complaint in this action was also verified on its behalf. If the making of the oath is objectionable to the plaintiff it must be for reasons relating to the content of the particular oath and not merely because it is an oath. This contention, therefore, may not be sustained.

[17–19] It is also claimed that section 19 of article XX is a restriction on freedom of speech. The phrase "freedom of speech" is helpful in bringing to mind the concept which it means to convey, but as is often the case such a descriptive phrase assumes a literal meaning which causes difficulty and confusion in the development of the law surrounding it. Justice Holmes aptly stated that it "is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." See Hyde v. United States, 225 U.S. 347, 390, 32 S.Ct. 793, 811, 56 L.Ed. 1114, 1135; see also Corwin, Bowing Out "Clear and Present Danger", 27 Notre Dame Lawyer 325.

Despite the fact that the First Amendment is cast in terms of the absolute it is not to be applied literally. There never has been an absolute right of free speech or an unqualified liberty to speak. "Speech" in the broad sense embodies all means of expression and communication. It is the primary vehicle by which individuals and organizations converse and transmit ideas, information and knowledge, and is deserving of the highest degree of protection and preservation. But there are other important interests of society which, at times, may conflict with the interest of individuals or groups in the exercise of this asserted freedom. In such circumstances the courts must declare when the individual or group does or does not have a right to speak freely, depending on a balance of the individual's right to speak out as against the harm or injury society may suffer as a result of such speech. The courts have been called upon to engage in this weighing process in many instances. Illustrative are those which protect society from a breach of the peace (Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031), "loud and raucous" noises caused by sound trucks (Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 449, 93 L.Ed. 513), interruption of the free flow of commerce (American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925) and the like.

The standard by which the various interests have been balanced has, until recently, been the so-called "clear and present danger" test. It was heretofore declared that the right to free speech could be infringed upon only in situations where it appeared that the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" sought to be repressed. Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. However, in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 868, 95 L.Ed. 1137, the Supreme Court, reviewing its earlier decisions in this field, reconsidered the test in the light of existing and recognized realities and in conclusion stated: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' [United States v. Dennis, 2 Cir.,] 183 F.2d [201] at [page] 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." By that statement of the test the standard by which a weighing of interests is to be made is clearly indicated.

The interest of the state in protecting its revenue raising program from subversive exploitation has already been considered. There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well-being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law. It has been said that when church properties are exempted from taxation "it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws." County of Santa Clara v. Southern Pac. R. Co., C.C., 18 F. 385, 400; 24 Cal.Jur. 105. The same may be said of others enjoying tax exemptions, notably veterans (§ 1¼, article XIII; Allied Architects Ass'n of Los Angeles v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; Veterans' Welfare Board v. Riley, 188 Cal. 607, 611, 206 P. 631), colleges (§ 1a, article XIII), and charitable organizations (§ 1c, article XIII) which, together with church groups, occupy positions whereby they may exert a salutary influence on the moral well-being of the community. Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities are doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. The propriety of that objective is recognized by the Supreme Court in the Dennis case (Dennis v. United States, supra, 341 U.S. 494, at page 509, 71 S.Ct. 857, at page 867), where it said: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

Obviously a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat.

The test requires further that consideration be given not only to the "gravity of the 'evil'" sought to be repressed but that the evil be "discounted by its improbability." The Dennis case involved the validity of the Smith Act which prohibited and made criminal the advocacy of the activities denounced by the people of this state in its Constitution. In speaking of the imminence of the threat posed by the advocacy of subversive activities, the court, 341 U.S. at page 509, 71 S.Ct. at page 867, stated: "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. * * Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." In that case the court upheld an instruction to the jury that if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then as a "matter of law * * * there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." In the present case the constitutional provision is concerned with those who advocate the same prohibited activity. It must be said that such advocacy from whatever source poses a threat to our government and that the gravity of the evil is not to be materially discounted by its improbability within the meaning of the test employed in the Dennis case.

Against the fundamental interest sought to be safeguarded by the state it is necessary to consider and balance the interest of those who assert that their right to speak has been unduly limited. From what has heretofore been said it is apparent that the limitation on speech is a conditional one, imposed only if a tax exemption is sought; that the prohibited advocacy is penal in nature, and that not one of the fundamental guarantees but only a privilege or bounty of the state is withheld if the exemption claimant prefers to engage in the prohibited criminal advocacy. It is obvious, therefore, that by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.

Apart from considerations involving the constitutional amendment the additional requirement of an oath imposed by section 32, of and by itself, gives no cause for the plaintiff to complain that it is improperly deprived of constitutional freedoms where compliance with the oath requirements otherwise may properly be imposed. Chesney v. Byram, supra, 15 Cal.2d 460, 465–468, 101 P.2d 1106.

Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. For example, as a condition to obtaining or maintaining employment state employees have been required to subscribe to oaths which declare their nonadvocacy of subversive activities (Pockman v. Leonard, supra, 39 Cal.2d 676, 249 P.2d 267); as have county employees (Hirschman v. County of Los Angeles, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145; Steiner v. Darby, 88 Cal.App.2d 481, 199 P.2d 429), municipal employees (Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, affirming Garner v. Board of Public Works, 98 Cal.App.2d 493, 220 P.2d 958), public school teachers (Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617; Board of Education of City of Los Angeles v. Eisenberg, 129 Cal.App.2d 732, 277 P.2d 943; Board of Education of City of Los Angeles v. Wilkinson, 125 Cal.App.2d 100, 270 P.2d 82), and candidates for public offices (Gerende v. Board of Sup'rs of Elections of Baltimore City, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; Shub v. Simpson, 196 Md. 177, 76 A.2d 332). The right to a bounty or other benefits from the state has been so conditioned in the case of applicants for state unemployment benefits. State v. Hamilton, 92 Ohio App. 285, 110 N.E.2d 37; Dworken v. Collopy, Ohio Com. Pl., 91 N.E.2d 564. Even the right to vote (Opinion of the Justices, 252 Ala. 351, 40 So.2d 849), and to citizenship (United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889), has been so conditioned.

The plaintiff contends that the constitutional amendment and implementing legislation are invalid for other reasons based on constitutional guarantees. Such contentions are without merit in view of what has been said in disposing of the basic contentions presented.

[20] Attention has been directed to the recent decision in Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 483, 100 L.Ed. 640 (April 2, 1956), wherein the Supreme Court declared invalid a Pennsylvania penal provision (Pa. Penal Code § 207, 18 Purdon's Pa.Stat.Ann. § 4207) which made it a crime to advocate the violent overthrow of the federal or state government. Reasons for the decision in that case were that Congress had occupied the field to the exclusion of "parallel" state legislation; that the dominant interest of the federal government required that such "prosecutions" should be exclusively within the control of the federal government, and that the "Pennsylvania Statute presents a peculiar danger of interference with the federal program." It is clear from the opinion of the court in that case that the exclusion of state sedition legislation was limited to the imposition of criminal penalties. The court directed its attention to "anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws,

etc." No reference is made to the many so-called loyalty oath cases considered by the court in recent years. The court's intention not to change or modify the established law in those cases by what it said in the Nelson case appears from its later opinion in Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, decided on April 9, 1956, one week after the court's decision in the Nelson case. In speaking of balancing the state's interest in the loyalty of certain persons against the interests of those persons in their individual rights, the court referred by way of illustration to its earlier decisions in Adler v. Board of Education, supra, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, and Garner v. Board of Public Works of City of Los Angeles, supra, 341 U.S. 716, 720, 71 S.Ct. 909, 95 L.Ed. 1317. In both of those cases the court upheld the validity of state legislation which required, as a condition to acquiring or maintaining particular privileges or rights by certain persons, that such persons refrain from advocating the violent overthrow of our form of government. If in the present case the constitutional amendment and implementing legislation infringe upon an area occupied exclusively by Congress within the scope of the decision in the Nelson case, certainly the same conclusion would be true of the enactments involved in the Garner and Adler cases and the court would not have approved those decisions in the Slochower case. Furthermore, in any consideration of the possible application of the Nelson case to the case at bar, it would be unreasonable to conclude that the federal government intends to or has occupied the field of state taxation.

Finally it should be observed that we are here dealing with questions of law and not with any questions of fact with reference to the activities of the plaintiff organization. As hereinbefore noted there is attached to the protest filed with the payment of the tax sought to be recovered a statement of the principles and objectives of the plaintiff in furtherance of its religious activities. Those principles and doctrines reflect the high ideals of morality and personal conduct which are basic in the foundation of our system of government both state and national. They are noble in purpose and inspiration in tone. It is inconceivable that an organization actuated by the doctrinal pronouncements there declared would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys. But an assumed fact of the non-existence of subversion in an organization is not enough. The law demands the ascertainment of that fact for purposes of taxation and section 32 requires the cooperation of the plaintiff in establishing it.

No good reason has been advanced why churches as well as all of the many other organizations seeking exemption from taxation should not be required to comply with the law of the state providing for assistance to the county assessors in the discharge of their duties to ascertain the facts which would justify the exemption. By the plaintiff's failure and refusal to allege that it has complied with the law which would enable it to qualify for the exemption the complaint fails to state a cause of action. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice.

I dissent.

Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech. Section 19 in effect imposes a penalty in the form of withholding a tax exemption upon any person or organization that chooses to speak in a certain manner, namely, by advocating overthrow of the federal or state governments by force or support of a foreign government against the United States in event of hostilities. Section 32 provides a special method of enforcing these restrictions as to certain tax exemptions. A person claiming one of these exemptions must make a declaration that he does not advocate the conduct specified in section 19. In effect the provisions impose a tax measured by the exemptions allowed to others not only upon those who advocate overthrow of the government by force or support of a foreign government in event of hostilities, but also upon those who do not advocate such conduct but refuse to declare that they do not.

A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment. This court so held in Danskin v. San Diego Unified School District, 28 Cal.2d 536, 547–548, 171 P.2d 885, 892, involving a comparable privilege, the use of school buildings for public meetings. "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the from of convictions and affiliations that it deems acceptable. * * * The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who held them, but granting it to those whose convictions and affiliations happen to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship, and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas."

The tax exemptions in question are likewise comparable to the privilege of using the mails at less than cost. In Hannegan v. Esquire, 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586, the court declared that, "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." The dissent of Mr. Justice Brandeis in United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430–431, 41 S.Ct. 352, 361, 65 L.Ed. 704, invoked in the Esquire case, reasoned that, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in Ex parte Jackson [96 U.S. 727, 24 L.Ed. 877], that—'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.' Cummings v. State of Missouri, 4 Wall. 277, 325, 18 L.Ed. 356. The government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression."

Although free speech may not be an absolute right, it must be jealously guarded. As the court stated in American Communications Ass'n v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925, the first amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." That test is still a valid one. It was not repudiated in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. The court was there concerned not to abolish the clear and present danger test but to bend it to the special situation of a critical time and the diabolic strategy of the Communist Party. As before, the key word in its solution was danger: "'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" 341 U.S. at page 510, 71 S.Ct. at page 868. There was evidence that the defendants, members of the Communist Party, advocated overthrow of the government by force and violence. The jury was instructed that it could not find them guilty under the statute unless it found that they had conspired with the intent that their advocacy "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction" of the government by force. The jury had also to determine whether the defendants intended to overthrow the government "as speedily as circumstances would permit." Moreover, the court of appeals held that the record supported the conclusion that "the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party * * *". 341 U.S. at pages 498, 511–512, 71 S.Ct. at pages 861, 867, 868.

It is essential in each case to inquire into the character of the speech to be restrained and the surrounding cicumstances. The probability that advocacy will break out in action depends on the numbers, methods, and organization of the advocates.

The state provisions in question penalize advocacy in a totally different context from that in the Dennis case. The penalty falls indiscriminately on all manner of advocacy, whether it be a call to action or mere theoretical prophecy that leaves the way open for counter-advocacy by others. Moreover, with regard to advocacy of support of a foreign government, the state provisions penalize not only advocacy during actual hostilities but also advocacy during peacetime of action during hostilities that may occur, if at all, in the remote future.

There is no evidence in the present case that plaintiff church or its members advocate the overthrow of the government by force or otherwise. There is no evidence that plaintiff church or any of the organizations seeking tax exemptions are infiltrated by Communists or other disloyal persons, or that they are in any danger of such infiltration. The evidence is all to the contrary. It is baldly assumed that plaintiff church advocates the overthrow of the government by force because it refuses to declare that it does not. It is one thing for a court to sustain convictions after it has concluded following a full trial that it is dealing with an organization wielding the power of a centrally controlled international Communist movement; it is quite another to deprive a church of a tax exemption on the ground that it will not declare that it does not advocate overthrow of the government.

If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. See Danskin v. San Diego Unified School District, 28 Cal.2d 536, 548, 171 P.2d 885. Such a restraint is the more vicious because it penalizes not only those who advocate overthrow of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in censorship of unpopular ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty. See Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

The majority opinion, however, invokes the rule that the government may attain a legitimate objective through means reasonably related thereto even though there is an incidental restraint on speech. Thus, in securing qualified and trustworthy employees for government service a loyalty oath may be required, not for the purpose of restraining speech, but as a means of selection. Adler v. Board of Education, 342 U.S. 485, 492 et seq., 72 S.Ct. 380, 96 L.Ed. 517; Garner v. Board of Public Works, 341 U.S. 716, 720 et seq., 71 S.Ct. 909, 95 L.Ed. 1317; Gerende v. Board of Sup'rs of Elections of Baltimore City, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; Steinmetz v. California State Bd. of Education, 44 Cal.2d 816, 285 P.2d 617; Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267. Similarly, American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, held that in seeking to keep interstate commerce free of political strikes, Congress may require labor officials to file non-Communist affidavits as a condition to their unions' invoking the jurisdiction of the National Labor Relations Board.

In such cases it is necessary to determine whether the provisions that incidentally restrain speech are in fact reasonably related to the attainment of the governmental objective. In Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605, certiorari denied, 350 U.S. 882, 76 S.Ct. 135, 100 L.Ed. 778, the Supreme Court of Wisconsin considered a federal statute that provided in effect that no housing unit constructed under the statute could be occupied by a member of an organization designated as subversive by the Attorney General. Pursuant to this statute, the Milwaukee Housing Authority adopted a resolution that required its tenants to execute a certificate of nonmembership in the listed organizations. The court held the resolution unconstitutional, and after discussing the Douds case stated: "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedoms of the First amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects." 270 Wis. at pages 287–288, 70 N.W.2d at page 615. In considering the same problem, the Supreme Court of Illinois pointed out that, "The purpose of the Illinois Housing Authorities Act [S.H.A. ch. 67½, § 1 et seq.] is to eradicate slums and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522, 526.

In the present case the majority opinion thus states the governmental objective: "Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities * * * doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. * * * Obviously a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat."

The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking. Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. In holding that school children may not be compelled to salute the flag as a condition to attending public schools, the Supreme Court through Mr. Justice Jackson stated that, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641–642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628.

Advocacy does not occur in an intellectual vacuum. Usually it answers or challenges other advocacy. As Mr. Justice Frankfurter aptly stated in Dennis v. United States, 341 U.S. 494, 549–550, 71 S.Ct. 857, 887, 95 L.Ed. 1137: "Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, The American Commonwealth, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellant the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas."

Section 32 impedes not only advocacy itself but discussion short of advocacy that may be of the utmost value. As Mr. Justice Jackson pointed out in the Dennis case, "Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation," and Mr. Justice Frankfurter recognized that, "there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy." 341 U.S. at pages 545, 572, 71 S.Ct. at pages 885, 898. Yet section 32 compels the cautious to forego discussion for fear they will overstep the line that no divining rod can locate.

Errors in thought or expression are best counteracted by deeper thought and more cogent expression. Only through free discussion can subversive doctrines be understood and effectively combatted. " 'The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.' * * * In the last analysis it is on the validity of this faith that our national security is staked." Mr. Justice Frankfurter concurring in Dennis v. United States, 341 U.S. 494, 550, 71 S.Ct. 857, 888.

The majority opinion in the present case goes far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. Section 19 of article XX, implemented by section 32 of the Revenue and Taxation Code, arbitrarily assumes that those who seek tax exemptions advocate overthrow of the government unless they declare otherwise. The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees.

I would reverse the judgment.

GIBSON, C. J., concurs.

CARTER, Justice.

I dissent.

I approach the consideration of this case with a profound consciousness that the problems involved may have a direct impact upon the stability of our state and federal governments. Evidently those who enacted the legislation here involved felt that it was necessary to preserve the status quo of those governments. On the other hand the plaintiff challenges the enactments as an invasion of fundamental constitutional guarantees to it and other religious institutions. We are, therefore, at the outset, faced with the problem as to what sanctions, in the way of pledges of fealty and loyalty, our government may exact from a taxpayer in order to qualify the latter for a tax exemption granted to all in the same class. The solution of this problem depends upon our interpretation and application of the constitutional guarantees relied upon by plaintiff as barriers against such sanctions.

It must be remembered that while our government was "conceived in liberty," it was born in revolution. The Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which the then American colonists were a part. This memorable document epitomized the concept of its framers of the objects and purposes of government and the right of the people to change it by force if necessary. It declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government."

The events which followed the adoption of the Declaration of Independence by the Continental Congress on July 4, 1776, are well known to every student of American history. These events culminated in the Constitutional Convention at Philadelphia during the summer of 1787 where the Constitution of the United States was drafted. Many of the delegates at the Constitutional Convention had been members of the Continental Congress which had adopted the Declaration of Independence. They were revolutionists in the truest and most dignified sense. It should be remembered that the Declaration of Independence and the Constitution of the United States were prepared by a group of men who had endured tyranny under a monarchial form of government for over three generations. They were the leaders in the struggle which overthrew that government and they sought to establish a government of the people, by the people, and for the people, which would derive its just powers from the consent of the governed. They sought to establish justice, ensure domestic tranquility, promote the general welfare, provide for the common defense and secure the blessings of liberty to themselves and their posterity—a government which would govern without tyranny and without oppression and which would guarantee to the governed all of the liberty that a free people in a homogeneous society could enjoy.

The great liberality accorded to the guarantees of freedom of speech and press by those at the head of our government during its formative period is exemplified by the following statement in the First Inaugural Address of President Thomas Jefferson. He there declared: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." This same concept was again expressed by Mr. Jefferson in his letter to Benjamin Rush in these words: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." This concept was more recently depicted by Mr. Justice Brandeis in Whitney v. People of State of California, 274 U.S. 357, 47 S.Ct. 641, 648, 71 L.Ed. 1095, in words that will forever be a part of our American heritage. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Over a century and a half has elapsed since the above quoted utterances of Thomas Jefferson. Our government has withstood one major revolution and several minor armed rebellions but the fundamental basic concept of civil liberties embraced within the Bill of Rights has remained unimpaired.

It is worthy of note that the framers of the Constitution of the United States saw fit to exact of the person who assumed the office of President a very simple oath which reads as follows: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States." U.S.Const. art. II, § 1. This is the only oath mentioned in the Constitution. Notwithstanding the great trust reposed in and power conferred upon the President of the United States by the Constitution and laws enacted by Congress, no other oath or pledge of loyalty may be exacted of him. Nevertheless no President has ever been suspected of disloyalty. It may be said with confidence that history has demonstrated the wisdom of the framers of the Constitution in drafting an oath so simple and yet so effective that it has endured the tests of time and trial. The past at least is secure. But such an oath was not deemed sufficient to insure the loyalty and fealty of the Vice President, members of Congress and other officials of our national government. Although no other official of our government possesses the power or authority of the President, they are required to take an oath much more exacting as it amounts to a pledge of allegiance. This oath is contained in an act of Congress and is as follows: "I * * * do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C.A. § 16. I find no fault with this oath and recognize the propriety of exacting such an oath from one who assumes an official position with our government. It will be observed, however, that neither of the above quoted oaths has the slightest resemblance to the test oath here involved. In commenting on such an oath Dr. Carl Joachim Friedrich, Professor of Government, of Harvard University has the following to say: "It is depressing to realize that the oath has always cropped up as a political device when the political order was crumbling. In the period of religious dissensions the oath of allegiance made its appearance in England as an instrument of intolerance and, a little later, of royal oppression. James Stuart, the tiresome pedant on the throne, sought refuge in an oath required of all ministers and the like (most teaching then being religious). At that time the imperial pretensions of the 'reformed' papacy, the right of the Pope claimed by the Jesuits to absolve the subjects of an heretical king from their allegiance, made the king desirous of testing the loyalty of his more influential subjects. Yet not many years later his son's head rolled into the sand.

"Following that, Oliver Cromwell in his desperate efforts to find a legitimate basis for his dictatorial regime, demanded an oath preceding the election of parliament in 1653 that no one participating in the election would allow the constitution 'as settled in one person and parliament' to be disturbed. But Cromwell died and the oath was forgotten. The rupture which the oath was supposed to heal did not disappear until toleration and a liberal, truly constitutional government had taught people how Catholic and Protestant, how parliamentarian and authoritarian, how Whig and Tory could live peaceably together, with no one requiring the other to swear oaths which were either unnecessary or ineffectual.

"And where have oaths appeared in our own day? In Fascist Italy and in Nazi Germany. In both of these countries the dictators have promulgated requirements according to which the teachers and professors have to swear an oath of allegiance to the Duce, the Leader. But what, one may ask, was the object of demanding such a declaration from men who every day were obliged to mold their words and their teachings to the Fascist creed? The purpose was to humiliate or to destroy them. There were plenty of men who were known to the students as non-Fascists, non-Nazis. If they could be forced into swearing their allegiance to the official creed, they were morally discredited, they were shown to be trimmers. What is more, the man of integrity and of faith is the really dangerous enemy. He would not consent. He would protest. Gaetano Salvemini, now teaching at Harvard, is such a man. He knew the game of Mussolini and he left." Article entitled "Teacher's Oaths,' published in the January, 1936 issue of Harper's, Vol. 172 at p. 171.

At this point, I cannot refrain from quoting the words of warning contained in the powerful concurring opinion of Mr. Justice Black in Wieman v. Updegraff, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216: "History indicates that individual liberty is intermittently subjected to extraordinary perils. * * * The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few people and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. *When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.* Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

"* * * Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. *We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.* And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost." (Emphasis added.)

History is replete with accounts of the many stratagems created by tyrants to violate the individual's liberty. But it is also replete with accounts of man's constant warfare against these devices and victories won by courageous judges, legislators, administrators, lawyers, and citizens.

In 1787, the founders of this nation assumed that they had settled these matters for all time when they drew upon the lessons of history and wrote a Bill of Rights to assure the individual permanent freedom from official tyranny, and the right freely to participate in the process of self-government.

"Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Learned Hand, J., in United States v. Kirschenblatt, 2 Cir., 16 F.2d 202, 203, 51 A.L.R. 416.

"These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. * * * 'Upon this point a page of history is worth a volume of logic.' New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963." Frankfurter, J., United States v. Lovett, 1945, 328 U.S. 303, 321, 323, 66 S.Ct. 1073, 1081, 90 L.Ed. 1252.

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319) have declared the importance to *political liberty* and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties to the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers." Gouled v. United States, 1920, 255 U.S. 298, 303, 41 S.Ct. 261, 263, 65 L.Ed. 647, Clarke, J. (Emphasis supplied.) See also: Brandeis, J. dissenting, Olmstead v. United States, 1927, 277 U.S. 438, 476, 478, 48 S.Ct. 564, 72 L.Ed. 944, and Jones v. Securities and Exch. Comm., 1935, 298 U.S. 1, 28, 56 S.Ct. 654, 80 L.Ed. 1015.

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess* by word or act their faith therein." Jackson, J., in West Virginia State Board of Education v. Barnette, 1943, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628. (Emphasis supplied.)

The story of the rise and fall of the *oath ex-officio* needs to be retold. It will be recalled that the early 1200's were marked by the adoption of this procedural device in the ecclesiastical courts. In this period the inquisitional oath began to take the place of the trial by compurgation oaths in the ecclesiastical courts. The compurgation trials conducted with the device of "oath helpers" had become little better than a farce. The new method of the *oath ex-officio* was one which pledged the accused to answer truly and was followed by a rational process of judicial probing by questions on the specific details of the affair. In a footnote by John H. Wigmore in 15 Harvard Law Review 615, it is stated that by the middle of the 13th century "the new oath became the customary instrument in the papal inquisition of heresy; which, indeed, owed its effectiveness largely to the new methods."

Liberals in the church courts insisted that the oath could only be imposed if the court had a rational hypothesis for proceeding against the suspect. Such rational hypothesis could either be *fama publica* or *clamosa insinnatio*. However, this was too mild for those who wanted a more vigorous pursuit of heretics and schismatics, and they finally prevailed in establishing the doctrine that the oath could be imposed by the church official *ex-officio* without any antecedent foundation. This extreme position, however, directly resulted in the downfall of the power of the ecclesiastical courts because of the public indignation it aroused.

The ordinary course of trial by the Inquisition was this. A man would be reported to the inquisitor as of ill-repute for heresy, or his name would occur in the confessions of some other prisoners. A secret inquisition would be made and all accessible evidence against him would be collected. When the mass of surmises and gossip, exaggerated and distorted by the natural fear of the witnesses, eager to save themselves from the suspicion of favoring heretics, grew sufficient for action, the blow would fall. The accused was then prejudged. He was assumed to be guilty, or he would not have been put on trial, and virtually his only mode of escape was by confessing the charges against him, abjuring heresy, and accepting whatever punishment might be imposed on him in the shape of penance. Persistent denial of guilt and assertion of orthodoxy, when there was evidence against him, rendered him an impenitent, obsinate heretic, to be abandoned to the secular arm and consigned to the state. See Henry Charles Lea, A History of the Inquisition of the Middle Ages, I, p. 407.

However, the English people early registered their resistance to general inquisitorial methods and their attendant abuses. A statute passed in 1360 in the reign of Edward III, provided, "that all general inquiries before this time granted within any seignories, for the mischiefs and oppression which have been done to the people by such inquiries, shall utterly cease and be repealed." 34 Edw. III, ch. 1.

But in 1583 the Court of High Commission in Causes Ecclesiastical, under the leadership of Archbishop Whitgift, started a crusade against heresy wherever it could be found, examining suspected persons under oath in most extreme *ex-officio* style.

In 1609 Sir Edward Coke, as Chief Justice of Common Pleas, granted prohibition against the High Court of Ecclesiastical Causes in Edward's case. 13 Rep. 9. Edward had been charged with libel and the church court put him under the *ex-officio* oath to compel him to state his meaning of the libelous words he was accused of uttering. The common-law court took jurisdiction away from the church court upon the ground, among others, that "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intentions or thought of his heart; and if any man should be examined upon his oath of the opinion he holdeth concerning any point of religion, he is not bound to answer the same."

But the oath *ex-officio* persisted and the Court of the Star Chamber began during James' reign to use the *ex-officio* oath in stamping out sedition. Here the common-law courts were powerless to prevent employment of the oath procedure because they lacked jurisdiction over the Court of the Star Chamber.

In 1639 the Court of the Star Chamber examined John Lilburn, "Freeborn John," an opponent of the Stuarts, on a charge of printing or importing certain heretical and seditious books. Lilburn refused to answer questions "concerning other men, to insnare me, and to get further matter against me." The Council of the Star Chamber condemned him to be whipped and pilloried and his "boldness *in refusing to take a legal oath*," without which many offenses might go "undiscovered and unpunished." See 3 How. State Trials 1315, et seq.

The whip that lashed "Freeborn John" smashed the Court of the Star Chamber as well. In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter administer an *ex-officio* oath on penal matters. In 1645 the House of Lords set aside Lilburn's sentence and in 1648 Lilburn was granted £3000 reparation for the whipping which he had received.

Meanwhile, the scene of struggle against oaths *ex-officio* was carried to colonial America. The story is well told by R. Carter Pittman in 21 Virginia Law Rev. 763 from which the following quotations are taken:

"The settlement of the English colonials in the new world took place at a time in English History when opposition to the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. * * * The *ex-officio* oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists. * * *

"About getting out of England there was much 'red tape' and it consisted in the most part of taking oaths—the oath of Supremacy and the oath of Allegiance, etc. For days and weeks thousands waited aboard ship in the river Thames until *this oath ordeal was over* and after that they were forced with a refined cruelty to say the prayers in the Anglican prayer books twice a day at sea. * * *"

The trial of Mrs. Ann Hutchinson before Governor Winthrop of Massachusetts in the year 1637 was recalled by Mr. Justice Black in Adamson v. People of State of California, 332 U.S. 46, at page 88, 67 S.Ct. 1672, at page 1694, 91 L.Ed. 1903, when he commented:

"Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox religious views. People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected. As a result of her trial and *compelled admissions,* Mrs. Hutchinson was found guilty of *unorthodoxy* and banished from Massachusetts. The lamentable experience of Mrs. Hutchinson and others, contributed to the over-whelming sentiment that demanded adoption of a *Constitutional Bill of Rights.* The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves.*" (Emphasis supplied.)

But the ingenuity of those who would use the oath against the unorthodox was undaunted.

See Harrison v. Evans, 1 English Reports, 1437, decided by the House of Lords in 1767. Evans was a Protestant Dissenter and this fact was known to the Lord Mayor of London. Nevertheless, the Mayor appointed Evans to fill a vacancy as sheriff, despite the existence of an act providing that no person should be admitted to any office who had not, within the twelve preceding months "received the sacrament of the Lord's Supper according to the rites of the Church of England." Because of this statute Evans could not take the oath of office or assume it, and he was assessed for a statutory penalty of £600 which was made applicable to any citizen who refused to assume an office after being appointed thereto.

The House of Lords, by a 6 to 1 vote, ruled with the dissenting Evans, overturned the judgments of the lower courts and returned to him his £600.

"Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct were an abomination to the founders of this nation. This feeling was made manifest in Article VI of the Constitution which provides that '*no religious Test shall ever be required as a Qualification to any Office or public Trust*

under the United States.'" Black, J., dissenting In re Summers, 1945, 325 U.S. 561, 576, 65 S.Ct. 1307, 1315, 89 L.Ed. 1795. (Emphasis supplied.)

"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, *that the religious test oath* or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." (Emphasis supplied.) Bridges v. State of California, 1941, 314 U.S. 252, at page 265, 62 S.Ct. 190, at page 194, 86 L.Ed. 192.

It is revealing to note that test oaths and the struggle against them arose at a time when the division between church and state was in its early stages, when the separation was far from complete. The immunity from compulsory disclosure which ultimately developed affected not only the right of the individual to worship as he pleased but also his right, notwithstanding his place or mode of worship, to hold political office. The protection accorded religious belief developed hand in hand with non-sectarianism in government.

This policy has been recognized in the United States. While the original purpose behind the abolition of the test oath may have been to further religious liberty, the effect has been to extend political liberty. The following statement is illustrative: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 * * *. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430.

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at the primary, to give an oath that they would thereafter support the nominees of that party. That statute was declared unconstitutional and the Supreme Court, in Spier v. Baker, 1898, 120 Cal. 370, at page 379, 52 P. 659, at page 663, 41 L.R.A. 196, said: "* * * And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in a protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

In Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, the same thought is expressed: "But it cannot be the duty, because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. *In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.*" (Emphasis supplied.)

In the light of the foregoing discussion, let us consider the attacks made by plaintiff upon the oath here required. It is contended, with merit, that the oath here is unconstitutional in that it violates the equal protection clauses of both the federal and state Constitutions and that it also violates the First Amendment to the Constitution of the United States. Section 32 makes an exception insofar as the householder's $100 exemption on personal property is concerned. While it cannot be denied that the Legislature in its wisdom may classify in order that certain evils may be avoided in the future, such classification must bear a reasonable relation to the evil to be avoided. There is here no reasonable classification when the evil to be avoided is considered. There is no evidence that any of the churches or veterans here involved advocated, or intended to advocate, the forbidden political philosophy. The constitutional amendment and section 32 appear to be a sort of shotgun attempt on the part of the Legislature to hit an undefined object. In other words, there is no relation between the object to be achieved and the tactics taken to achieve it. A statement made in the majority opinion clearly shows the fallacy in the entire affair. That statement reads as follows: "By its enactment [section 19 of article XX] the people of the state declared the public policy of withholding from the owners of property in this state *who engage in the prohibited activities* the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats.1919, p. 281), and the act of Congress known as the Smith Act (54 Stat. 670) makes it unlawful to advocate the overthrow of the government by force and violence." 311 P.2d 513. It should be emphatically stated and understood that not one of the churches or veterans here involved has been so much as accused of subversive activities. But through their refusal to take the unconstitutional (as I believe) oath, they are penalized in advance for something they have not done and will, in all probability, never do. By the majority opinion we are informed that the reason for the oath is to protect state revenues from impairment by those who would seek to destroy it by unlawful means. An entirely different situation would be presented had any of those involved sought to destroy the state, but here only future *highly problematical* activity is forsworn although the tax is levied for past ownership of property to which the exemption was applicable. Just why charitable institutions are singled out as presenting the greatest danger to this country in time of peace or war is not made clear in the majority opinion. It is Hornbook law that legislation classifying certain groups for corrective purposes must bear a reasonable relationship to the object to be achieved. Churches would, indeed, seem to me to be the least likely subjects of classification for legislative measures to correct the evil thought to exist. Veterans, also, are those who have risked their lives or have been willing to risk them to uphold the ideals for which this country stands. The exemptions were granted, in the first instance, so that religious work might be carried on with the least amount of tax burden possible to the end that the money saved thereby might be used to promote the general welfare; in the second instance, to veterans because they gave up homes, families, and positions to promote the general welfare insofar as protecting this country from an enemy was concerned. It hardly seems logical to assume that laws removing the tax exemptions from those dedicated to the promotion of the general welfare because they *might,* in the future, decide to do a turn-about-face and *destroy* the general welfare can be said to be a reasonable classification. If there is one principle that has always (heretofore) been clearly understood in this country it is that every person is presumed innocent until proven guilty beyond a reasonable doubt. The legislation involved here presumes that one refusing to sign the oath has been, or will soon be, guilty of treasonable conduct. From what is said in the majority opinion it appears that this thought did occur to the members of the court signing it. We are informed that there is a presumption of innocence *but* that the assessor, because of it, is not relieved from making the investigation enjoined on him by law; that his administrative determination is not binding on the tax exemption claimant "but it is sufficient to authorize him to tax the property as non-exempt and *to place the burden on the claimant to test the validity of his administrative determination in a court of law.*" What is this but forcing the supposedly subversive organization or person to prove *itself* or *himself* innocent beyond a reasonable doubt?

In testing the reasonableness of the laws under attack here, the next question which presents itself is why are householders excepted from those who must take the oath before any tax exemption is allowed them? We are told that the "segment of householders in this state is so overwhelmingly large as compared with others chosen for exemption that the cost of processing them would justify their separate classification." If this class is so "overwhelmingly large" it would appear that if the old adage "in numbers lie strength" is true, that this class should also be required to take the oath prior to claiming the exemption. It would also appear that mere difficulty in "processing" would be of little moment in an undertaking thought to be so vitally necessary. Furthermore, if the principle behind the oath is, as we are told, to prevent those dangerous persons from depleting the state's revenues, it would appear that this "overwhelmingly large" class might, even though the exemption is a relatively small one, deplete it even more than the revenues from those which fall within the legislation. The Supreme Court of the United States said, (Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37, 48 S.Ct. 423, 425, 72 L.Ed. 770) that "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, Kentucky Railroad Tax Cases [Cincinnati, N. O. & T. P. R. Co. v. Commonwealth of Kentucky], 115 U.S. 321, 337, 6 S.Ct. 57, 29 L.Ed. 414; Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293, 18 S.Ct. 594, 42 L.Ed. 1037, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. County of Santa Clara v. Southern Pac. R. Co., C.C., 18 F. 385, 388–399; The Railroad Tax Cases, C.C., 13 F. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. [Commonwealth of] Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989; Air-way [Electric Appliance] Corp. v. Day, 266 U.S. 71, 85, 45 S.Ct. 12, 69 L.Ed. 169; Schlesinger v. [State of] Wisconsin, 270 U.S. 230, 240, 46 S.Ct. 260, 70 L.Ed. 557. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155, 17 S.Ct. 255, 257, 41 L.Ed. 666."

There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. Presumably that objective is to stamp out, by any means at hand, the promulgation of unpopular ideas. While the idea of the overthrow of the government of this country by force and violence in either peace or war is as abhorrent to me as it is to the majority of Americans, I am at a complete loss when it comes to imagining any reasonable theory on which the legislation in question can be considered an effective way of preventing such action. The tax itself is on property owned by churches and used for religious purposes and the exemption applies only when such property is used for such purposes. So far as the veteran's exemption is concerned, the tax to which it applies is also on property. Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to the other. The classification here involved falls directly within the rule of the Louisville Gas case: it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a *mere* difference which "is not enough."

The Oath Is a Violation of the Constitutional Guarantee of Freedom of Speech:

In Danskin v. San Diego Unified Sch. Dist., 28 Cal.2d 536, 542, 171 P.2d 885, 889, we held that "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infringement by state Legislatures. Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430; De Jonge v. [State of] Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278. *However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present no 'clear and present danger that they will bring about the substantive evils' that the Legislature has a right to prevent.* 'It is a question of proximity and degree.' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. The United States Supreme Court has been live to the difference between negligible dangers and substantial ones, between remote dangers and immediate ones. * * * '* * * Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial", Brandeis, J., concurring in Whitney v. [People of State of] California, supra, 274 U.S. at page 374, 47 S.Ct. at page 647; it must be "serious", Id., 274 U.S. at page 376, 47 S.Ct. at page 648. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression * * *.'". Bridges v. State of California, 314 U.S. 252, 261, 62 S.Ct. 190, 86 L.Ed. 192, quoting from the concurring opinion of Mr. Justice Brandeis in Whitney v. People of State of California, 274 U.S. 357, 374, 47 S.Ct. 641, 71 L.Ed. 1095.

A reading of the majority opinion leaves in the minds of the reader the implication that the "clear and present danger" rule was abrogated by the later case of Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 867, 95 L.Ed. 1137. In the Dennis case it was specifically noted by the court that in the Smith Act "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity *in which the evidence showed these petitioners engaged.*" It will be recalled that we have here *no evidence* that the churches and veterans involved were even so much as accused of the forbidden activities. In the Dennis case the petitioners had been found guilty by a jury of organizing a Communist party in the United States; in knowingly and wilfully teaching and advocating the overthrow of our government by force and violence. The court also held that it had been determined that the evidence amply supported the necessary finding of the jury that the petitioners "were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared." In the majority opinion in the Dennis case it was said that "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech" and speaking of the "clear and present danger" rule it was said "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. *If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.*" (Emphasis added.) The court expressly rejected the contention that success or probability of success in overthrowing the government was the criterion. The court then, in speaking of prior cases, said that the court had not been "confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." The Supreme Court then stated the rule, relied upon by the majority here, that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This rule, following the court's language concerning what constituted a "clear and present" danger and read in the light of the facts as they were stated in the Dennis case, shows the absurdity of this tempest-in-a-teapot with which we are here confronted: there is no showing that the churches and veterans were highly organized into a war-like machine dedicated to the overthrow of the government by force and violence with leaders highly trained and ready to give the "word" when the time was ripe for revolution! The objects of the legislation, the objective and the means used to achieve it are completely unrelated. Where is the "danger" so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? Or does the oath involved just constitute an unconstitutional invasion of freedom of speech? In my opinion it constitutes an unconstitutional invasion of freedom of speech with the absurdity of the entire situation pinpointed by the thought that any embryo revolutionist would surely not hesitate to subscribe to such an oath.

As Mr. Justice Douglas said in his dissenting opinion in the Dennis case, "Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

"Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

"There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

"Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."

Mr. Justice Douglas said that "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial." The books on Leninism and Communism, etc., which were involved in the Dennis case were commented on by Mr. Justice Douglas as follows: "Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon." Mr. Justice Douglas then continued: "The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion [Mr. Justice Jackson], which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. * * * I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme."

I repeat that in the case at bar we haven't even had speech let alone any facts. Neither prejudice nor hate nor senseless fear should be the basis for abridging freedom of speech. "Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson —"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

At this truly grave moment in our nation's growth it is in the power of this court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the political market place never blurred the meaning of freedom.

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. * * * No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." Chambers v. State of Florida, 1940, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L.Ed. 716.

What is required at this moment of this court is not innovation, but rather a restatement of the glowing principles by which the history of the western world has given dignity to its citizens: "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' * * *. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." Cardozo, J., Matter of Doyle, 257 N.Y. 244, 268, 177 N.E. 489, 498, 87 A.L.R. 418.

The issue is momentous, of far-reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time. "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report upon the Illegal Practices of the United States Department of Justice', which aroused the public concern of Chief Justice Hughes (then at the bar), and by the little book entitled 'The Deportations Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." Frankfurter, J., dissenting, Harris v. United States, 1947, 331 U.S. 145, 173, 67 S.Ct. 1098, 1112, 91 L.Ed. 1399.

Devotion to Americanism often calls for something other than conformity. The plaintiff in the present case knew that to protect the Constitution, indeed merely to invoke its protection for all Americans, required courage, and that hardihood to challenge a wrong done under color of authority was as indispensable to good citizenship as would be, in other circumstances, unquestioning obedience. President Thomas Jefferson wrote to Benjamin Rush in a letter dated April 21, 1803: "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. *It behooves him, too, in his own case to give no example of concession, betraying the common right of independent opinion, by answering questions of faith* which the laws have left between God and himself." (Emphasis supplied.)

In the last analysis, when the moment of decision comes, to the private citizen as well as to the judge, it is in the quiet of his own mind and in the glow of his own courage that Americanism thrives. And it is in the cumulative decision of millions, citizen as well as official, that Americanism is reborn each moment.

For the foregoing reasons, I would reverse the judgment.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

48 Cal.2d 899

The PEOPLE'S CHURCH of SAN FERNANDO VALLEY, Inc., Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES, California; City of Los Angeles, California; H. L. Byram, County Tax Collector, Defendants and Appellants.

L. A. 23790.

Supreme Court of California,
In Bank.

April 24, 1957.

Rehearing Denied May 22, 1957.

Action to recover taxes paid under protest. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for plaintiff, predicated upon conclusions that Revenue and Taxation Code section, requiring nonsubversive declarations from property tax exemption applicants, was invalid by reason of exclusion of householders therefrom and because it applied to property taxes only, and defendants appealed. The Supreme Court, Shenk, J., held that the contrary conclusions reached in the First Unitarian Church case, 311 P.2d 508, required reversal.

Reversed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

Taxation ⚿194

In action to recover taxes paid under protest, judgment for plaintiff, predicated upon conclusions that Revenue and Taxation Code section, requiring nonsubversive declarations of property tax exemption applicants, was invalid by reason of exclusion of householders therefrom, and because it applied to property taxes only, was reversed. West's Ann.Const. art. 13, § 1½; West's Ann.Rev. & Tax.Code, § 32; West's Ann.Const. art. 20, § 19.

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Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Alfred C. DeFlon, Deputy County Counsel, Roger Arnebergh, City Atty., and Spencer L. Halverson, Deputy City Atty., Los Angeles, for appellants.

A. L. Wirin and Hugh R. Manes, Los Angeles, for respondent.

Beardsley, Hufstedler & Kemble, Charles E. Beardsley, Shirley M. Hufstedler, Seth M. Hufstedler, Los Angeles, Morris E. Cohn, Beverly Hills, and Richard W. Petherbridge, El Centro, as amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal by the defendants from a judgment for the plaintiff in an action to recover taxes paid under protest and for declaratory relief.

The plaintiff is a church organization owning real property within the jurisdiction of and subject to taxation by the County and City of Los Angeles. Within the time prescribed by law for the tax year 1954–1955 the plaintiff filed a property statement and an application for the tax exemption authorized by section 1½ of article XIII of the Constitution. The application was made on the regular affidavit form provided by taxing officials of the defendant county. Among other things the form provided for a statement under oath that the applicant did not advocate the violent overthrow of the local or federal government nor the support of a foreign government in the event of hostilities. The oath is required by the provisions of section 32 of the Revenue and Taxation Code adopted in 1953 to implement section 19 of article XX of the Constitution. The plaintiff refused to execute the oath and its property was assessed in the same manner as non-exempt property. The plaintiff paid the first installment of its taxes under protest, and commenced this action to recover the same.

The plaintiff contends that both section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code are invalid for the reasons urged by the plaintiff in the case of The First Unitarian Church of Los Angeles v. County of Los Angeles, Cal., 311 P.2d 508. The trial court properly concluded that section 19 of article XX of the state Constitution did not violate any provision of the federal Constitution, but held that the application for exemption was improperly denied because section 32 of the Revenue and Taxation Code was invalid. Its decision followed from its conclusion that the Legislature, in enacting that section, had no authority to exclude householders from the requirements of making the oath in order to qualify for a tax exemption nor to limit that section to claims for exemption from property taxes only.

It was held in The First Unitarian Church case that section 32 of the Revenue and Taxation Code is a reasonable regulation provided by the Legislature in administering the tax exemption laws of the state and that case is controlling here. The conclusion of law in the present case to the effect that section 19 of article XX is valid was not carried into the judgment. The conclusion of law that section 32 is invalid formed the sole basis for the judgment ordering the refund.

The judgment ordering the refund is reversed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church v. County of Los Angeles, 311 P.2d 523, I would affirm the judgment.

GIBSON, C. J., concurs.

CARTER, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, Cal., 311 P.2d 527, I would affirm the judgment.

Rehearing denied.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

48 Cal.2d 901

FIRST METHODIST CHURCH OF SAN LEANDRO, a California Corporation, Plaintiff and Respondent,

v.

Russell C. HORSTMANN, as Assessor of the County of Alameda, State of California; County of Alameda, California; City of San Leandro, California; and Edwin Meese, Jr., as Tax Collector of the County of Alameda, Defendants and Appellants.

FIRST UNITARIAN CHURCH OF BERKELEY, a California Corporation, Plaintiff and Respondent,

v.

Russell C. HORSTMANN, as Assessor of the County of Alameda, State of California; Edwin Meese, Jr., as Tax Collector of the County of Alameda; County of Alameda; James H. Briggs, as Assessor of the City of Berkeley, State of California; Fred A. Bird, as Tax Collector of the City of Berkeley; and City of Berkeley, Defendants and Appellants.

S. F. 19507.

Supreme Court of California,
In Bank.
April 24, 1957.

Actions brought by churches to recover property taxes paid under protest. The Superior Court, Alameda County, James R. Agee, J., rendered judgments for plaintiffs, predicated upon conclusions that Constitution section making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption and implementing statute were invalid, and defendants appealed. The Supreme Court, Shenk, J., held that the contrary conclusion reached in the First Unitarian Church case, 311 P.2d 508 required reversal.

Reversed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

Taxation 🔑193

In church's action to recover property taxes paid under protest, judgment for plaintiff, predicated upon conclusions that Constitution section making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption and implementing statute were invalid, was reversed. West's Ann.Const. art. 13, § 1½; art. 20, § 19; West's Ann.Rev. & Tax.Code, § 32.

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J. F. Coakley, Dist. Atty., Richard J. Moore and Maury Engel, Deputy Dist. Attys., Oakland, Arthur M. Carden, City Atty., San Leandro, and Fred Hutchinson, City Atty., Berkeley, for appellants.

Lawrence Speiser, San Francisco, and William T. Belcher, Jr., Phillips, Avakian & Johnston and J. Richard Johnston, Oakland, for respondents.

Landels & Weigel and Stanley A. Weigel, San Francisco, and Frank B. Frederick, as amici curiae on behalf of respondents.

SHENK, Justice.

This is an appeal by the defendants from judgment for the plaintiffs in two cases consolidated for trial and on appeal. They are actions in which the plaintiff churches seek to recover property taxes paid under protest and for declaratory relief to determine their claim that article XX, section 19 of the Constitution and section 32 of the Revenue and Taxation Code are unconstitutional.

It appears from a written stipulation of facts that the plaintiff First Methodist Church of San Leandro owns real property devoted solely and exclusively to religious purposes within the jurisdiction of and subject to taxation by the defendant City of San Leandro and the County of Alameda. Other facts appear which would otherwise fulfill the requirements of section 1½ of article XIII of the Constitution providing for the exemption of such property from taxation. On March 16, 1954, an application for the exemption for the tax year 1954–1955 was filed in the office of the defendant Assessor of the County of Alameda. The application was made on the form provided by the assessor, but the nonsubversive oath contained therein as required by section 19 of article XX of the Constitution and as implemented by section 32 of the Revenue and Taxation Code was stricken out and not included in the affidavit. The application was denied and the property assessed as other nonexempt property in the county and city. The plaintiff First Methodist Church paid, under protest, the first installment of its 1954–1955 taxes and brought its action to recover the same.

The cause commenced by the First Unitarian Church of Berkeley was submitted on the pleadings. It appears therefrom that this plaintiff owns real property devoted solely to religious purposes within the jurisdiction of and subject to taxation by the defendant City of Berkeley and County of Alameda. Facts are alleged which fulfill the requirements of article XIII, section 1½ of the Constitution for exemption from taxation, but in filing its application for the exemption the plaintiff struck out and refused to execute the oath contained in the application form provided by the assessor pursuant to article XX, section 19 of the Constitution and section 32 of the Revenue and Taxation Code. The application was denied. Taxes were assessed without benefit of the exemption and were paid by the plaintiff church under protest.

The judgment in the consolidated action declared section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code to be invalid on numerous grounds, and ordered a refund of taxes paid in the amounts stipulated in the protests filed with the payments.

The contentions asserted in support of the judgment have been discussed and disposed of adversely to the plaintiffs' contentions in the case of The First Unitarian Church of Los Angeles v. County of Los Angeles, Cal., 311 P.2d 508. It was held in that case that the oath could validily be required of churches as a condition to granting the tax exemption. That case is controlling here.

The judgment is reversed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

.TRAYNOR, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church v. County of Los Angeles, 311 P.2d 522, I would affirm the judgment.

GIBSON, C. J., concurs.

CARTER, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 527, I would affirm the judgment.

48 Cal.2d 472

Daniel PRINCE, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, Defendant and Respondent.

S. F. 19450.

Supreme Court of California.
In Bank.
April 24, 1957.

Action to recover taxes paid under protest and for declaratory relief. The Superior Court, City and County of San Francisco, William T. Sweigert, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Shenk, J., held that Revenue and Taxation Code section requiring nonsubversive declarations of veterans' tax exemption applicant was not subject to claimed infirmity of fallaciously inferring that those who did not subscribe to the oath engaged in prohibited activities.

Affirmed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

1. Constitutional Law ⟾283
Taxation ⟾193

State Constitution subsection making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption and statute implementing same did not violate free speech rights of veterans' tax exemption claimant, notwithstanding oath requirement of implementing statute. West's Ann.Const. art. 13, § 1¼; art. 20, § 19.

2. Statutes ⟾95(1)

Revenue and Taxation Code section requiring nonsubversive declarations of veterans' tax exemption applicant did not constitute special legislation and was not subject to claimed infirmity of fallaciously inferring that those who did not subscribe to oath engaged in prohibited activities. West's Ann.Rev. & Tax.Code, § 32.

3. Taxation ⟾251

Legislature may, in implementation of Constitution section serving as predicate for exemption, properly require that claimant perfect his application for property tax exemption by compliance with reasonable regulations. West's Ann.Const. art. 13, § 1¼.

4. Constitutional Law ⟾5

Constitution section requiring that every act embraced but one subject and that such subject be expressed in its title was intended to be applied only to *legislative* enactments under Constitution; and Constitution subsection making nonadvocacy of overthrow of government by unlawful means a condition for tax exemption could not be successfully attacked as embracing more than one subject. West's Ann.Const. art. 4, §§ 1 et seq., 24; art. 20, § 19.

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Lawrence Speiser and Ralph Wertheimer, San Francisco, for appellant.

Dion R. Holm, City Atty., Walker Peddicord, Chief Deputy City Atty., and Robert M. Desky, Deputy City Atty., San Francisco, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment in favor of the defendant in an action to recover taxes paid under protest and for declaratory relief.

The plaintiff is a veteran of World War II and as such filed applications for and obtained tax exemptions from the defendant city and county for the tax years 1951–1952, 1952–1953 and 1953–1954, pursuant to the provisions of section 1¼ of article XIII of the Constitution. That section provides in its pertinent parts as follows: "The property to the amount of $1,000 of every resident of this State who has served in the Army, Navy, Marine Corps, Coast Guard or Revenue Marine (Revenue Cutter) Service of the United States (1) in time of war, or (2) in time of peace, in a campaign or expedition for service in which a medal has been issued by the Congress of the United States, and in either case has received an honorable discharge therefrom, * * * shall be exempt from taxation * * *."

On November 4, 1952, the Constitution was amended to add section 19 of article XX limiting the veterans' tax exemption, as well as other tax exemptions, to those otherwise entitled who do not advocate the overthrow of the federal or state government by force and violence or the support of a foreign government in the event of hostilities against the United States, and authorizing implementation by legislation to effectuate the provisions of the constitutional amendment. Accordingly, on July 1, 1953 (Stats.1953, ch. 1503, § 1, p. 3114) section 32 was added to the Revenue and Taxation Code providing that applications for tax exemptions must contain an oath as specified by that section. The constitutional amendment and the implementing legislation are the same as those set forth and considered in the opinion of this court in The First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 508.

On April 12, 1954, the plaintiff filed in the office of the assessor of the defendant city and county an application for a property tax exemption for the tax year 1954–1955. The application form furnished by the assessor contained, for the first time, the nonsubversive affidavit required by section 32 of the Revenue and Taxation Code. The plaintiff failed and refused to sign the application containing the oath. Facts were stipulated to which otherwise appear to entitle the plaintiff to the exemption. The application was denied. The plaintiff paid the tax under protest and commenced this action to recover the same. He claims that he is entitled to the exemption without compliance with the constitutional amendment and the statutory enactment passed in pursuance thereof. He contends that section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code violate provisions of the state and federal Constitutions. In support of his contentions he argues that the provisions of our state law infringe upon various aspects of freedom of speech; that because section 32 of the Revenue and Taxation Code does not apply to all of those entitled to tax exemptions it constitutes special legislation and he is denied due process and equal protection of the law, and that it fallaciously infers that those who do not sign the oath engage in the prohibited advocacy. It is also urged that the constitutional amendment is void because it embraces more than one subject.

[1–4] In the case of The First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 508, this court declared the purposes of the constitutional amendment and its implementing legislation as applied to churches and held both enactments to be valid. The same reasons and conclusions apply to tax exemption claims by veterans provided for in section 1¼ of article XIII of the Constitution. Veterans traditionally have been selected by the states and by the nation for numerous special bounties and benefits. These are said to be, in part at least, in consideration for services in the public interest and welfare and as encouragement to others to follow their example. See Allied Architects' Ass'n of Los Angeles v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; Veterans' Welfare Board v. Riley, 188 Cal. 607, 611, 206 P. 631. In the case of The First Unitarian Church of Los Angeles v. County of Los Angeles, above referred to, it was held that the pursuit of such objectives by the state through the means employed in the constitutional amendment and implementing legislation does not in any way violate the right of free speech; that the classifications imposed are reasonable and proper; that they do not violate any constitutional provision, and that the oath requirement of section 32 of the Revenue and Taxation Code is valid. That case is controlling here. The further contention that section 32 fallaciously infers that those who do not subscribe to the oath engage in the prohibited activity is without merit. The Legislature may properly require that a claimant perfect his application for a property tax exemption by compliance with reasonable regulations in implementation of section 1¼ of article XIII of the Constitution. Chesney v. Byram, 15 Cal.2d 460, 465, 101 P.2d 1106. Finally the plaintiff's contention that the constitutional amendment violates section 24 of article IV of the Constitution, which provides that "Every act shall embrace but one subject, which subject shall be expressed in its title", is also without merit. Article IV of the Constitution deals with the "Legislative Department" and section 24 is intended to be and has been limited to legislative enactments under the Constitution. See McClure v. Riley, 198 Cal. 23, 26, 243 P. 429; Ex parte Haskell, 112 Cal. 412, 421, 44 P. 725, 32 L.R.A. 527.

No good reason appears why veterans should not be required to comply with the same reasonable regulations and conditions provided by section 32 of the Revenue and Taxation Code as are applied to all other included tax exemption claimants.

The judgment is affirmed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church v. County of Los Angeles, 311 P.2d 522, 523, I would reverse the judgment.

GIBSON, C. J., concurs.

CARTER, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 527, 528, I would reverse the judgment.

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48 Cal.2d 903

Lawrence SPEISER, Plaintiff and Respondent,
v.
Justin A. RANDALL, as Assessor of Contra Costa County, Defendant and Appellant.

Lawrence SPEISER, Plaintiff and Respondent,
v.
Mary Ellen FOLEY, as Assessor of City of El Cerrito, Defendant and Appellant.

S. F. 19322, 19323.

Supreme Court of California,
In Bank.

April 24, 1957.

Actions wherein the Superior Court, Contra Costa County, Harold Jacoby, Hugh H. Donovan, Homer W. Patterson, Norman A. Gregg and Wakefield Taylor, Judges, rendered judgment declaring invalid, on grounds of unreasonable classification and infringement upon free speech guarantee of federal Constitution, state Constitution section making nonadvocacy of overthrow of government by unlawful means a condition for tax exemption and implementing statute requiring nonsubversive declarations of applicant for veterans' tax exemption, and defendant appealed. The Supreme Court, Shenk, J., held that the contrary conclusions reached in Prince v. City and County of San Francisco, 311 P.2d 544, required reversal.

Reversed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

Constitutional Law ⟹283
Taxation ⟹193

Judgment declaring invalid, on grounds of unreasonable classification in infringement upon free speech guarantee of federal Constitution, state Constitution section making nonadvocacy of overthrow of government by unlawful means a condition for tax exemption and implementing statute requiring nonsubversive declarations of applicant for veterans' tax exemption, would be reversed. West's Ann.Const. art. 20, § 19; West's Ann.Rev. & Tax.Code, § 32; West's Ann.Const. art. 13, § 1¼; art. 20, § 19; West's Ann.Rev. & Tax.Code, § 32; U.S.C.A.Const. Amend. 1.

Francis W. Collins, Dist. Atty., Martinez, Thomas F. McBride, Asst. Dist. Atty., Concord, George W. McClure, Deputy Dist. Atty., Martinez, and Clifford C. Anglim, City Atty., Richmond, for appellants.

Lawrence Speiser, San Francisco, in pro. per., and Joseph Landisman, Richmond, for respondent.

SHENK, Justice.

This is an appeal by the defendants from a single judgment in two consolidated cases in which the common plaintiff, Lawrence Speiser, sought declaratory relief against the Assessors of the County of Contra Costa and the City of El Cerrito located in that county to the effect that section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code are invalid and that he is entitled to the veterans' property tax exemption provided for in section 1¼ of article XIII of the Constitution notwithstanding the provisions of those enactments.

The material facts in these two cases are the same and appear by stipulation of the parties in the trial court. The plaintiff is a resident of the City of El Cerrito and the County of Contra Costa. He meets all of the requirements for the veterans' tax exemption except that in his application for the tax year 1954–1955 he failed and refused to subscribe to the nonsubversive oath contained in the application form supplied by the assessors pursuant to article XX, section 19 of the Constitution and section 32 of the Revenue and Taxation Code. His applications were rejected. He thereupon commenced these actions for declaratory relief. The trial court held that the constitutional provisions and the code section were invalid as an infringement upon the right of free speech guaranteed by the federal Constitution, Amend. 1, and that section 32 was invalid for the reason that in failing to require an oath from the members of all groups otherwise entitled to tax exemptions an unreasonable classification was imposed. The judgment ordered that the plaintiff be granted the exemption.

The contentions urged on appeal in these cases are the same as those presented in Prince v. City and County of San Francisco, 311 P.2d 544. For reasons stated in the opinions in that case and in The First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 508, the defendants should have prevailed.

The judgment is reversed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church v. County of Los Angeles, 311 P.2d 522, 523, I would affirm the judgment.

GIBSON, C. J., concurs.

CARTER, Justice (dissenting).

For the reasons stated in my dissenting opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, 311 P.2d 527, 528, I would affirm the judgment.

151 Cal.App.2d 253

Adella GROLLA, Plaintiff and Appellant,
v.
Oscar M. GROLLA, Defendant and Respondent.
Civ. 17218.

District Court of Appeal, First District, Division 1, California.
May 27, 1957.

Divorced wife made a motion to modify divorce decree by increasing support payments, and made a motion for counsel fees and costs on appeal from order denying the first motion. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered orders denying the motions, and the divorced wife appealed. The District Court of Appeal, Peters, P. J., held that where property settlement agreement, which was confirmed by divorce decree, provided that parties agreed as and for a complete settlement of their community property rights and all claims of every kind and character of each against the other, parties would be deemed to have intended that support and property division provisions were non-severable, and that support provisions were therefore not subject to modification.

Orders affirmed.

1. Divorce ⚷245(1)

Where divorce decree confirms property settlement agreement containing provisions for support of wife, court has power to modify support provisions, if they are severable, but does not have power to modify support provisions without consent of both parties, if the support provisions are not severable.

2. Divorce ⚷245(1)

Where support clause in property settlement agreement confirmed by divorce decree is in the nature of an annuity in lieu of part of wife's share of marital property, or the support clause waives any right of wife to increase support in the future in exchange for a larger share of the marital property than she otherwise would get, support clause cannot be modified without consent of both parties, since the support clause is non-severable.

3. Divorce ⚷286

Where there was no extrinsic evidence introduced as to intent of parties to property settlement agreement confirmed by divorce decree, interpretation of the agreement became a question of law, and trial court's interpretation, though reasonable, was not binding on reviewing court, if reviewing court believed that there was another and more reasonable interpretation.

4. Divorce ⚷245(1)

Though fact that support payments under property settlement agreement confirmed by divorce decree were designated as "alimony" in one paragraph of the agreement, was entitled to some consideration in determining whether parties intended that provisions for support payments were severable and therefore subject to modification, such designation was not controlling, since even if support provisions constituted "alimony" they might be inseparable from provisions relating to division of marital property.

5. Divorce ⚷245(1)

Fact that property settlement agreement, which was confirmed by divorce decree, provided that obligation of husband to pay wife $100 a month for her support and maintenance should terminate on her remarriage or the death of either party, did not necessarily require a determination that support provisions of agreement were severable and therefore subject to modification.

6. Divorce ⚷245(1)

Where trial court by divorce decree approved, ratified, and confirmed property settlement agreement, fact that agreement was not made part of complaint and was not introduced into evidence at trial of divorce action was irrelevant on issue whether support provisions were severable and therefore subject to modification.

7. Divorce ⚷245(1)

Fact that provision for support in property settlement agreement, which was confirmed by divorce decree, was separately stated and was not part of provisions for division of community property, did not indicate that provision for support was severable and therefore subject to modification.

8. Divorce ⚷245(1)

Where wife sought and secured divorce on grounds of extreme cruelty, so that trial court could have awarded her all of the community property, fact that property settlement agreement, which was confirmed by divorce decree, gave wife $21,000 worth of community property and gave husband only $7,000 worth of community property, did not require an interpretation of the agreement that support provisions were non-severable and therefore not subject to modification.

9. Divorce ⚷**245(1)**

Where property settlement agreement, which was confirmed by divorce decree, provided that parties agreed as and for a complete settlement of their community property rights and all claims of every kind and character of each against the other, parties would be deemed to have intended that support and property divisions were non-severable and that support provisions were therefore not subject to modification.

10. Husband and Wife ⚷**279(1)**

General rules applicable to construction of contracts applied to interpretation or property settlement agreements confirmed by a divorce decree.

11. Contracts ⚷**155**

In case of uncertainty in a contract, it is construed most strongly against the party who drafted the contract and caused the uncertainty to exist.

12. Divorce ⚷**225, 288**

Where property settlement agreement, which was confirmed by divorce decree, contained an implied waiver by wife of any potential claim to a future increase in support allowance, divorced wife was not entitled to costs and counsel fees involved in unsuccessful appeal by wife from decree denying her motion to modify support provisions of agreement.

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Postel & Postel, San Francisco, for appellant.

Joseph F. Mannion, San Francisco, for respondent.

PETERS, Presiding Justice.

Adella Grolla appeals from two orders of the trial court, one denying her motion to modify a divorce decree by increasing her support payments, and the other denying her motion for counsel fees and costs on her appeal from the first order. The main problem on these appeals is the frequently recurring one of determining whether a property settlement agreement between a husband and wife that not only divides the property of the parties but contains provisions for the wife's support is an integrated agreement, which cannot be modified by the court, or whether the support provisions are severable, and therefore subject to court modification. The trail court ruled that, as a matter of law the agreement was not subject to modification. The wife appeals.

In August of 1954 the wife, who had been married to the defendant for 32 years, brought an action for a divorce on the ground of cruelty, praying for a divorce, alimony, attorney's fees and all the community property. Defendant defaulted, and an interlocutory decree was secured by plaintiff in October of 1954. The interlocutory provided, in part:

> "It is further ordered, adjudged and decreed that the property settlement agreement entered into by and between plaintiff and defendant on the 30th day of September, 1954, be and the same is hereby approved, ratified and confirmed in all respects.
>
> "It is further hereby ordered, adjudged and decreed, in pursuance of said property settlement agreement, that defendant pay to plaintiff as alimony for the sole support and maintenance of plaintiff the sum of $100.00 per month commencing with the first day of October, 1954, and continuing monthly thereafter until the remarriage of plaintiff or the death of either party."

In August of 1955 plaintiff, claiming changed circumstances, moved for a modification of the support payments from $100 to $200 monthly. On October 6, 1955, the final decree of divorce was entered. It contained provisions identical with those quoted above from the interlocutory decree. On October 10, 1955, the motion for modification was denied, the court expressly finding that the interlocutory decree "was made pursuant to * * * [the property settlement] agreement, and that said agreement was approved by the trial Court and that the decree entered herein was and is an inseparable part of the consideration for the property settlement agreement and that, together, they constitute an integrated bargain * * *."

On these appeals the major contention of appellant is that the provision in the property settlement agreement for her support is severable from the portions of the agreement relating to the division of the marital property, and was, therefore, subject to modification.

[1] Property settlement agreements containing provisions for the support of the wife or children have frequently been before the courts for interpretation. Usually the question is whether the provision for support is or is not severable from the balance of the agreement. If severable, the power to modify the support provision is retained. If non-severable, the support provisions cannot be modified without the consent of both parties. Herda v. Herda, 48 Cal.2d 228, 308 P.2d 705; Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988; Finnegan v. Finnegan, 42 Cal.2d 762, 269 P.2d 873; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265.

[2] Generally speaking, property settlement agreements containing support provisions may fall into one of three categories. It may contain (1) a support clause not related to any division of the marital property; or (2) a support clause in the nature of an annuity in lieu of part of the wife's share of the marital property; or (3) a support clause that waives any right to increased support in the future in exchange for a larger share of the marital property than she otherwise would get. The first type of agreement is subject to the general rule of modification applicable to alimony allowances. The latter two types of agreement cannot be modified without the consent of both parties, the support and property division provisions being "non-severable."

[3] In the instant case, since the final decree confirmed the provisions of the interlocutory, which, in turn, confirmed the terms of the original agreement, the agreement itself must be examined for interpretation purposes. Where, as here, no extrinsic evidence as to the intent of the parties is introduced, the interpretation of the agreement becomes a question of law, and the interpretation of the trial court, although reasonable, is not binding on the appellate court if that court believes there is another and more reasonable interpretation. Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988.

These are the general rules applicable to the problem here presented. There is no difference of opinion between the parties as to these rules. They differ, however, as to the proper application of these rules to the agreement here involved.

That agreement was drafted by appellant's then counsel. It is relatively short. The preamble provides: "The above-named parties, wife and husband, hereby agree as and for a complete settlement of their community property rights and all claims of every kind and character of each against the other as follows:" There then follows a listing of the community property and provisions for its division between the parties. Admittedly, the wife received community property valued at about $21,000, while the property received by the husband was valued at about $7,000. Immediately after the division of the property appears paragraph 4 which provides:

> "The defendant husband hereby agrees to pay to the plaintiff wife as alimony for the sole support and maintenance of said plaintiff wife, the sum of $100.00 per month * * * con-

tinuing monthly * * * until the remarriage of plaintiff wife or the death of either party."

Paragraph 6 reads as follows:

> "Any and all other property of every kind and character in the possession or under the control of either of the parties, except as hereinbefore mentioned, is the separate property and estate of the party holding or controlling the same, free and clear of any claims of the opposite party."

Paragraph 7 contains the following language:

> "The parties hereto do, and each of them does, hereby waive, release, relinquish and acknowledge full and complete satisfaction of any and all claims against each other, except as herein provided, and said parties do acknowledge full and complete satisfaction of any and all claims against or interest in the community property of the parties hereto, and that the said community property rights of the parties hereto are fully settled and determined; and it is understood and agreed that any property hereafter acquired by either of the parties hereto, of any nature or kind whatsoever, shall be the sole and separate property and estate of the party acquiring the same."

[4] Appellant points out that in paragraph 4 the support payments are designated "as alimony." While such a designation is entitled to some consideration in trying to ascertain the intent of the contracting parties, such label is not controlling. Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873. This is so because even if the support provisions constitute "alimony" they may be inseparable from the provisions relating to the division of the marital property.

[5] Appellant also places reliance on the other provisions of paragraph 4 which terminate the support provisions upon the remarriage of the wife or the death of either party. Such provisions are, of course, characteristic of alimony, which normally terminates upon the specified events. But as the cases cited above indicate (see also Herda v. Herda, 48 Cal.2d 228, 308 P.2d 705, in which the rationale of the opinion supports the cited cases), such provisions cannot be considered as a binding determination that the amount allotted is alimony when the agreement is construed as a whole.

[6] Appellant also contends that it is significant that the separation agreement was not part of the complaint, nor was it introduced into evidence at the trial. This is irrelevant on the issue of interpretation. Admittedly, the parties entered into the agreement, and the trial court "approved, ratified and confirmed" it "in all respects." Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865.

[7] Appellant also points out that the provision for support is separately stated and not part of the provisions for the division of the community property, and seems to believe that that indicates that the provisions are severable. This argument was expressly rejected by this court in Helvern v. Helvern, 139 Cal.App.2d 819, at page 828, 294 P.2d 482, at page 487, where we pointed out: "These arguments are without merit, because the purpose of such separate treatment is obviously to make the support provisions enforceable by contempt process." See also Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Finnegan v. Finnegan, 42 Cal.2d 762, 269 P.2d 873.

[8] As opposed to these arguments respondent points to evidence which, he claims, constitutes internal evidence that the support and property provisions are inseverable. He calls attention, for example, to the fact that under the agreement the wife recieved $21,000 worth of community property while the husband received but $7,000. Respondent seems to think that this implies a waiver of future rights to increased payments for support. This factor is certainly not binding on this court on the

issue of interpretation. See Helvern v. Helvern, 139 Cal.App.2d 819, 294 P.2d 482. It is worthy of note that appellant sought and secured her divorce on the ground of extreme cruelty. The trial court, in such a case, could, of course, have awarded her all of the community property. More important on the issue of interpretation are the provisions of the preamble providing that the parties "hereby agree as and for a complete settlement of their community property rights and all claims of every kind and character of each against the other." This shows a general intent to settle "all claims" of the parties, one of which is the right to support. Such intent is emphasized by the provisions in paragraph 7, in which the parties expressly "waive, release, relinquish and acknowledge full and complete satisfaction of any and all claims against each other, except as herein provided * * * and it is understood and agreed that any property hereafter acquired by either of the parties hereto, of any nature or kind whatsoever, shall be the sole and separate property and estate of the party acquiring the same." These provisions closely resemble paragraphs 10 and 12 of the property settlement agreement involved in Helvern v. Helvern, supra, see 139 Cal.App.2d at page 829, 294 P.2d at page 488. In that case such paragraphs were deemed to constitute strong internal evidence of an intent that the provisions were non-severable. See also Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988.

[9] Thus, a reading of the contract indicates that the provisions supporting an inference of non-severability outweigh those that support the inference of severability. It is our view that the most reasonable interpretation of the agreement is that it shows on its face that the parties intended that the support and property division provisions should be non-severable.

[10, 11] It should also be mentioned that the separation agreement was drafted by the former attorney for the appellant. The general rules applicable to the construction of contracts apply to the interpretation of separation agreements. See Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988. One of the settled canons of construction is that "in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument." Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258, 259.

[12] This holding that the agreement, properly interpreted, contains an implied waiver by appellant of any potential claim to a future increase in the support allowance is necessarily decisive of the correctness of the order denying appellant's motion for the costs and counsel fees involved in the second appeal. The same language of waiver must be construed as waiving such costs and fees. See Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Pearman v. Pearman, 104 Cal.App.2d 250, 252, 231 P.2d 101. Nicolai v. Nicolai, 96 Cal.App.2d 951, 216 P.2d 913, is not contrary to these cases. In that case, although an allowance for costs and counsel fees was upheld in the face of a waiver, the respondent did not, on appeal, contest the allowance.

The orders appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

151 Cal.App.2d 353

Dora Huyck CONDAFFER, as Special Administratrix of the Estate of Walter S. Huyck, Deceased, and Dora Huyck Condaffer, Individually, Plaintiffs, Cross-Appellants and Respondents,

v.

Elleta Huyck HOSKINSON, as Executrix of the Last Will of Augusta B. Huyck, also known as A. B. Huyck, also known as "Gussie" Huyck, deceased; John Doe, Richard Roe, and Jane Doe, Defendants, Cross-Respondents, and Appellants.

Civ. 22028.

District Court of Appeal, Second District,
Division 1, California.

May 28, 1957.

Suit by widow, individually, and as administrator of husband's estate, to impress trust upon realty conveyed by widow and her husband, and for an accounting. From judgment for defendants entered in Superior Court, Santa Barbara County, Atwell Westwick and Walter J. Fourt, JJ., the widow appealed. Defendants appealed from order granting motion for new trial. The District Court of Appeal, Drapeau, J. pro tem., held that trial court did not abuse its discretion in granting new trial.

Judgment for defendants reversed; order for new trial affirmed with directions.

1. New Trial ⚿68

In suit by widow to impress trust on realty conveyed by widow and her deceased husband, wherein jury returned verdict for defendants, trial court's grant of new trial was not an abuse of discretion.

2. Appeal and Error ⚿977(3)

The granting of a motion for new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears.

3. Trusts ⚿244

When property is held in trust by a decedent for others, the representative of that decedent in the probate courts holds it upon the same terms as his testator held it, the real ownership being in the beneficiary of the trust.

4. Appeal and Error ⚿1178(7)

Where widow who sought to impress trust on property conveyed by herself and her deceased husband was mother of executrix of estate which held property in question, and executrix clearly favored the mother's case, Supreme Court directed that devisees under will be made parties to new trial of the action and served with process as required by law. West's Ann.Code Civ. Proc., § 389.

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Lawrence C. Grossman, Lompoc, Heckendorf & Schwab, Santa Barbara, for appellants and cross-respondents.

Arden T. Jensen, Albert W. Meloling, Solvang, for respondents and cross-appellants.

DRAPEAU, Justice pro tem.

In 1931 Walter S. Huyck owned a forty-acre ranch near Lompoc, in Santa Barbara County, California. He had a trust deed upon the ranch, securing the payment of his promissory note for $12,000 and interest. Payments on the debt being in default, the beneficiary directed sale of the real property, as required by the terms of the trust deed.

At this juncture, other members of the Huyck family, a sister-in-law and two brothers, came to Walter's rescue. They raised the money and paid off the note Then Walter and his wife conveyed the ranch to the sister-in-law and two brothers, as joint tenants.

The complaint in this action alleges, and the evidence on the trial of it supports the allegation, that the grantees under the joint tenancy deed promised to hold title to the property for Walter's benefit, to apply the profits from crops on the ranch to the money they had advanced, and whenever it was repaid to them, to deed the ranch back to Walter. Thus we have the familiar legal allegation that a deed was in fact a mortgage, with a prayer in the complaint to impress a trust upon the property, and for an accounting.

As the years went by, Walter Huyck died, leaving his widow, Dora Huyck Condaffer, surviving (who later married), and one daughter, Elleta Huyck Hoskinson.

On the other side of the family the two brothers died, vesting title to the ranch in the sister-in-law, Augusta B. Huyck, as surviving joint tenant. But by her will she devised the property to two nephews and one niece, and not to Walter's widow or to her heirs.

Before the final decree of distribution in Augusta's estate was made, Walter Huyck's widow, Dora, brought this action, as special administratrix of her husband's estate, and in her individual capacity. Lis pendens was filed and recorded.

Thereafter the property was distributed by the probate court to Augusta's niece and nephews, as directed by her will. These people are not named in the complaint as parties defendant, the sole defendant being Augusta's executrix.

As commented upon in the briefs, the plaintiff administratrix, Dora, and the defendant executrix, Elleta, are mother and daughter. And Elleta is manifestly favorably inclined to plaintiff's case.

Upon the trial, evidence in support of plaintiffs' cause of action was presented, and the case was continued for further testimony in the form of depositions. It appearing that the trial judge was about to be elevated to the appellate bench, counsel agreed that the case be submitted for decision upon the evidence already taken, and waived the taking of the depositions. Thereupon, the trial judge found for defendants, and judgment followed accordingly.

After the trial judge had taken office as justice of the District Court of Appeal, another Superior Court judge heard and granted plaintiffs' motion for a new trial.

Defendants appeal from the order granting the new trial, and plaintiffs appeal from the judgment against them.

Defendant appellant in support of her appeal from the order granting a new trial argues that the devisees under Augusta's will are necessary and indispensable parties to the action, and that the order granting a new trial should be reversed for the reason that they are not parties. But the cases cited in support of this argument, involving as they do, attempts to enforce a trust upon property distributed by will, contrary to an alleged promise to make a different will, are not controlling (see, Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 106 P.2d 879).

[1, 2] In any event it is not necessary to pass upon this contention, for the reason that no abuse of discretion appears in the order granting the new trial. As stated by our Supreme Court in Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, at page 169, 153 P.2d 338, at page 340: "It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears."

[3] But something should be said as to the parties to the action. When property is held in trust by a decedent for others, the representative of that decedent in the probate court holds it upon the same terms as his testator held it, the real ownership being in the beneficiary of the trust. McNeil v. Dow, 89 Cal.App.2d 370, 375, 200 P.2d 859.

[4] However, in view of the relationship between the plaintiff mother and defendant daughter, and in view of the fact that the defendant executrix clearly favors the plaintiffs' case, it will be in the interests of justice to direct that the niece and nephews be made parties to the action, and that they may have the right to appear and participate in the defense of it, if they are so advised. Code Civ.Proc. § 389.

The judgment is reversed; the order for a new trial is affirmed; and it is directed that the niece and nephews be made parties to the action and be served with process as required by law.

WHITE, P. J., and DORAN, J., concur.

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151 Cal.App.2d 496

In the Matter of the Proposed Ascertainment and Establishment of the Standing of the PARADISE NEWS PRESS as a Newspaper of General Circulation.

Wallace D. DRIVER, Petitioner and Respondent,

v.

CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, Inc., Contestant and Appellant.

Civ. 9113.

District Court of Appeal, Third District, California.

June 4, 1957.

Hearing Denied July 31, 1957.

Proceeding to establish standing of newspaper as newspaper of general circulation to qualify it for publication of matter required by law to be published. The Superior Court, Butte County, J. F. Good, J., held that newspaper was one of general circulation, and newspaper publishers association appealed. The District Court of Appeal, Warne, J. pro tem., held that articles in newspaper concerning meeting of board of trustees of school district, candidacy of men for membership on board of directors of irrigation district, American Legion Post, change of ownership of insurance business, talk on veterinary medicine, meeting of association of nursing homes, unlawful cutting of Christmas trees, social news, and items of local interest, constituted intelligence of general character within statute providing that newspaper of general circulation is newspaper published for dissemination of local or telegraphic news and intelligence of general character.

Affirmed.

1. Newspapers 🔑3(2)

Articles in newspaper concerning meeting of board of trustees of school district, candidacy for membership on board of directors of irrigation district, American Legion Post, change of ownership of insurance business, talk of doctor of veterinary medicine, meeting of association of nursing homes, unlawful cutting of Christmas trees, social news, and items of local interest constituted "intelligence of general character" within statute providing that newspaper of general circulation, qualified to publish public notices is newspaper published for dissemination of local or telegraphic news and intelligence of general character. West's Ann.Gov.Code, § 6000.

See publication Words and Phrases, for other judicial constructions and definitions of "Intelligence of General Character".

2. Newspapers 🔑3(5)

Fact that newspaper did not contain editorials did not mean that it could not be newspaper of general circulation within statute restricting publication of matter required by law to be published to newspapers of general circulation. West's Ann. Gov.Code, § 6000.

3. Newspapers 🔑3(5)

In proceeding to establish standing of newspaper as newspaper of general circulation to qualify it for publication of public notices evidence sustained finding that newspaper with paid subscription list of 254 out of circulation of approximately 3,200 had bona fide subscription list of paid subscribers. West's Ann.Gov.Code, § 6000.

4. Newspapers 🔑3(5)

Fact that only a few of subscribers of newspaper received papers actually addressed to them did not invalidate the bona fides of their subscriptions for purposes of establishing newspaper as one of general circulation and thereby qualify it for publication of matter required by law to be published. West's Ann.Gov.Code, § 6000.

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Albert M. King, Oroville, for contestant and appellant.

Frank L. Willis, Chico, for petitioner and respondent.

WARNE, Justice pro tem.

This is an appeal from a decree of the Superior Court of Butte County, establishing that the Paradise News Press is a newspaper of general circulation within the meaning of Section 6000 of the Government Code.

The Paradise News Press is a weekly newspaper. The first issue was published on May 6, 1954, and has since been published weekly. The paper contains about equal amounts of news and advertising matter. News consists principally of local items concerning events of interest to persons living in the "ridge area" of Butte County. The paper does not print telegraphic news or editorials. It is distributed as third class mail by the post office to each family residing in the area of distribution. Approximately 3,200 papers are distributed each week. The papers are delivered by the post office to each boxholder and to each rural free delivery box. Most papers are not individually addressed. The paper had, on May 19, 1954, a paid subscription list of 254. This consisted of 206 subscribers in a part of the county known as the ridge area, comprising the Paradise, Magalia and Stirling City areas, 24 in Butte County outside of the ridge area and 24 outside of Butte County. On September 19, 1955, the number of subscribers were 251 within the ridge area, 24 in other parts of Butte County and 45 outside of the county. The ridge area has from 10,000 to 12,000 inhabitants.

Appellant contends that the Paradise News Press is not a newspaper of general circulation within the definition of Section 6000 of the Government Code, which reads:

> "A 'newspaper of general circulation' is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement."

[1] Appellant claims that while the newspaper prints local news, it does not print intelligence of a general character. Copies of the paper were admitted in evidence. The copy of December 23, 1954, is fairly representative of the general character of news published. In this copy there is an article concerning a special meeting of the Board of Trustees of the Paradise Unified School District and an article concerning the candidacies of two men for membership on the Board of Directors of the Paradise Irrigation District. This article gave the background of the candidates and their policies. There is an article concerning the American Legion Post, an article concerning the change in ownership in an insurance business, an article publishing a talk on tapeworm by a doctor of veterinary medicine, an article concerning a joint meeting of the Sierra Chapter and the Sacramento Chapter of the California Association of Nursing Homes, Sanitariums, Rest Homes, and Homes for the Aged, and an article concerning the unlawful cutting of Christmas trees. There are also some social news and items of local interest and a number of advertisements. We believe that such news items are of interest to people residing within the area of publication and do constitute intelligence of a general character within the meaning of the statute. In re Green, 21 Cal.App. 138, 131 P. 91.

[2] Appellant also raises the point that there are no editorials in the paper. But this does not mean that a paper may not be a newspaper of general circulation. There

is no language in the statute requiring a newspaper to publish editorials. A newspaper may still disseminate local news and intelligence of a general character without having an editorial column. Editorials are only a part of what may be published along with other news items. Although there is language in In re Herman, 183 Cal. 153, 164, 191 P. 934, to the effect that in a newspaper of general circulation one should expect to find editorials, the language of the case must be read in context. That case was reversed, because the Supreme Court concluded, as a matter of law, that the purpose of the paper, as shown by the record, was not a publication for the dissemination of local or telegraphic news of a general character. Such is not true in the case now before us.

[3, 4] There is no merit in appellant's contention that there is no bona fide subscription list of paid subscribers. The evidence established that there was a paid subscription list of 254 out of a circulation of approximately 3,200. The fact that there was considerable circulation above the subscription list would not prevent the paper from being a newspaper of general circulation. The question was one of fact for the trial court, and its decision may not be reversed on appeal in view of the evidence and the decision of the court. In re Santa Ana Independent, 75 Cal.App.2d 764, 769, 171 P.2d 548. Nor should the fact that only a few of the subscribers living on the ridge receive papers actually addressed to them necessarily invalidate the bona fides of their subscriptions. We see no real difference in using the postal service as a means of delivery from having a newsboy make deliveries by placing the paper on the subscriber's doorstep. In the latter event, we believe it is a matter of common knowledge that neither the subscriber's name nor address usually appears on the paper.

We conclude that there is no merit in any of appellant's contentions.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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151 Cal.App.2d 219

Loyd V. CROTHERS, Plaintiff and Appellant,

v.

COUNTY OF SANTA CRUZ, a body corporate and politic, Defendant and Respondent.

No. 17260.

District Court of Appeal, First District, Division 2, California.

May 22, 1957.

Hearing Denied July 16, 1957.

Action brought to recover property tax paid under protest. The Superior Court, Santa Cruz County, Robert McWilliams, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that mere fact that assessed value of certain property is reduced by Board of Equalization will not give another taxpayer a cause of action, even though taxes he pays are thereby increased.

Affirmed.

1. Taxation ⚷494(2)

Mere fact that assessed value of certain property is reduced by Board of Equalization will not give another taxpayer a cause of action, even though taxes he pays are thereby increased. West's Ann.Rev. & Tax.Code, §§ 616, 1601.

2. Taxation ⚷40(7)

Constitutional requirement of equality and uniformity of taxation means that taxes must be levied according to some fixed rate or rule of apportionment so that like amount of taxes will be paid upon similar kinds of property of same value. West's Ann.Const. art. 1, § 13.

3. Taxation ⚷40(8)

Inequality of taxation is produced as surely by inequality of valuation as by inequality of rate of tax, and property owners are entitled to have their property placed on same basis of valuation as that applied to other property of like character and similarly situated. West's Ann.Const.

art. 1, § 13; West's Ann.Rev. & Tax.Code, § 1607.

4. Taxation ⚷40(8)

To secure an equality of taxation, it is necessary that there be an equality of assessment as well as an equality of tax rates. West's Ann.Const. art. 1, § 13; West's Ann.Rev. & Tax.Code, § 1607.

5. Taxation ⚷493(7)

Taxes will not be invalidated on basis of speculative charge of discrimination. West's Ann.Const. art. 1, § 13; West's Ann.Rev. & Tax.Code, § 1607.

6. Taxation ⚷470

Boards of Equalization are quasi-judicial bodies established by law to remedy excessive assessments made by assessor. West's Ann.Rev. & Tax.Code, §§ 616, 1601.

7. Evidence ⚷82

There is a presumption in favor of regularity of result reached by judicial body.

8. Constitutional Law ⚷229(3)

An unequal tax assessment cannot be held in violation of Fourteenth Amendment where purpose of assessing board to discriminate is not clearly established and where discrimination may be attributed to an honest mistake of judgment and lack of time and evidence for making general re-evaluations when objection was made. West's Ann.Const. art. 1, § 13; West's Ann. Rev. & Tax.Code, § 1607; U.S.C.A.Const. Amend. 14.

◆

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, for appellant.

Ray J. Scott, Dist. Atty., of Santa Cruz County, Santa Cruz, for respondent.

KAUFMAN, Presiding Justice.

Plaintiff taxpayer has appealed from a judgment in favor of defendant county in this action brought pursuant to Rev. & Tax. Code Sections 5136–5143 to recover the amount of $19.07 of property tax paid under protest. Plaintiff contends that a portion of his ad valorem tax has been illegally collected by the defendant. The facts are as follows:

Before 1952, all ad valorem assessments in Santa Cruz County had been set forth on the assessment roll at 25% of the fair market value of the property assessed. In 1952, as a result of recommendations made by the State Board of Equalization, the County Assessor increased his assessment ratio to 40% of market value. Plaintiff is the owner of property in the City of Capitola on which was levied a total tax of $330.80 for the tax year 1952–1953, at the rate of $1.678 per $100 of assessed valuation. The assessed valuation of plaintiff's property placed on the tax roll was $6,820. On or about July 21, 1952, the county assessor of Santa Cruz County, as required by law, completed and delivered the tax roll to the County Board of Supervisors sitting as a Board of Equalization, accompanied by affidavit, that all property had been assessed by him equally and without favor to anyone, as required by Rev. & Tax.Code Section 616. The County Board of Supervisors, pursuant to Rev. & Tax.Code Section 1601, published notice that it would sit as a Board of Equalization from July 24, 1952 to August 4, 1952. Within this period, 182 written and verified applications for reductions in assessed valuation were received by the Board; eighty-four of these were acted upon and the remainder dismissed for the applicant's failure to appear for hearing. The plaintiff did not file any applications for the reduction of valuation on any of his properties. On August 10, 1952, the County Board of Equalization adjourned "sinedie". The actions complained of by the plaintiff are the following:

(1) On August 8, 1952, the Board of Equalization, by unanimous vote ordered a reduction of 33⅓% in the assessed valuation of 171 parcels of farm land in the Watsonville Joint Union High School District. This district encompasses property in both Santa Cruz County and Monterey County. The reduction was based upon testimony received by the Board that the

assessed valuation placed upon comparable property in the district in Monterey County was lower than the assessed valuation determined by the county assessor of Santa Cruz County, and was made so that the taxpayers of Santa Cruz County would not be paying an unjust amount for the high school district. The reduction was made without there being filed by or on behalf of any taxpayer a written application and without the examination on oath of the persons affected.

(2) On August 8, 1952, the Board ordered a reduction of 33⅓% in the assessed valuation of 490 parcels of farm land, also without the written application or examination under oath of the persons affected. This reduction was based upon the recommendations of the county assessor, and testimony received by the Board that the parcels in question had been over-valued by the county assessor. Of these 490 properties, 300 lots were owned by Peninsula Properties, Inc., a land holding company, and the remaining 190 by several subdividers. The county assessor testified that it was normal practice to give low valuations to lots remaining unsold for a certain length of time in the hands of the subdivider.

(3) On Sunday, August 10, 1952, at 8:00 a. m. the County Board of Equalization ordered a reduction slightly below 33⅓% of the assessed valuation entered on the tax roll by the county assessor, on 4 parcels of farm land. Applications for reduction were filed on behalf of these four taxpayers. All of the above reductions were entered on the tax roll by the clerk of the Board of Equalization after the tax roll had been delivered to the county auditor.

(4) On August 19, 1952, the Board of Supervisors of Santa Cruz County ordered the 33⅓% reduction of 50 additional parcels in the Watsonville Joint Union High School District, on the affidavit of the county assessor that these parcels had through clerical error been omitted from the original list. This change was entered on the tax roll by the county auditor.

The trial court found the facts substantially as stated above. There is no dispute to the facts. The controversy centers on the legal effects of these facts and the conclusions of law drawn by the trial court.

Plaintiff's contentions are as follows:

(1) That as a result of the above acts of the County Board of Equalization and the County Board of Supervisors, 721 assessments of land, personal property and improvements, as entered on the tax roll by the county assessor with a total aggregate assessed valuation in excess of $4,300,000 were reduced by 33⅓% to a total aggregate assessed valuation of $2,834,390. That the result of these reductions was that these properties were on the assessment roll at the 1952 level of 25% of fair market value, while plaintiff's property which was not so reduced, was on the assessment roll at 40% of its fair market value. That therefore plaintiff's property was forced to bear an unequal burden of taxation, and that plaintiff was therefore denied of the uniformity of taxation guaranteed by Section 13, Art. I of the State Constitution and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

(2) That the County Board of Equalization acted in excess of its jurisdiction under Rev. & Tax.Code Section 1607, in ordering the reductions without the verified petitions and sworn testimony of the persons affected, and in taking action after August 4th, the published date for its termination as a Board of Equalization. Plaintiff maintains that Rev. & Tax.Code Section 1607 is jurisdictional. Respondent contends that the jurisdiction of the County Board of Equalization is derived from the Constitution and that the statutory provisions are only directory in aid of jurisdiction.

(3) That the County Board of Equalization erred in considering the assessed valuations placed upon comparable property in Monterey County and in attempting to equalize assessments for the entire Watsonville Joint Union High School District.

(4) That the County Board of Supervisors, in permitting the correcting of the tax roll by the addition of 50 parcels, ex-

ceeded its limited statutory power to reduce assessments.

(5) That the reductions in assessed value could not be properly entered on the tax roll by the clerk of the Board of Equalization as Rev. & Tax.Code Section 1612 authorized changes only before delivery of the tax roll to the county auditor.

(6) That the trial court erred in its findings of fact and conclusions of law that all of the acts complained of were legal and within the jurisdiction of the Boards and that the reductions were not the result of any fraud, actual or constructive, nor the result of any arbitrary wilful disregard of the law.

(7) That the trial court erred in its finding that plaintiff was estopped from maintaining the action herein by reason of the fact that he did not file a verified protest with the County Board of Equalization within the time and manner prescribed by law. Plaintiff contends that he was not required to file a protest as he had no notice of the reductions made until too late, and by virtue of the fact that the errors made occurred by act of the Board of Equalization and the Board of Supervisors and not by act of the assessor. Plaintiff seeks to bring himself within the rule of Associated Oil Co. v. Orange County, 4 Cal.App.2d 5, 40 P.2d 887, and Parr-Richmond Industrial Corp. v. Boyd, 43 Cal.2d 157, 272 P.2d 16, that no appearance before the Board of Equalization is required where the assessment is erroneous or illegal.

[1] It is not necessary to dispose of all of the above contentions, as we are in agreement with the excellent memorandum opinion of the trial court that the plaintiff here has no cause for complaint. The mere fact that the assessed value of certain property is reduced by a Board of Equalization will not give another taxpayer a cause of action even though the taxes he pays are thereby increased. The plaintiff here did not allege or attempt to prove that his property was similar in character or situation to the reduced property; or that his property was overvalued, or the reduced property undervalued by the reduction.

[2-4] The constitutional requirement of equality and uniformity of taxation means that taxes must be levied according to some fixed rate or rule of apportionment so that all property shall pay the like amount upon similar kinds of property of the same value. People v. Whyler, 41 Cal. 351; People v. Keith Railway Equipment Co., 70 Cal.App.2d 339, 161 P.2d 244. While inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax, (McClelland v. Board of Supervisors, 30 Cal.2d 124, 180 P.2d 676) property owners are entitled to have their property placed on the same basis of valuation as that applied to other property of like character and similarly situated. Birch v. County of Orange, 186 Cal. 736, 200 P. 647; Rittersbacher v. Board of Supervisors, 220 Cal. 535, 32 P.2d 135. To secure an equality of taxation it is necessary that there be an equality of assessment as well as an equality of tax rates. Rancho Santa Margarita v. San Diego County, 135 Cal.App. 134, 26 P.2d 716.

[5] The position of the plaintiff here is aptly stated in Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, at page 349, 212 P. 711, at page 715: "* * * plaintiff's cause of complaint, as disclosed by the evidence, is not that its own lands are assessed too high, but that certain other lands are assessed too low. Plaintiff has no greater cause of complaint on account of these low assessments than has every other taxpayer in the county whose lands were fairly assessed. The law certainly does not contemplate that a taxpayer, whose lands are assessed at the same relative value as other lands generally in the county, is entitled to have his assessment reduced to the level of a comparatively small number of parcels which are assessed at a low figure." In that case in upholding a judgment in favor of the defendant, the court said in 60 Cal.App. at pages 342 and 343, 212 P. at page 712: "In the absence of evidence tending to show the value of plaintiff's lands, or of other lands in the county, the premises were wanting from which a conclusion could be drawn by the board that inequality of assessments existed. * * * Proof

that one taxpayer's lands are assessed at a higher value than those of his neighbors does not justify the inference that there is any inequality in the assessments, in the absence of proof of the relative market values of the lands compared." The plaintiff has not shown that he was subjected to taxes not imposed on others of the same class, but only argues that he should also receive the benefits of the illegal actions of the Board. There is a curious inconsistency in this argument. It would appear to be more consistent to argue that because of the illegal acts complained of, the entire assessment roll of Santa Cruz County for the year 1952–1953 was invalid. As stated on this point in Rittersbacher v. Board of Supervisors, supra, 220 Cal. at page 542, 32 P.2d at page 138, "Such a result may not lightly be contemplated and should not be adjudged except upon a clear showing of 'fraud or something equivalent of fraud' on the part of the assessing authorities * * *." Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, at page 240, 285 P. 896, at page 898 states: "To invalidate the assessment there must be a conscious failure to exercise a fair and impartial judgment, or a resort to arbitrary methods varying from those employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant." Taxes will not be invalidated on the basis of a speculative charge of discrimination. Simms v. County of Los Angeles, 35 Cal.2d 303, 306, at page 312, 217 P.2d 936.

Plaintiff argues that "various classes of property cannot be treated differently one from the other." As aptly pointed out by the court below, even conceding that the constitutional requirement of uniformity is not limited to property of like character, but that it includes all property within the general class of property subject to ad valorem taxes, it does not follow that the constitutional requirement was violated under the evidence introduced in this case. It should be noted that there was some evidence in the instant case that the valuations placed on certain properties by the assessor were excessive. As pointed out in Mahoney v. City of San Diego, 198 Cal. 388, at page 398, 245 P. 189, at page 193: "The essential question with respect to the assessment of properties of the same or different classes to be determined is as to whether the provisions of the Constitution regarding uniformity in valuations and of the laws declaring how uniformity and equality in the distribution of the burdens of taxation are to be ascertained and applied have been fairly conformed to or systematically, and intentionally and grossly disregarded."

[6–8] Boards of Equalization are quasi-judicial bodies established by law to remedy excessive assessments made by assessor. Merchants' Trust Co. v. Hopkins, 103 Cal. App. 473, 284 P. 1072. As further pointed out by the trial court in its memorandum opinion, our Supreme Court said in Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, at page 356, 153 P.2d 746, at page 748: "* * * it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, 'the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" * * * or unless there be something equivalent to fraud in the action of the board'; and that 'mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board.' " We are met by the presumption in favor of the regularity of the result reached by a judicial body. An unequal tax assessment cannot be held in violation of the Fourteenth Amendment where the purpose of the assessing board to discriminate is not clearly established and where discrimination may be attributed to an honest mistake of judgment and lack of time and evidence for making general re-evaluations when objection was made. Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154. In Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 cited by plaintiff, the Bridge Company was able to prove sufficiently that it was singled out for discrimination, so that the case was remanded to the State Board of Equalization for a hearing to determine whether or not there was such discrimination. Hillsborough Township, Somerset County, N. J. v. Cromwell, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed 358, and County of Los Angeles v. Ransohoff, 24 Cal.App.2d 238, 74 P.2d 828, were also situations in which a single taxpayer was assessed for a class of property for which no other taxpayers were assessed. In Mahoney v. City of San Diego, 198 Cal. 388, 245 P. 189, strongly relied upon by the plaintiff, it was held that the assessor's valuation of improvements at their salvage value rather than market value under a misinterpretation of the law, while assessing the plaintiff's real estate at full value was sufficient violation of duty to show something akin to fraud. The injury which the plaintiffs there had suffered was, "* * * that resulting from a general and systematic undervaluation of all improvements upon real estate within said City as a result of which an undue and unequal burden of taxation has been laid upon all real estate therein." The court relied on Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277; and Southern Pac. Land Co. v. San Diego County, 183 Cal. 543, 191 P. 931. In the former, the trial court rendered a judgment for the plaintiff on the ground of the extreme disparity of valuation between the plaintiff's property and property of like character arose from the intentional design of the assessor in using a different method to evaluate the property of the electric company; in reversing the judgment, the Supreme Court found that there was nothing in the evidence to indicate that the action of the board was not fair and not based on evidence presented to it. In the latter, the plaintiff's land was assessed at twice its market value while all other property in the county was assessed at 25% of its value.

In view of the foregoing, it is clear that the findings and judgment of the trial court find support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

151 Cal.App.2d 343

Myrtle BROOMS, Plaintiff and Respondent,
v.
Kermit BROOMS, Defendant and Appellant.
Civ. 17121.

District Court of Appeal, First District,
Division 2, California.

May 28, 1957.

Rehearing Denied June 27, 1957.

Hearing Denied July 24, 1957.

Action for divorce by wife. Husband filed cross-action for annulment on ground of wife's undissolved prior marriage to another man. The Superior Court, Alameda County, Richard H. Chamberlain, J., entered decrees and orders, and husband appealed. The District Court of Appeal, Stone, J. pro tem, held that under the circumstances the modified interlocutory decree should have contained child custody provision.

Appeal dismissed in part; orders partly reversed and partly affirmed; modified interlocutory decree affirmed as modified.

1. Divorce 🔑151

Motion for new trial filed over one year after entry of interlocutory divorce decree was timely in absence of service of notice of entry of judgment upon defendant. West's Ann.Code Civ.Proc., § 657.

2. New Trial 🔑150(4)

Motion for new trial for newly discovered evidence was properly denied where defendant failed timely to file affidavit showing due diligence in support of his motion. West's Ann.Code Civ.Proc., §§ 657, 659a.

3. Divorce 🔑150(2), 164

Where wife was awarded interlocutory decree of divorce and defendant moved for new trial and court granted alternative relief to wife who filed new set of findings and modified interlocutory decree, the new findings and modified decree were not nunc pro tunc orders under Civil Code in absence of motion required by Code for entry nunc pro tunc. West's Ann. Civ.Code, § 131.5; West's Ann.Code Civ. Proc., §§ 657, 662.

4. Divorce 🔑164

Where motion for new trial was denied and correction by modified interlocutory divorce decree involved finding as to plaintiff's residence, modified interlocutory decree required exercise of judicial discretion, and did not become effective as of date of filing of original decree. West's Ann.Code Civ.Proc., § 662.

5. Divorce 🔑151

Order authorizing the filing of amended finding of fact as to residence of plaintiff and modified interlocutory decree at conclusion of hearing on motion for new trial in divorce action was within court's discretion under Code of Civil Procedure section which, in cause tried by court, authorizes judge on motion for new trial, to change findings and modify judgment. West's Ann.Code Civ.Proc., § 662.

6. Divorce 🔑165(2)

Where wife was permitted to file amended findings of fact and modified interlocutory decree showing her residence in the county on denial of husband's motion for new trial in reference to wife's interlocutory divorce decree, and husband did not seek relief by way of new trial motion but moved to have interlocutory decree, final decree and modified interlocutory decree set aside as void judgments, the question was moot as to original interlocutory decree because it was superseded by modified interlocutory decree. West's Ann.Code Civ.Proc., §§ 473, 657, 659, 662.

7. Divorce 🔑162

Final divorce decree derives its validity from interlocutory decree which precedes it.

8. Divorce 🔑165(3)

Where original interlocutory divorce decree was superseded on denial of motion for new trial by modified interlocutory decree which was not nunc pro tunc order and which corrected a judicial rather than clerical error, final decree entered prior to the modification was prematurely entered and motion to vacate final decree should have been granted. West's Ann.Code Civ. Proc., § 662.

9. Trial 🔑90, 105(2)

In divorce action by wife, evidence, although largely hearsay testimony, supported judgment for wife on question whether another man was wife's husband at time she married defendant, in absence of timely objection to, or motion to strike, such testimony.

10. Trial 🔑105(2)

Hearsay testimony when properly admitted will support finding.

11. Marriage 🔑40(1)

Marriage solemnized as required by law is presumed valid.

12. Divorce 🔑312.7

Where second amended findings of fact in divorce action contained finding that mother was fit person to have children's custody, but concurrently filed modified interlocutory decree provided only for specified monthly payments by father to mother for their support, failure to include custody in modified decree was inadvertent and the District Court of Appeal, under statute, modified said decree to include such custody in wife. West's Ann.Code Civ. Proc., § 956a.

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Vince Monroe Townsend, Jr., Los Angeles, for appellant.

Vaughns, Dixon & White, Oakland, for respondent.

STONE, Justice pro tem.

The plaintiff wife sued for divorce on the ground of extreme cruelty. Defendant husband cross-complained for divorce on the same ground and later filed an amendment to the cross-complaint adding a cause of action for annulment on the ground that a prior marriage of the wife to one Richard Daniels was undissolved when she married Brooms in 1943. The wife upon information and belief denied that the prior marriage had not been dissolved and at the trial testified that Daniels in 1939 had told her that he had obtained a final decree of divorce from her and had remarried. On August 26, 1957, the court granted the plaintiff wife an interlocutory decree of divorce and custody of the children and alimony and child support. Each of the parties was awarded certain items of community personal property and an undivided one-half interest in a parcel of real property located in the City of Oakland, County of Alameda. The order of events occurring subsequent to the trial is of great importance in this appeal and in chronological order they are:

The original findings, denominated "First Amended Findings of Fact and Conclusions of Law", filed	August 26, 1954
Interlocutory Decree of Divorce, entered	August 27, 1954
(No Notice of Entry of Interlocutory Decree was ever served or filed.)	
Final Decree of Divorce, entered	September 2, 1955
Notice of motion for a new trial pursuant to Sections 657 and 659 of Code of Civil Procedure, filed	September 16, 1955
Notice of motion to vacate interlocutory decree and final decree pursuant to Sections 663 and 663a of the Code of Civil Procedure, filed	September 16, 1955
Affidavit of newly discovered evidence, filed	September 22, 1955
Affidavit of newly discovered evidence, filed	September 23, 1955
Notice of Motion to strike original Answer and Cross-Complaint and Amendment to Cross-Complaint and for leave to file new Answer and Cross-Complaint, filed	October 10, 1955
Affidavit of due diligence, filed	October 14, 1955
Order denying Motion for New Trial and denying Motion to Vacate Judgments and Decrees, and granting alternative relief under Code of Civil Procedure, Section 662 authorizing filing of amended findings of fact and conclusions of law and modified interlocutory decree, filed	October 27, 1955
Second Amended Findings of Fact and Conclusions of Law, filed	October 27, 1955
Modified interlocutory decree, entered	October 31, 1955
Notice of appeal from original interlocutory decree and from final decree and modified interlocutory decree, filed	November 3, 1955
Notice of Motion for Order to Modify Previous Order for Plaintiff's Support and Alimony, filed	November 16, 1955
Notice of motion to set aside interlocutory decree, final decree and modified interlocutory decree as void judgments under and pursuant to Section 473 of Code of Civil Procedure, filed	November 16, 1955
Order denying defendant's motion to set aside interlocutory decree, final decree and modified interlocutory decree, filed	December 2, 1955
Notice of Appeal from order denying motion to vacate interlocutory decree, final decree and modified interlocutory decree, pursuant to Code of Civil Procedure, Section 473, filed	December 2, 1955

[1, 2] The motion for a new trial was made in reference to the original interlocutory decree filed August 26, 1954. Although filed over a year after the entry of the interlocutory decree, it was nonetheless timely in that no notice of entry of judgment was ever served upon defendant. The motion for a new trial was made pursuant to Section 657 of the Code of Civil Procedure and upon the ground of newly

discovered evidence. The court properly denied the motion because defendant failed to file an affidavit showing due diligence in support of his motion within the time required by Code of Civil Procedure, Section 659a. In denying defendant's motion for a new trial, the court granted the plaintiff alternative relief pursuant to Code of Civil Procedure, Section 662, whereupon the plaintiff filed a new set of findings entitled "Second Amended Findings of Fact and Conclusions of Law," and also filed a "Modified Interlocutory Judgment and Decree of Divorce."

[3] Respondent contends the modified interlocutory decree was a nunc pro tunc order and that the parties' rights are predicated upon the original interlocutory decree. This, she contends, makes the final decree entered prior to the filing of the modified interlocutory decree valid because of the nunc pro tunc effect of the modified order. There was no motion by plaintiff to have the second amended findings of fact and the modified interlocutory decree entered nunc pro tunc, nor does the record reflect that the court on its own motion made the order nunc pro tunc. In view of the plain language of Civil Code, Section 131.5, requiring a motion for entry of such a decree, the second amended findings of fact and modified interlocutory decree cannot be said to be nunc pro tunc orders within the contemplation of said section.

[4] Respondent argues that even though the modified interlocutory decree may not be considered a nunc pro tunc order, nonetheless, its effective date is that of the original decree in that it is not a new judgment but merely a modification of the original. If the modification is clerical in nature, it might be argued that it became effective as of the date of the filing of the original decree. Williams v. Koenig, 219 Cal. 656, 659, 28 P.2d 351; People v. A. T. L., Inc., 150 Cal.App.2d 152, 309 P.2d 552; Wilson v. Wilson, 109 Cal.App.2d 673, 674, 241 P.2d 281. This interpretation could not apply to a modification which requires an exercise of judicial discretion. Gossman v. Gossman, 52 Cal.App.2d 184, 194, 126 P.2d 178; 24 Cal.Jur. 1005. The correction was required in this case because the findings of fact did not support the interlocutory decree in that there was no finding as to plaintiff's residence. This was not a clerical error because in Coleman v. Coleman, 23 Cal.App. 423, at page 425, 138 P. 362, at page 363, the court held: "The fact of residence being a jurisdictional prerequisite, it must appear affirmatively in the findings that the plaintiff or defendant has resided in the jurisdiction for the specified period; and failing in this, the judgment thereon is void. [Citation]." See also Flynn v. Flynn, 171 Cal. 746, 748, 154 P. 837; Hamburger v. Hamburger, 60 Cal.App.2d 530, 534, 141 P.2d 453.

[5, 6] The second amended findings of fact cured this jurisdictional defect and found plaintiff had been a resident of Alameda County, and the State of California, for the time required by law. These second amended findings of fact are supported by the record. The order of the trial court authorizing the plaintiff to file amended findings of fact and modified interlocutory decree at the conclusion of the hearing on the motion for a new trial was an order within the court's discretion and within the authority conferred upon the court by the provisions of Code of Civil Procedure, Section 662 (Moklofsky v. Moklofsky, 79 Cal. App.2d 259, 264, 179 P.2d 628). Section 662 further provides relative to such amended findings or modified judgment, as follows: "Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code." The defendant did not elect to proceed according to such provisions and utilize the affidavits previously filed, but, relying upon Code of Civil Procedure, Section 473, moved to have the interlocutory decree, final decree and modified interlocutory decree set aside as void judgments. The question is moot as to the original interlocutory decree because it was superseded by the modified interlocutory decree. In considering a comparable situation in Goss-

man v. Gossman, supra, 52 Cal.App.2d 184, at page 199, 126 P.2d 178, at page 186, the court said: "Likewise it is obvious that the ruling of the trial court denying defendants' original motion for a new trial as addressed to the first judgment has no application here. Under the circumstances shown, the subsequent third judgment superseded for all purposes the prior judgments [Citations]. The trial court had jurisdiction to entertain defendants' motion for a new trial addressed to the third judgment and it was not bound by any prior ruling in the case." Hayes v. Silver Creek & Panoche Land & Water Co., 136 Cal. 238, 68 P. 704; Amell v. Amell, 10 Cal.2d 153, 73 P.2d 888.

[7, 8] A final decree of divorce derives its validity from the interlocutory decree which precedes it. In this case, the original interlocutory decree was superseded by the modified interlocutory decree. As the modified interlocutory decree was not a nunc pro tunc order, and it was a correction of a judicial rather than a clerical error, the final decree was prematurely entered and defendant's motion to have the final decree vacated should have been granted.

[9–11] Defendant's appeal from the trial court's denial of his motion to vacate the modified interlocutory decree and his appeal from the modified interlocutory decree present the same question. In each instance, defendant predicates his right to a reversal of the trial court upon the affidavit of one Richard Lee Daniels, filed pursuant to his motion for a new trial, wherein he alleges that he is the husband of plaintiff and was her husband at the time she married defendant. This issue was litigated at the trial and was determined adversely to the defendant. There is substantial evidence to support the judgment. It is true the evidence was largely hearsay testimony as pointed out by appellant. However, no objection was made to the testimony when it was introduced, nor was any motion made to have it stricken from the record. In fairness to appellant's counsel, it should be pointed out that he did not represent defendant at the trial of the action. Hearsay testimony when properly admitted in evidence will support a finding. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859. The judgment is also supported by the presumption that a marriage solemnized as required by law is valid. In the case of Wilcox v. Wilcox, 171 Cal. 770, at page 774, 155 P. 95, at page 97, the court said: "* * * These cases must be taken as establishing it to be the law in this state that the burden of proof is on the party assailing a marriage on the ground that a former husband or wife is still alive, to show not only the former marriage, but also that it has not been dissolved by death or judicial decree, and that the prima facie presumption in favor of the validity of the marriage assailed outweighs the presumption of the continuance of life of the former husband or wife." Moran v. Superior Court, 38 Cal.App.2d 328, 332, 100 P.2d 1096.

The modified interlocutory decree based upon the evidence presented at the trial of the action is not void and the trial court did not err in denying defendant's motion to set the judgment aside. Nor did the court err in denying defendant's motion to set aside its orders awarding support money, alimony and attorney's fees to the plaintiff upon the ground that plaintiff's marriage to defendant was bigamous and void.

[12] The record before this court makes the defendant's appeal from the modified interlocutory decree untenable for the same reasons said decree is not void as set forth, supra. However, an examination of the modified interlocutory decree discloses no order determining custody of the minor children of the parties. The original findings of fact contained a finding that the mother is a fit and proper person to have the care, custody and control of the minor children and the original interlocutory decree contains such a provi-

sion. The second amended findings of fact contain such a finding, but the modified interlocutory decree filed concurrently therewith provides only for payments of $60 a month per child by the defendant to the plaintiff for the support and maintenance of said children. Obviously, the omission to include the custody provision in the modified interlocutory decree was due to inadvertence. As the evidence supports such a finding and the original findings of fact and the original interlocutory decree contained such a provision and the second amended findings of fact so find, this court under the authority conferred on appellate courts by Section 956a of the Code of Civil Procedure will modify the judgment to conform to the evidence and the findings of the trial court. Therefore, the modified interlocutory decree of divorce is amended by adding thereto the following provision: "It is further ordered, adjudged and decreed that the care, custody and control of the minor children of the parties, to wit, Joyce Marie Brooms and Kermit Douglas Brooms, be awarded to the plaintiff and cross-defendant with right of defendant and cross-complainant to visit said children at all reasonable time and places." Kenney v. Kenney, 220 Cal. 134, 139, 30 P.2d 398; 4 Cal.Jur.2d 518.

The order denying defendant's motion to vacate the final decree is reversed. The appeal from the original interlocutory decree of divorce is dismissed. The order denying defendant a new trial and granting alternative relief to plaintiff is affirmed. The order denying defendant's motion to vacate the modified interlocutory decree of divorce and the order denying defendant's motion to vacate orders for alimony, support money and attorney's fees are affirmed. The modified interlocutory decree of divorce as modified by this court is affirmed. Each side to bear own costs on appeal.

KAUFMAN, P. J., and DOOLING, J., concur.

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151 Cal.App.2d 351

Myrtle BROOMS, Plaintiff, Cross-Defendant and Respondent,

v.

Kermit BROOMS, Defendant, Cross-Complainant and Appellant.

Civ. 17122.

District Court of Appeal, First District, Division 2, Califorina.

May 28, 1957.

Rehearing Denied June 27, 1957.

Hearing Denied July 24, 1957.

Action for partition of realty to which each party was awarded one half interest in companion divorce action. Pursuant to stipulation for entry of judgment of partition, the Superior Court of Alameda County, Richard H. Chamberlain, J., entered interlocutory and final judgments in partition, and defendant appealed therefrom and from certain orders. The District Court of Appeal, Stone, J. pro tem., held that where question whether plaintiff was married to another man at time she married defendant had been decided adversely to defendant in divorce action in which decree was affirmed on appeal, husband could not in companion partition action contend that his stipulation to entry of judgment of partition was void on ground of mistake of fact in that he had mistakenly assumed validity of his marriage.

Orders and judgments affirmed.

1. Appeal and Error ⟹154(4)

Consent of defendant who stipulated to entry of judgment of partition of certain realty precluded review on appeal.

2. Appeal and Error ⟹154(4)

A stipulation is a "consent" within meaning of rule that judgment or order will not be disturbed on appeal by party who consented thereto.

See publication Words and Phrases, for other judicial constructions and definitions of "Consent".

3. Stipulations ⟹11

Where question whether plaintiff was married to another man at time she married defendant had been decided adversely to defendant in divorce action in which decree was affirmed on appeal, husband could not in companion partition action contend that his stipulation to entry of judgment of partition was void on ground of mistake of fact in that he had mistakenly assumed validity of his marriage.

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Vince Monroe Townsend, Jr., Los Angeles, for appellant.

Vaughns, Dixon & White, Oakland, for respondent.

STONE, Justice pro tem.

This partition action is a companion case to a divorce action between the same parties. The plaintiff wife filed an action for divorce to which the defendant answered and filed a cross-complaint for annulment, alleging that plaintiff had a husband living at the time she married defendant. The trial court found against the defendant on his cross-complaint and granted plaintiff an interlocutory decree of divorce awarding each party a one-half interest in the parcel of real property which is the subject of this partition action. The defendant answered the plaintiff's complaint for partition and thereafter stipulated with the plaintiff for the entry of a judgment of partition. Pursuant to said stipulation, an interlocutory judgment and decree of partition was entered. The usual partition proceedings followed, and eventually an order and decree confirming Referee's sale at private sale in partition was filed. The defendant moved to have each order set aside as void, which motions the trial court denied. Defendant has appealed from those orders and from the interlocutory and final judgments in partition.

[1, 2] The defendant stipulated to the entry of the "Judgment of Partition" from which he appeals, and his consent precludes a review on appeal. In the case of Sorensen v. Lascy, 42 Cal.App.2d 606, at page 608, 109 P.2d 713, at page 714, the court said: "It is an elementary and fundamental rule of appellate procedure that a judgment or order will not be disturbed on an appeal prosecuted by a party who consented to it. [Citations]." See also 3 Cal.Jur.2d 590, paragraph 132. A stipulation is a consent within the meaning of this rule. Hibernia Savings & Loan Soc. v. Waymire, 152 Cal. 286, 92 P. 645; Pacific Paving Co. v. Vizelich, 1 Cal.App. 281, 82 P. 82.

[3] Defendant argues that the stipulation and consent to judgment are void and not binding upon him as he entered into the stipulation because of a mistake of fact. Defendant contends he mistakenly assumed his marriage to plaintiff was valid while in truth and in fact it was void because she had a husband living at the time she married defendant. This contention was decided adversely to appellant in the divorce action, and this court affirmed said judgment in Brooms v. Brooms, 311 P.2d 562.

The judgment appealed from is affirmed. The order denying motion to vacate and set aside interlocutory and final judgment of partition is affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

151 Cal.App.2d 364

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henry C. DUPEE, Defendant and Appellant.

Cr. 2742.

District Court of Appeal, Third District, California.

May 28, 1957.

Prosecution for unlawful possession of narcotics and two prior convictions. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered judgment of conviction and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Schottky, J., held that where arresting officers were in possession of information that defendant was selling marijuana and was living in a particular room at a particular address, and had marijuana in his possession, and knew defendant had been arrested previously for narcotics violations, they had reasonable cause to arrest defendant, and therefore, search made of his room, without a warrant, as an incident to his arrest was lawful, and evidence seized during such search was properly admitted into evidence.

Judgment and order affirmed.

1. Arrest ⚷63(4)

An arrest without a warrant will not be held to have been validly made even though the arrested person was guilty of having committed a felony, unless the arresting officer had reasonable grounds as a basis for making the arrest. West's Ann. Pen.Code, § 836, subd. 2.

2. Arrest ⚷63(4), 71

When an arresting officer has reasonable grounds to believe that a person arrested has committed a felony, the arrest without a warrant is valid, and a search without a warrant properly conducted as an incident to that arrest is not unreasonable or unlawful.

3. Arrest ⚷63(4), 71
Criminal Law ⚷395

Where arresting officers were in possession of information that defendant was selling marijuana, and was living in a particular room at a particular address, and had marijuana in his possession, and knew defendant had been arrested previously for narcotics violations, they had reasonable cause to arrest defendant, and therefore search made of his room without a warrant as an incident to his arrest was lawful, and evidence seized during such search was properly admitted into evidence.

4. Criminal Law ⚷394

If a search without a warrant is properly made as an incident to an arrest, evidence secured by such search will not be held inadmissible in evidence even though arresting officers had time to procure a search warrant and failed to do so.

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George I. Lewis, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Henry C. Dupee was charged by information with a violation of section 11500 of the Health and Safety Code of California, it being alleged that said defendant, on May 23, 1956, "did then and there willfully and unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (Cannabis Sativa)." Said information also charged defendant with two prior convictions for violating section 11500 of the Health and Safety Code.

Defendant admitted the prior convictions but pleaded not guilty to the offense charged. Defendant waived trial by jury, and following the trial was found guilty by the court. His motion for a new trial was denied and judgment was pronounced. Defendant has appealed from the judgment and from the order denying his motion for a new trial.

It appears from the record that on May 23, 1956, between 9:30 and 10 a. m., three state narcotic inspectors, following instructions, went to appellant's room. After receiving no response from their knock at the door, Inspector Murphy used a key given him by Inspector House and opened the door and entered the room.

Appellant and one Mary Nixon were in bed, and Murphy walked over to them and placed them under arrest for a violation of section 11500 of the Health and Safety Code. At about the time that the arrest was made, Inspector Murphy noticed a brown paper sack on the dresser. He examined the contents of this sack and determined that it contained marijuana. A chemical analysis of the contents of the sack revealed that it contained approximately 123 grains of marijuana.

Inspector Murphy testified that he showed appellant the sack and appellant stated, "It all belonged to me, and she doesn't know anything about it," and further stated, "It is mine. I obtained it last night from some old fellow at Sixth and Capitol, and I never peddled any of it. I just use it myself, and I never sold it." Appellant also admitted that he knew the sack contained marijuana, saying, "Yes, it is marijuana."

Appellant testified in his own behalf and denied any knowledge of the marijuana, although admitting that it had been found on his dresser. Appellant also denied saying that the marijuana was his and testified that he had denied any knowledge of it when it was shown to him.

After appellant objected to the introduction of the narcotics into evidence, the district attorney introduced the following evidence to show reasonable cause for the arrest and search of appellant.

On May 22, 1956, Joseph House, a narcotic inspector, received information from two reliable informants that appellant was dealing in marijuana in front of 1321 Sixth Street, and that he was living in a Room 10 at that address. House was informed that appellant had marijuana in the room when he was there and took the marijuana with him when he left. House was also informed that appellant went to his room late at night and left early in the morning.

At about 10 p. m. on May 22, 1956, House obtained a key to appellant's room from the manager of the building and also received information that appellant was not at that time in his room.

The next morning at about 9:30, House instructed Narcotic Inspectors Best, Murphy and McHugh to go to 1321 Sixth Street and arrest appellant.

Appellant does not attack the sufficiency of the evidence but contends that the judgment should be reversed because evidence that was obtained by an illegal search and seizure was erroneously admitted. Respondent in reply contends that there was no illegal search and seizure because there existed reasonable cause for the arrest, and therefore the evidence was properly admitted.

[1] Penal Code, § 836, subdivision 2, provides that a peace officer may make an arrest without a warrant when the person arrested has committed a felony although not in the officer's presence, but in the case of People v. Brown, 45 Cal.2d 640, 290 P.2d 528, it was stated that an arrest will not be held to have been validly made even though the arrested person was guilty of having committed a felony unless the arresting officer had reasonable grounds as a basis for making the arrest.

In Willson v. Superior Court, 46 Cal.2d 291, at page 294, 294 P.2d 36, at page 38, the court said:

> "* * * Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information. [Citations], and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. [Citation.] In some cases the identity of, or past experience with, the informer may provide such evidence [citation], * * *."

Also, in the case of Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222, the court came to the conclusion that an officer is justified in acting solely upon information from an informant where that informant is known to the arresting officer and is believed by the officer to be trustworthy and reliable. People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50, is to the same effect.

[2] When the arresting officer does have reasonable grounds to believe that the person arrested has committed a felony, the arrest is valid and a search which is properly conducted as an incident to that arrest is not unreasonable. People v. Dixon, 46 Cal.2d 456, 296 P.2d 557; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People

v. Martin, 45 Cal.2d 755, 290 P.2d 855. See also People v. Vice, 147 Cal.App.2d 269, 305 P.2d 270; People v. Garnett, 148 Cal.App.2d 280, 306 P.2d 571.

[3] We believe that under the authority of the above decisions the arrest of the appellant on information received by the officer from the two reliable informants that appellant was selling marijuana was reasonable. The officers were informed that appellant was living in a particular room at a particular address and at that time had marijuana in his possession. They were also informed that appellant went to his room late at night and left early in the morning, taking the marijuana with him. The officers knew appellant and had arrested him previously for narcotics violations.

There was testimony that the informants were reliable and the officers had had previous dealings with them. That the informants were reliable is borne out by the fact that appellant was living in the room specified, that he went to his room at about 2:00 a. m. on the morning of the arrest and did have marijuana in his possession.

Since the officers were in possession of the aforesaid information, there can be no doubt that they had reasonable cause to arrest appellant, and therefore the search made was lawful and the evidence seized during the search was properly admitted into evidence. People v. Garnett, supra; People v. Vice, supra.

[4] Appellant contends also that since the officers did not attempt to secure a search warrant although they had the opportunity to do so during the interim between the previous night when they obtained a key to appellant's room and the morning of the arrest, there was an illegal search and seizure.

However, as stated in the case of People v. Sayles, 140 Cal.App.2d 657, at page 660, 295 P.2d 579, at page 581:

> "The claim that failure to procure a search warrant, given reasonable time so to do, precluded a search as an incident to the arrest, was rejected by the Supreme Court in People v. Winston, 46 Cal.2d [151, 162–163], 293 P.2d 40, 47. The court there said: 'Defendant unavailingly argues that here the police officers had ample time to procure a search warrant and therefore such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest. Trupiano v. United States, 334 U.S. 699, 708, 68 S.Ct. 1229, 92 L.Ed. 1663. In United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, it was held that a search of the defendant's premises incident to his lawful arrest at those premises was not unreasonable.' In the cited case of United States v. Rabinowitz, 339 U.S. 56, 65–66, 70 S.Ct. 430, 435, 94 L.Ed. 653, it was observed: 'It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 U.S. 699, 68 S. Ct. 1229, 92 L.Ed. 1663, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That

criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.' "

We do not believe that appellant's contention that there was an illegal search and seizure can be sustained in view of the facts and circumstances of the instant case as hereinbefore set forth. The implied findings of the trial judge that there was a legal arrest and that the search was incident thereto is fully supported by the record.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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150 Cal.App.2d 22

James J. CONBOY, Appellant,

v.

SPARTON SCAFFOLDING PRODUCTS, Inc., et al., Respondents.

Civ. 22313.

District Court of Appeal, Second District, Division 2, California.

April 9, 1957.

Proceeding on motion to dismiss appeal. The District Court of Appeal dismissed the appeal and on motion for rehearing held that where appellant had been long in default in having failed to pay estimated cost of clerk's transcript, ex parte order of Presiding Justice directing clerk of court to accept for filing a settled statement on appeal in lieu of a clerk's transcript was void, and it did not relieve appellant of his default nor did subsequent payment of fee to clerk for clerk's transcript operate to cure the default.

Petition for rehearing denied.

Appeal and Error 🔑371

Where appellant had been long in default in having failed to pay estimated cost of clerk's transcript, ex parte order of Presiding Justice directing clerk of court to accept for filing settled statement on appeal in lieu of clerk's transcript was void, and it did not relieve appellant of his default nor did subsequent payment of fee to clerk for clerk's transcript operate to cure default. West's Ann.Rules on Appeal, rules 4(a, c), 5(c), 53(b).

◆

Elmer Low, Ed S. Roeth, Pasadena, for appellant.

James V. Brewer, Los Angeles, for respondents.

PER CURIAM.

The appeal herein was dismissed February 24, 1957, on motion of respondents, based upon the ground that appellant had failed to make timely arrangement for payment of cost of the clerk's transcript on appeal. Judgment had been entered July 25, and a second judgment, after amended findings had been filed, September 14, 1956. Notwithstanding that on October 24 and 29, 1956, the clerk (Rules on Appeal 4[a]) mailed to appellant's attorneys a notice of estimated costs of clerk's and reporter's transcripts, appellant had not, on February 6, 1957, made arrangement with the clerk for the payment of such cost. Neither was any notice to prepare a record of appeal from the judgment of September 14, 1956, given at any time prior to the issuance of the clerk's certificate, February 6, 1957.

On January 24, 1957, after appellant had been long in default in pursuing his appeal from either judgment (rules 4[c] and 5[c]), appellant's counsel filed with the clerk an application for leave to prosecute the appeal upon a "settled statement."

[1] At that time appellant's attorneys knew that he was in default in having failed to pay the estimated cost of the clerk's transcript and he should have known that there is no rule authorizing the

Presiding Justice to make an ex parte order directing the clerk of the superior court to accept for filing a settled statement on appeal in lieu of a clerk's transcript. The order was signed, but it was a void order, rule 53(b). This fact should have been known to appellant, but he erroneously conceived that he had been relieved of his default in the prosecution of his appeal. Not so.

[2] On March 8, 1957, he paid $29.50 to the clerk for the clerk's transcript. But such payment did not operate to cure the default which had existed since November 9, 1956. Whelpton v. Taylor, 81 Cal.App.2d 949, 951, 185 P.2d 391; Heatly v. Heatly, 83 Cal.App.2d 677, 679–680, 189 P.2d 748; Yurkas v. O'Neill, 87 Cal.App.2d 885, 198 P.2d 103.

When at the hearing of the motion appellant's counsel pleaded the order of February 24, the Presiding Justice stated that the order was void and the court, *en banc*, concurred in granting the motion to dismiss.

The petition for a rehearing is supported by the affidavit of Elmer Low, appellant's attorney, who deposes that his associate who was present at the hearing of the motion to dismiss was not familiar with the facts; that while his notice of appeal was filed September 27, 1956, from the judgment on the amended findings, he had given no notice to the clerk to prepare a record on appeal. That he paid the costs of the clerk's transcript on March 8, 1957, does not relieve appellant of his default or tend to induce this court to grant a rehearing.

All that he has done by way of preparation and presentation of a proposed settled statement has not prejudiced him for the reason that his right of appeal expired in early January 1957. His later efforts have been merely misdirected attempts to be relieved of his default.

Petition for rehearing denied.

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151 Cal.App.2d 209

ESTATE of James ROBERTSON, Deceased.

Eleanor M. Robertson, Appellant,

Bank of America National Trust and Savings Association and James Krantz Robertson, Executors, and Florence Ruth Wanless and James Krantz Robertson (individually), Respondents.

No. 16707.

District Court of Appeal, First District, Division 1, California.

May 22, 1957.

The Superior Court, County of Alameda, A. J. Woolsey, J., entered decree from which widow appealed. The District Court of Appeal, Bray, J., held, inter alia, that will and subsequently executed marriage settlement contract would have to be construed together.

Affirmed in part, and reversed in part with instructions.

1. Wills 🔑58(1)

A person may make a valid and binding contract to devise or bequeath certain property in a certain specified way.

2. Wills 🔑475

Where testator's will was executed during the life of his first wife who predeceased him, and subsequently testator remarried and entered into a marriage settlement contract and never changed his will, will and contract would be construed together.

3. Courts 🔑201

The Probate Court has jurisdiction to determine the effect of a marriage settlement contract upon a will.

4. Wills 🔑475

Where testator executed will while first wife was living and after wife died, he entered into a marriage settlement contract with second wife but left will unchanged, court in construing documents together could not make a new will for testator but only enforce the provisions of the will as modified, if they were, by provisions of marriage settlement.

5. Wills ⚷782(11)

Under statute providing that if a wife is omitted from a will it is revoked as to her and she is entitled to share in the estate, but if a provision has been made for her under a marriage contract the will is not revoked, property covered by marriage settlement contract is withdrawn from application of the will which in all other respects applies. West's Ann.Prob.Code, § 70.

6. Executors and Administrators ⚷55

Where decedent's will made no provisions for wife but marriage settlement contract provided that testator was to create a joint tenancy with second wife in savings account, even though testator failed to do so, balance of account would be assigned to surviving wife separate and apart from testator's estate or its obligations.

7. Husband and Wife ⚷31(4)

Under marriage settlement contract providing that husband agreed to open and maintain joint commercial and savings accounts in names of both of the parties, only logical interpretation of clause, under circumstances, was that all money in the bank was to be held in joint tenancy.

8. Wills ⚷753, 756, 827

Where testator gave one-half interest in specific properties to son and daughter and other half became a part of the residuary, and marriage settlement contract gave testator control over disposing of such specific properties, upon testator's death son and daughter each received only one-half interest in specific properties as specific bequests and other half interests went to them as part of residuary estate, subject to estate's obligations.

9. Wills ⚷756

A devise or bequest of all real property or all personal property is not a specific devise or bequest, but is general.

10. Wills ⚷827

Where will failed to make provision for surviving second wife of testator but he had executed a marriage settlement contract with her that provided he would execute a will devising and bequeathing all his property except two named items and testator never executed will, court properly considered property to be received by second wife under agreement in will as part of residue subject to debts and expenses of administration. West's Ann.Prob.Code, §§ 161, 202.

11. Wills ⚷728

Rents on specifically devised property are regarded as belonging to the realty from which they are derived.

12. Wills ⚷827

Where only a one-half interest in specific property was specifically bequeathed, one-half of the rents therefrom were property of the estate subject to the charges of the estate.

13. Wills ⚷756, 827

Where marriage settlement contract provided that wife was to have no interest in royalties in connection with certain business and prior will had disposed of royalties in residuary clause, royalties were residuary and not specific bequests and were subject to the charges of the estate.

Andrew F. Burke, San Francisco, for appellant.

Errol C. Gilkey, Oakland, for respondent Bank of America and James Robertson, Executors.

Thomas L. Ferro, Alameda, Andrew P. Costelli, Oakland, for respondents Wanless and Robertson (individually).

BRAY, Justice.

This appeal upon a clerk's transcript and a settled statement from decree of settlement of final account of special administrators and executors and of final distribution, raises primarily the question as to whether the probate court properly construed decedent's will, a marriage settlement agreement, and a degree upholding the validity of that agreement.

Record.

October 17, 1946, decedent executed a will in which he named as beneficiaries his then wife, Ruth Eleanor Robertson, his daughter, Florence Ruth Wanless, and his son, James Krantz Robertson. September 9, 1948, the wife died. August 10, 1949, decedent entered into a prenuptial or marriage settlement agreement with Eleanor M. Hamilton (now Robertson, his widow, appellant). August 12, decedent, then about 65 years of age, and Eleanor married. November 16, decedent died. Only one of the provisions of the agreement had been then carried out.

The executors named in the will, Bank of America and James K. Robertson, filed a petition for its probate. Thereafter appellant filed a partial contest to probate on the ground that she was not provided for in the will nor by the contract.[1] August 15, 1950, the probate court entered a judgment requiring the personal representatives and the beneficiaries of the will to comply with the provisions of the contract.[2] This judgment provided further that appellant was not entitled, additionally to the money and property provided for in the contract, to any of the property or money of the estate, other than family allowance. This judgment was not appealed. In their petition for final distribution, the executors listed the property and money to which under their interpretation of the agreement, the Agee judgment and the will, they believed appellant entitled. Appellant filed exceptions and objections. After a hearing thereon, the decree from which this appeal was taken, was entered.

The Will.

The important provisions here follow. By article second, decedent declared all his property was community property of himself and his then wife, Ruth. By article third he confirmed to her her community half interest in a bowling alley property in Alameda known as "Neptune Bowl." The other half interest he devised to his daughter. By article fourth he confirmed to his wife, Ruth, her community half interest in a partnership business known as Terminal Manufacturing Company. (As recited in the will testator owned a 40 per cent interest.) The other community half interest he bequeathed to his son. By article fifth he devised his residuary estate to Ruth, if she survived him, if not to his son and daughter in equal shares.

His wife having predeceased him without will, upon her death her half of the community property devolved upon decedent, so that at the time of his death the dispositive provisions of the will stood as follows: Under article third the daughter took as a specific devise an undivided one-half interest in Neptune Bowl. Under article fourth, the son took as a specific bequest one-half interest in Terminal. The other half interests in Neptune Bowl and in Terminal as well as all other property constituted residuary estate, which was devised equally to the son and daughter. Thus the daughter acquired a half interest in Neptune Bowl by specific devise and a quarter interest therein and a quarter interest in Terminal as a residuary devisee; the son acquired a half interest in Terminal as a specific legatee and a quarter interest therein and in Neptune Bowl as a residuary devisee.

The Marriage Settlement Agreement.

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[1] "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." Probate Code, § 70.

[2] This judgment was made by Hon. James R. Agee sitting in the probate court. For brevity it will be referred to hereafter as the "Agee judgment."

The provisions important here follow. Paragraph 2 provided that appellant should have no claim to Neptune Bowl or Terminal, and that both properties should be available for testamentary disposition to the son and daughter or the survivor or issue of either or both. In paragraph 3, decedent agreed that upon marriage all of his other property should be treated in all respects as community property of the contracting parties. Decedent further agreed that upon marriage he would create a joint tenancy in his and appellant's name in his home on Clover Drive, Oakland, and would do likewise with his commercial and savings accounts.[3] In paragraph 4, decedent agreed upon marriage to execute a valid will, devising and bequeathing to appellant all his property except the Neptune Bowl and Terminal. In paragraph 6, he reserved the right to make such testamentary disposition of these two properties as he might desire. Appellant should have no interest in them either in his lifetime or upon his death. Paragraph 9 provided that if he should sell either or both of these properties the proceeds should be kept separate from his other property and appellant should have no claim or interest in such proceeds.

The Agee Judgment.

It held the marriage settlement agreement to be a valid obligation binding upon appellant, the estate, the special administrators and the executors. It ordered both of the latter to comply with its terms insofar as the agreement had not been performed by decedent. The exact order was: "* * * said special administrators and/or executors and/or beneficiaries named in the will of decedent are hereby ordered and directed to transfer, assign and convey to contestant, Eleanor M. Robertson, widow of decedent above named, all of the money and property to which she is entitled to receive under and by virtue of the terms of said agreement; * * *"

The Decree of Distribution.

It held that the agreement modified the will and consequently that the will and the agreement must be construed together to effectuate the intention of the decedent, and to dispose of his estate in accordance with the expressed intentions contained in the two documents.

The Clover Drive property which the agreement had provided was to be changed into a joint tenancy together with the household furniture and furnishings therein (appraised at $500) was set aside to appellant as a probate homestead. The savings account which was also to have been changed into a joint tenancy (it amounted to $4,077.32) was distributed to appellant as a specific bequest or legacy.

The entire interest in Neptune Bowl was distributed to the daughter as a specific devise. This property is subject to a deed of trust on which there is a balance due of $3,525.51. The estate was ordered to pay the daughter that amount. The entire interest in Terminal was distributed to the son as a specific bequest.[4] The business, however, having been sold during probate, a note and chattel mortgage securing part payment therefor, and certain assets of the estate, are distributed to the son to equal the value of said business.

The debts and expenses of administration were ordered paid from the residuary estate. This exhausted the residuary estate. The court found that there was insufficient money in the possession of the executors to satisfy the specific devises in full, and that after applying the entire residuary estate towards the partial satisfaction of such specific devises and bequests there still remained a deficit of $5,821.36; that this deficit should be allocated among the several distributees in proportion to the appraised value of their respective devises and bequests, as follows:

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[3] Decedent did convert the commercial account into a joint tenancy account. At the time of his death it amounted to $2,680.57, which appellant received as surviving joint tenant. Decedent did not convert the savings account or the Clover Drive property into joint tenancy.

[4] Actually the court held that the will should be construed as specifically devising and bequeathing the Neptune Bowl and Terminal to the son and daughter, one-half to each. The daughter assigned her half interest in Neptune Bowl to her brother, while he assigned his half interest in Terminal to his sister.

Daughter	54.6%	$3,178.46
Son	39.4%	2,293.62
Wife	6.0%	349.28
		$5,821.36[5]

Contentions of The Parties.

Both parties agree that where, as here, the court in distributing an estate has before it a will and a marriage settlement agreement which is held to be provision for the wife, preventing revocation of the will under section 70, Probate Code, the two documents must be considered together. The main difference in their contentions is the extent of that consideration. Appellant takes the position that the probate court may not make a new will for the testator, but must carry out the terms of the agreement and the terms of the will, withdrawing, however, from the application of the will the properties provided for in the agreement, thus, distributing to appellant under the agreement, and to respondents under the will. Respondents, on the other hand, contend that it is the duty of the court to interpret the will in the light of a will which the court believes the testator would have made had he carried out the provisions of the agreement, thus distributing to all parties under the will as the court believes it would have been had the testator himself made a will pursuant to the contract. This was the position that the court took. For example, while the will only provided half interests in Neptune Bowl and Terminal as specific devises and bequests, the other half interests being residuary, the court interpreted the will as providing the full interests as specific bequests and devises.

[1-3] There can be no question but that under the circumstances here, the agreement as ordered enforced by the Agee judgment and the will must be construed the one in the light of the other. The agreement except as to the portions relating to the creation of joint tenancies, was that decedent would make a will providing for appellant as therein set forth. "It is well settled by the decisions in this state that one may make a valid and binding contract to devise or bequeath certain property in a certain specified way." O'Neil v. Ross, 98 Cal.App. 306, 315, 277 P. 123, 127; Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198. In Merrill v. Dustman, 97 Cal.App.2d 473, at page 476, 217 P.2d 998, at page 1001, where the will was made *after* the agreement to make a will, the court held: "The true rule is that the contract and the will are to be considered together to ascertain whether the will constitutes performance of the contract." We can see no good reason why, where the will was made before the contract, the will and the contract should not be considered together. That the probate court has the jurisdiction to determine the effect upon a will of a property settlement agreement is well established. See In re Estate of Yoell, 164 Cal. 540, 554-555, 129 P. 999; Bennett v. Forrest, 24 Cal.2d 485, 491, 150 P.2d 416. By so doing the parties to the contract and in the will are in the same, and no worse or better, condition than if the contract had been carried out and the will made in accordance therewith.

[4, 5] But construing the documents together does not mean that the court may make a new will for the testator. It can only enforce the provisions of the will as modified, if they are, by the provisions of the agreement. Thus, here, in the absence of the agreement and looking only to the will, appellant would receive nothing, and the entire estate would have gone to the son and daughter. However, the statute says that if a wife is omitted from a will it is revoked as to her and she is entitled to share in the estate. But, if, as here, pro-

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[5] By stipulation of the parties, an automobile appraised at $1600 was distributed to appellant. Appellant also received cash in the amount of $153.56.

vision is made for her in a marriage contract, the will is not revoked; she receives whatever the contract provides she is to receive, and that property is withdrawn from the application of the will. In all other respects the will applies. It is in the sense of determining what property is withdrawn from the application of the will that the agreement and the will must be considered together. Thus the court erred in the basis upon which it considered the two documents.

[6] Taking first the savings account which it considered as if the decedent had made a will leaving it to appellant as a specific bequest: The agreement provided that it was to be created into a joint tenancy. Had decedent done so, she would be entitled to it as surviving joint tenant. Or had the executors under the Agee judgment assigned it to appellant as money "to which she is entitled to receive under and by virtue of the terms of said agreement," as should have been done, it would have been taken out of the assets of the estate and could not be charged with any of the estate's obligations. There can be no doubt that the intention of the parties in the agreement, as well as their expressed agreement therein, was that this account was to belong to appellant separate and apart from decedent's estate or its obligations. It was not to be a part of the will which decedent agreed to execute.

[7] Respondents contend that since the savings account was in the name of decedent alone and the agreement did not provide for any definite amount to be placed in a savings account, the action of the court in considering the account as a specific bequest under the will, gave appellant more than she was entitled to. They say that if decedent had opened a joint tenancy account for the sum of $1 the agreement would have been performed. The exact language of the agreement is that decedent "further agrees to open *and maintain* joint commercial and savings bank accounts in the names of both of the parties hereto." (Emphasis added.) Taking the agreement as a whole there can be but one interpretation of this clause, namely, that all moneys in bank were to be held in joint tenancy. It is neither logical nor reasonable to interpret this clause as meaning that decedent could place in these joint accounts as little money as he might care to.

[8] The next matter to be considered is the determination that the entire interests in Neptune Bowl and in Terminal were specific bequests and devises. This was erroneous for the reason that neither the will nor the agreement so provided. The will provided that half interests in each were specific bequests and devises, the other half of each was residuary. The agreement did not attempt to specify in this particular. It provided that appellant was to have no interest in these properties; that they were to remain available to decedent for testamentary disposition to his children. Under the agreement appellant could not have complained had decedent seen fit to will them to someone other than his children. Nor could the children have complained in such event. There was no positive agreement to will them to the children. They were simply to be available for that purpose if decedent desired so to do. Thus, cases concerning agreements for the benefit of third persons are not applicable here because there was no agreement that decedent would will the properties to the children. It is reasonable to assume that decedent, had he made a new will, most likely would have willed, although he could have done otherwise, the two properties to the children as specific devises and bequests. However, he did not do so. Apparently decedent was satisfied to leave his will stand as it was, giving half interests as specific, the other half interests as residuary bequests and devises. The will before the probate court only made half interests in the properties specific bequests and devises. There was nothing in the agreement authorizing the probate court to change the provisions of the will in this respect. The court should have treated these bequests and devises as half specific and half residuary.

[9, 10] This brings us to the question of the correctness of the ruling concerning the property which decedent agreed to will to appellant. The agreement provided that decedent would execute and maintain in effect a will whereby "he shall give, devise and bequeath [to appellant] all of his property" excepting the Neptune Bowl and Terminal. Had decedent done so, such devise and bequest would have been general rather than specific. "A devise or bequest of all real property or all personal property is not a specific devise or bequest, but is general." In re Estate of Marinos, 39 Cal. App.2d 1, 5, 102 P.2d 443, 445. The agreement provided that all of "the rest, residue and remainder of his property and estate" (other than the excluded Neptune Bowl and Terminal) should "be treated in all respects as the community property" of the parties. Community property is liable for the husband's debts and the expenses of administration. Probate Code, § 202; In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443. "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific * * *." (Probate Code, § 161.) The court properly considered the property to be received by appellant under the agreement and will as residuary rather than specific

A reasonable construction of the agreement is that the parties contemplated that all the rest, residue and remainder of his property (that is, other than the Neptune Bowl, Terminal, the Clover Drive property and the commercial and savings accounts) would be willed to the wife, subject to debts and expenses of administration. It would be a most illogical and unrealistic interpretation of the agreement to hold that this property which was to be community property of the parties should go to appellant on decedent's death free and clear of the usual charges to which community property is subject. Had the Agee judgment been carried out during administration, the executors could only have assigned to appellant such of the estate as was not necessary to pay estate charges. Thus the court, in distributing the estate, was correct in making this property subject to payment of such charges. Strictly speaking, the disposition of the rest, residue and remainder of decedent's property to appellant was not under the residuary clause of the will. It was under the agreement which had the same effect as if it were a clause of the will. It was a determination that the properties to which appellant would be entitled under the agreement were subject to the charges of administration.

Neither party is complaining of the setting aside to appellant of the Clover Drive property.

Rent of Neptune Bowl and Interest Due Terminal.

[11, 12] The daughter at the time of decedent's death was the lessee of the Neptune Bowl. The court remitted to her the rent for which she was liable during administration of the estate. This was partially correct. Rents on specifically devised property are regarded as belonging to the realty from which they were derived. See In re Estate of De Bernal, 165 Cal. 223, 235, 131 P. 375; In re Estate of Matthiessen, 23 Cal.App.2d 608, 614, 73 P.2d 1267. However, only one-half interest was specifically bequeathed. Therefore one-half of the rents were the property of the estate subject to the charges of the estate.

The court likewise remitted to the son interest for which he was liable on his promissory note to Terminal. This being an asset of that company and only one-half of that business having been specifically bequeathed to him, only one-half of the interest should have been remitted.

Patent Royalties.

[13] The agreement provided that appellant was to have no interest in the royalties connected with the Terminal business. The will disposed of these royalties in the residuary clause. The court distributed them ($433.33) to the son as specific bequests. This was erroneous. They are residuary bequests.

The probate court will have to redetermine the allocation of the debts and expenses of administration. For that reason and to make proper distribution, the decree of distribution except as to the Clover Drive property will have to be reversed.

The decree is affirmed as to that portion setting aside to appellant the Clover Drive property. In all other respects the decree is reversed, and the probate court is instructed to redetermine the proper allocation of the debts and expenses of administration and distribute the estate in accordance with the views herein set forth.

PETERS, P. J., and FRED B. WOOD, J., concur.

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151 Cal.App.2d 239

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Herbert Olene HURST, Defendant and Appellant.

Cr. 1308.

District Court of Appeal, Fourth District, California.

May 22, 1957.

Defendants were convicted of attempt to commit infamous crime against nature. The Superior Court, San Diego County, Gerald C. Thomas, J., entered judgment and order denying motion for new trial, and one defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Sodomy 🔑6

Evidence sustained conviction for infamous crime against nature. West's Ann. Pen.Law, § 286.

2. Criminal Law 🔑703

Where, in prosecution for infamous crime against nature, district attorney, in his opening statement, stated that evidence would show that a trusty in the jail had heard one defendant remark to the other concerning the crime charged, district attorney's statement did not constitute misconduct, even though trusty's testimony, which supported such statement, was stricken from the record. West's Ann. Pen.Law, § 286.

3. Criminal Law 🔑706

In prosecution for infamous crime against nature, asking defendant, on cross-examination, whether he had heard any statement which pertained to commission of offense charged and which had been testified to by trusty before trusty's testimony was stricken was not error, in view of facts that trusty's testimony had been stricken because he was not positive that the statement had come from cell occupied by defendant, and that defendant had testified as to what had occurred in the cell at that time. West's Ann.Pen.Law, § 286.

4. Criminal Law 🔑1169(1)

In prosecution for infamous crime against nature permitting a police officer, over one defendant's objection, to testify that he had interviewed such defendant at the jail and that defendant had told officer that defendant had been a homosexual all his life did not constitute reversible error since, in view of evidence as a whole, it would be unreasonable to believe that the statement could have affected the result reached. West's Ann.Pen.Law, § 286; West's Ann.Const. art. 6, § 4½.

* * *

Victor B. Walton, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant Hurst and one Paul Rogers were jointly charged with the infamous crime against nature, in violation of section 286 of the Penal Code. The appellant was also charged with a prior conviction in that he had been convicted in Arizona of the crime of unnatural sex acts, a felony, for which he had served a term in prison. The appellant admitted the prior conviction and both defendants pleaded not guilty on the main charge. A jury found each defendant not guilty of the infamous crime against nature, but found each guilty of an attempt to commit that crime, a lesser and included offense. Hurst has appealed from the judgment sentencing him to prison and from an order denying his motion for a new trial.

[1] The incident in question occurred near midnight on August 6, 1956, in a cell in the San Diego City jail then occupied by Hurst and Rogers. The evidence, including the testimony of an eyewitness, was amply sufficient to sustain the verdict and no contention is made to the contrary. The appellant first contends that the deputy district attorney was guilty of prejudicial misconduct in his opening statement to the jury, and in connection with the cross-examination of Rogers. It is argued that in his opening statement the district attorney stated that the evidence would show that a trusty in the jail heard one of the defendants say to the other "Now, we can have sexual intercourse all night"; that the district attorney was unable to introduce any testimony that such a statement was made; that after a motion to strike the testimony of the trusty in this connection had been made and granted the district attorney persisted in asking the defendant Rogers, on cross-examination, whether he had heard such a statement; that at the time he asked the question the district attorney knew that he had no proof to offer because such proof had been rejected by the court; and that this conduct could only be interpreted as misconduct, since it discloses a purpose to keep before the jury the assumption of damaging facts not proven.

The trusty in question first testified that he looked in Cell 12, where the defendants were confined, and saw them kissing each other. He was then asked "What did you do?" He replied "I turned to leave and I heard someone say from that general direction that, 'We can have sexual intercourse all night.'" Counsel for appellant made the objection "He has to identify". In response to other questions the witness then testified that he had turned around on his way to get another trusty; that the statement came from the general direction of Cell 12; that Cell 12 was the end cell and the four cells next to it were not occupied; and that the statement came from the lower block of cells and sounded like it was nearby. When asked if it could come from any cell except Cell 12, he replied: "Possibly. But the nearest one to them would be Cell 7 or the guys up above." On cross-examination he admitted that he was not positive that the statement came from Cell 12, but that it was his opinion that it came from that general direction. He was then finally led to say "I don't have any opinion." Counsel for the appellant then moved that all of this witness' "remarks as to the conversation he heard" be stricken from the record. This motion was granted and the court instructed the jury to "disregard the statement that he states that he heard."

[2] No misconduct on the part of the district attorney appears in connection with his opening statement. The witness testified substantially to that effect, and the fact that the testimony was stricken does not indicate misconduct on the part of the district attorney. The record does not indicate that he tried to put in evidence which he knew to be inadmissible. As a matter of fact, some of this evidence could well have been left in, leaving its weight to the jury.

[3] No error appears in the district attorney's asking the defendant Rogers, on cross-examination, whether he remembered hearing any such statement made on that

occasion. The statement heard by the other witness had been stricken because he was not positive that the statement had come from the cell occupied by the defendant, and this question was asked of Rogers in an effort to ascertain whether it did come from that cell. There was no improper motive in asking the question, so far as indicated by the record. The witness Rogers had testified as to what had occurred in that cell at the time, and the question asked of him was proper cross-examination. No objection was made to the question (People v. Walker, 88 Cal.App.2d 265, 198 P.2d 534), and it cannot be said that the asking of the question constituted misconduct on the part of the district attorney. People v. Horowitz, 70 Cal.App.2d 675, 161 P.2d 833.

The only other point raised is that the court committed prejudicial error in permitting a police officer, over appellant's objection, to testify that he interviewed Hurst at the jail and that the defendant Hurst told him that he (Hurst) had been a homosexual all his life. It is argued that such a statement, indicating that he was of a lascivious nature or that he had theretofore indulged in such acts, was inadmissible, particularly relying on the case of People v. Musumeci, 133 Cal.App.2d 354, 284 P.2d 168; and that this evidence was highly prejudicial since the jury would naturally assume that if a defendant had a tendency to commit this sort of a crime it was more likely that the crime had, in fact, been attempted.

This officer was asked if he had a conversation with the defendant Hurst, and he replied "I did". He was then asked to repeat that conversation. It was then brought out that Rogers was not present and an objection was made and sustained as to its application to the defendant Rogers. No objection was made as to the defendant Hurst. The witness was then asked to repeat the conversation and he replied: "I questioned Mr. Hurst also about the alleged act that had occurred. I asked Mr. Hurst how long he had been a homosexual and he stated that he had been one all his life. I asked him why the act had occurred that was alleged and after hesitation Mr. Hurst denied the act. Beyond that, all of it was general conversation." No further questions were asked of the witness and no motion to strike was made.

[4] The case of People v. Musumeci, supra, is distinguishable on its facts. The defendant was there directly asked whether he was a sex pervert and whether his particular kind of perversion, which he had not been able to overcome, was not the kind involved in that case. Not only was an objection to the question overruled, but the matter was emphasized and the error enhanced by an instruction given the jury to the effect that the evidence was admitted solely to prove a criminal disposition or propensity on the part of the defendant, and for the purpose of having the jury consider whether or not a person of such nature and habits would be more likely to commit the act charged than some other person would be. Also in that case the evidence as a whole was weak and the testimony of the prosecuting witness was thoroughly impeached. In the instant case, the statement in question came in as a part of a conversation with the appellant, no objection was made, and the matter was not emphasized. In view of the evidence as a whole it would be unreasonable to believe that the statement thus made could have affected the result, and no reversible error appears within the meaning and intent of section 4½ of Article VI of the Constitution.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

151 Cal.App.2d 420

Morris K. COHEN, as Executor of the Last Will and Testament of Frank S. Cohen, Deceased, Plaintiff and Appellant,

v.

DAVIS CREEK LUMBER COMPANY, a corporation, et al., Defendants,

Melvin E. Jepson and Orr M. Chenoweth, as Executors of the Estate of John Fossett, Deceased, substituted in the place and stead of John Fossett, James Castelli and A. Zamboni, individually and as co-partners doing business as Fossett, Zamboni & Castelli, a co-partnership, and Fossett, Zamboni & Castelli, a co-partnership, and Zamboni Lumber Company, Inc., Respondents (two cases).

Civ. 9067.

District Court of Appeal, Third District, California.
May 29, 1957.

Two actions, the first being by the estate of former shareholder of corporation against the corporation, the other shareholders and transferee of corporate assets to set aside the transfer and the other being a stockholder's representative suit brought by the estate, were consolidated for trial. The Superior Court, Shasta County, Richard B. Eaton, J., rendered judgment in favor of the defendants except the corporation, and the plaintiff appealed from the adverse portion of the judgment. The District Court of Appeal, Warne, J. pro tem., held that the evidence sustained finding of trial court that there had been no fraud in the circumstances involving transfer of the corporate assets and that, in view of suspension of rights and privileges of corporation for failure to pay franchise taxes, the derivative suit could not be maintained.

Judgments affirmed.

1. Corporations 🔑190

In action by estate of former stockholder of corporation against corporation, other stockholders and transferee of assets of corporation to set aside such transfer on ground of fraud, evidence of corporation's financial difficulties and circumstances connected with transfer of assets at a judicial sale established absence of any fraud.

2. Fraud 🔑1

An action in which fraud is involved must be considered on its own facts.

3. Corporations 🔑202

Where corporate powers, rights and privileges had been suspended for failure to pay franchise taxes, estate of former shareholder was without right to maintain a derivative action.

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Carr & Kennedy, Redding, and Shapro & Rothschild, San Francisco, for appellant.

Carlton & Shadwell, Redding, and Chenoweth & Leininger, Redding, for respondents.

WARNE, Justice pro tem.

Two actions are involved in this appeal, numbered 14318 and 14319 in the court below. They were consolidated for trial, and findings of the trial court in both actions are in a single set of findings of fact and conclusions of law, upon which a single judgment in both actions was entered.

Action No. 14318 is an action by the estate of Frank S. Cohen, the holder of a promissory note in the principal sum of $35,000 issued by the defendant Davis Creek Lumber Company to Cohen at the time of its incorporation. In addition to the allegations setting up the note, the complaint alleges that the assets of the corporation were fraudulently conveyed to John Fossett; that the conveyance was accomplished by an agreement between Fossett and Zamboni, president, and James Castelli, vice president, respectively, of said corporation; that these named defendants agreed to a plan whereby Fossett would acquire the debts of the corporation, file suit thereon and acquire the assets of the corporation at a judicial sale at less than the fair market value and without paying the note sued upon herein; that, pursuant to the agreement, the claims of creditors were obtained, suit was brought and judgment against Davis Creek Lumber Company was obtained; that thereafter the assets of said corporation were obtained at a judicial sale; and that thereafter said assets were transferred by Fossett to a partnership composed of Fossett, Zamboni and Castelli. It was alleged that the action of the defendants was a fraud on the creditors, including Frank Cohen. Relief was sought against Zamboni, Castelli and Fossett, individually and as partners, for a decree setting aside, cancelling and annulling the transfers made, adjudging that Davis Creek Lumber Company is entitled to the property, for an order requiring the defendants to retransfer the property to said corporation and for recovery on the note.

Action No. 14319 is a stockholders' representative suit brought by the estate of Frank S. Cohen as the owner of Cohen's one-half interest in the corporate stock, seeking to set aside the alleged fraudulent conveyance above referred to.

Zamboni Lumber Company, though not named in the complaint, was also made a party to both actions by stipulation.

Defendant Fossett having died after suit was filed, his executors were substituted as defendants in the action.

Judgment was rendered in favor of all defendants, except Davis Creek Lumber Company, and as to that defendant judgment was in favor of plaintiff on the $35,000 note only.

Plaintiff appeals in each case from that part of the judgment which was against him.

Cohen, Zamboni and Castelli organized the Davis Creek Lumber Company in December of 1942. Zamboni became president, Castelli, vice president, and Cohen, secretary-treasurer. Cohen received one-half of the stock, Zamboni and Castelli, one-quarter each. The stock was issued in the amount of $10,000. The total capital contributed to the corporation was $120,000. Cohen's contribution was an equity in a lumber mill, which for the purpose of the capital account was deemed to be an investment of $60,000. Zamboni and Castelli each contributed $30,000. The mill was subject to a chattel mortgage with Morris Plan Company, which the corporation agreed to pay. At the time the corporation was organized it gave promissory notes to its stockholders in the amount of their capital contributions. Cohen's note, which is the basis of action No. 14318, represents the balance due from the corporation to Cohen for his share of the capital contribution to the corporation.

In May, 1943, operation of the mill was started, and the corporation soon thereafter encountered financial difficulties. Additional advances were made by the trio, most of which were made by Zamboni and Castelli. The financial condition of the company rapidly grew worse. Refinancing was required. A meeting of the board of directors was held, and various plans of reorganization were discussed but not agreed upon. Zamboni then made efforts to refinance or sell the mill by contacting various persons to lend or buy, with no success. Fossett was one of the persons contacted, but at first he was not interested in the deal.

In November of 1943 Cohen wrote to Ira Shadwell, an attorney, to represent him in a sale of his interest to one Hutcheon. This deal never materialized. Conditions did not improve, and a financial crisis was rapidly approaching. On December 15, 1943, a meeting of the shareholders was held. Morris Cohen represented his father, who was ill. At this time various plans were suggested.

One proposition was that Cohen surrender his interest in the mill: (1) if refinanced, in consideration of 10% of the profit; or, (2) if liquidated, for a dividend in proportion to his contribution. Zamboni and Castelli were willing to surrender their interest to Cohen on the same basis.

Later, by letter, Shadwell notified Cohen that "it appears that Zamboni and Castelli can effect a refinancing program after your block of stock is placed in trust". This letter referred to the plan, whereby Cohen was to receive 10% of the net profits. An attorney named Axelrod answered for Cohen and suggested that if nothing else could be worked out, relief was available under Chapter 10 of the Bankruptcy Act. Apparently, Shadwell did not approve of bankruptcy proceedings as a means of adjusting the affairs of the corporation, for in his reply to Axelrod he again talked of reorganization. This letter also indicates that the matter was urgent as the financial affairs of the corporation were rapidly coming to a crisis.

In January, the Morris Plan Company was pressing for payment and threatening suit. An action was filed to foreclose a logger's lien. A claim of lien on the mill for an unpaid balance of $5,212.42, for electrical machinery and wiring, was recorded. The corporation's indebtedness was in excess of $100,000 and suits had been brought and others threatened.

Apparently, after all efforts on the part of Zamboni and Castelli had failed, the Bank of America, an unsecured creditor of the corporation, through Mr. Matthews, one of its branch managers, interested Fossett in a plan whereby he was to take over the corporation's unsecured note to the bank, and the bank was to furnish him the money necessary to acquire the chattel mortgage on the mill from the Morris Plan Company. This plan was agreed to by Fossett in the latter part of December, 1943. Fossett thereafter gave notice that he had acquired the corporation's note payable to the Bank of America and would sue. There is testimony to the effect that as part of the plan Fossett would give Zamboni and Castelli a contract to purchase the mill. Fossett then acquired certain of the outstanding debts, including a note payable to Morris Plan Company, secured by chattel mortgage, upon the essential equipment of the sawmill. On January 27, 1944, he sued Davis Creek Lumber Company on this note. Zamboni, as president of the company, was served with summons the same day. On January 27, 1944, Davis Creek Lumber Company answered by general denial, and it was stipulated that the case be tried on that date. The company had no defense to the suit. Judgment was for plaintiff in the principal sum of $23,600 with $100 attorneys' fees. Foreclosure of the mortgage was decreed. At execution sale the mill and equipment were sold to Fossett for $24,000. In suits upon the unsecured debts a writ of attachment was levied on the remainder of the assets of Davis Creek Lumber Company, and these assets were sold to Fossett at execution sale. Cohen was not informed of these suits though he was informed of the execution sale.

Davis Creek Lumber Company did not own the millsite property but had an option to purchase it for $6,000. It had paid $750 on account. It was to be paid for in four equal installments. An agreement was to be drawn covering the deal, but this was never done. On January 15, 1944, $1,750 was due on this option. The owner, knowing that the payment would not be made, sold the property to Fossett. This deal was consummated prior to the time Fossett foreclosed the chattel mortgage on the mill. The purchase of the millsite property was a condition of the Bank of America loan to Fossett.

Following the levies above mentioned, Zamboni and Castelli received $1,133.25 from Diamond Match Company and $1,500 from the Pacific Gas and Electric Company, which were the remaining assets of Davis Creek Lumber Company and applied said sums as a set off against their own claims against the corporation. They also "pocketed" $36 remaining in the company's bank account.

In April, 1945, a contract was signed between Fossett and Castelli and Zamboni whereby Fossett agreed to sell the mill to Zamboni and Castelli. Negotiation on this contract commenced no later than February 20, 1944. Under the contract Zamboni and Castelli were to run the mill. Fossett would advance any necessary funds. Fossett was to get any lumber cut at market price, and once he was repaid for all his advances plus a bonus, the mill was to belong to Zamboni and Castelli. This method of operation was Fossett's own idea. He had discussed the matter with

Zamboni in January of 1944. The operation of the mill was financially successful. Later Zamboni acquired Castelli's interest in the mill.

Frank Cohen died insolvent in 1944, and in 1947, shortly before the statute of limitations had run, Morris Cohen, as executor of the estate of Frank Cohen, deceased, brought this suit. Fossett died after the suit was commenced, and his executors were substituted for him.

The court found Fossett, Zamboni and Castelli were not and never had been partners; that Zamboni and Castelli were partners; that no relationship ever existed between either of them and Fossett, other than that of seller and buyer, respectively, of certain assets involved in this action, and that said parties dealt at arms' length in all their transactions; that at the time of the death of Frank S. Cohen, and for more than one year prior thereto, the directors and officers of the Davis Creek Lumber Company were the defendant Zamboni, defendant Castelli and said Frank S. Cohen, and that Zamboni was president and acted as general manager.

There is a finding that Zamboni, Castelli and Fossett did not enter into a conspiracy to fraudulently acquire for themselves all of the assets of the Davis Creek Lumber Company. The court also found that Fossett acquired the claims of certain creditors of the Davis Creek Lumber Company and commenced legal actions thereon, reduced the same to judgments and then acquired some of the assets of said company at execution sales levied on such judgments and other assets, including the mill at foreclosure sale; that said acts and conduct of Fossett were not in pursuance of any conspiracy whatever, but were done in good faith and without any fraud or fraudulent intent whatever; that all of the assets purchased by Fossett at such execution sales and foreclosure sale were purchased at the fair market value of the same; that before the said foreclosure and execution sales were made Frank S. Cohen was fully informed thereof.

There is also a finding that at the time of the acquiring of the claims of certain of the creditors of Davis Creek Lumber Company and the filing of the suits thereon, said company was insolvent, and that at the time of his death Frank S. Cohen was insolvent, and that his estate was and is insolvent.

The court also found as follows: That at the time Fossett acquired the creditors' claims of Davis Creek Lumber Company and prior to the execution sales and foreclosure sales, Fossett agreed with the general creditors that he would pay all the creditors, except the claims of the stockholders of the company; that it was for the best interests of the company and its stockholders and directors that Fossett acquired the assets thereof; that the stockholders of Davis Creek Lumber Company had guaranteed and were personally responsible for certain of the obligations and debts of the Davis Creek Lumber Company; that the corporate rights, powers and privileges of said corporation had been suspended by reason of its failure to cause to be paid to the State of California certain franchise taxes due from said corporation; and that said failure was the result of its insolvency.

[1] There is no merit in appellant's contention that the trial court ignored the theory of constructive trust upon which he claims the case was primarily tried. He implies that the court made no finding on the issue of constructive fraud, that is, whether Zamboni and Castelli had been guilty of a breach of trust as directors.

As stated, the court found that neither Zamboni nor Castelli did any acts in derogation of their duties as directors of the Davis Creek Lumber Company, nor did either do any act for the purpose of acquiring the assets of the company or for the purpose of eliminating Frank S. Cohen as a stockholder. In this connection the court found that Zamboni and Castelli made every effort possible to obtain a favorable sale of the assets of the Davis Creek Lumber Company, so that the creditors thereof could be paid and the credit standing of the officers and stockholders thereof protected. There is substantial evidence to sustain the finding, and we feel that it is inclusive of constructive as well as actual fraud. We fail to see wherein either Zamboni or Castelli abused the fiduciary relationship of confidence reposed in them as directors of the corporation. There is evidence in the record that the corporation was insolvent, and Zamboni and Castelli had exhausted their credit; that Frank S. Cohen declared he had no money and could do nothing; and that Zamboni and Castelli were in no position to stop Fossett from buying up the mill at the foreclosure sale or purchasing the remaining property at the execution sales, even if they had so desired. If at any stage of the proceedings a presumption of fraud arose by reason of the fiduciary relation which existed because of Castelli and Zamboni being directors of the corporation, that presumption has been overcome by evidence and the court's finding. There is ample evidence in the record to show that this is not a case of Castelli and Zamboni, as directors, manipulating the affairs of the corporation so as to secure personal gain. No partnership, at any time, existed between Castelli and Zamboni and Fossett, and when Castelli, a year or so later, again acquired the mill it was by bona fide purchase from Fossett under a conditional sales contract. They dealt at arms' length with Fossett and paid him his price for the mill. They cannot, in the light of the facts, be charged with constructive fraud in so doing.

[2] An action in which fraud is involved must be considered on its own facts. Kahn v. Lischner, 128 Cal.App.2d 480, 489, 275 P.2d 539; Anderson v. Board of Medical Examiners, 117 Cal.App. 113, 3 P.2d 344; In re Estate of Arbuckle, 98 Cal.App.2d 562, 220 P.2d 950. For that reason we have not discussed the many cases cited by appellant in his briefs.

[3] Respondents' claim that Cohen had no right to sue in the derivative action is well taken, since the corporate powers, rights and privileges of Davis Creek Lumber Company were suspended for failure to pay certain franchise taxes due the State of California on March 15, 1945. In Smith v. Lewis, 211 Cal. 294, 298, 295 P. 37, 39, the court held:

> "* * * And a stockholder suing on behalf of the corporation, * * *, has no greater right or standing as plaintiff than the corporation would have had if the corporation itself had been plaintiff. The stockholder stands in the shoes of the corporation. He is the mere nominal plaintiff and the corporation is the real party in interest, and if the corporation is not in position to attack the transaction, the stockholder may not."

That portion of the judgment appealed from in each case is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

151 Cal.App.2d 402

Alice Sommer DUNCAN, Plaintiff and Cross-Defendant, and Appellant,

v.

Frederick KAHN and Willard B. Akers, Individually, and as Trustees under the inter vivos trust of Eugene Sommer, Defendants and Respondents,

and

Frederick Kahn, Cross-Complainant and Respondent.

Civ. 17461.

District Court of Appeal, First District, Division 2, California.

May 29, 1957.

Rehearing Denied June 28, 1957.

Hearing Denied July 24, 1957.

Action for trust accounting and to recover damages from trustees. From judgment for trustees entered in Superior Court, Alameda County, Richard H. Chamberlain, J., beneficiary appealed. The District Court of Appeal, Draper, J., held that although one of trustees who had discretionary power to terminate trust failed to sign termination notice, his receipt of notice of termination and his action in joining in all acts necessary to terminate the trust ratified termination notice.

Judgment affirmed.

1. Trusts ⚿262, 325

In action by beneficiary for trust accounting and to recover damages from trustees, evidence supported trial court's finding that trustees' partial termination of two other beneficiaries' interest in trust did not cause or result in any decrease in the value of plaintiff's beneficial interest in the trust.

2. Trusts ⚿247

Where trustees' partial termination of two other beneficiaries' interests in trust did not cause or result in any decrease in the value of plaintiff's beneficial interest, plaintiff could invoke no remedy based upon such alleged breach of trust by trustees.

3. Trusts ⚿262, 325

In action for trust accounting and to recover damages from trustees who terminated trust, prior to expiration of time specified in trust agreement under discretionary powers given trustees, evidence supported trial court's finding that the termination did not secure any personal advantage to trustees and was not in violation of fiduciary duty.

4. Trusts ⚿61(3)

Although one of trustees who had discretionary power to terminate trust failed to sign termination notice, his receipt of notice and his act in joining in all acts necessary to terminate trust constituted ratification of termination notice.

Aiken, Kramer & Aiken, Bauer E. Kramer, Fred V. Cummings, Oakland, for appellant.

Matt Wahrhaftig, J. D. Cooper, Jack Wahrhaftig, Robert Wahrhaftig, Oakland, for respondents.

DRAPER, Justice.

This action concerns a trust established in his lifetime by Eugene Sommer, an unmarried man. He was the owner of 538 shares of the capital stock of Sather Gate Book Shop. Defendant Kahn owned 339 shares and one share was held by a third person. By declaration of trust dated September 29, 1936, Sommer transferred his shares, in trust, to defendant Kahn. By addendum of the same date, Sommer designated defendant Akers as co-trustee. Pursuant to right reserved, this declaration was amended November 1, 1940. As amended the trust named four beneficiaries, who were to share equally. Plaintiff was one of these. Upon the death of any beneficiary except Siegfried Sommer, his interest in the trust was to pass to his heirs. As to Siegfried, it was provided that if he shall "predecease me or if he shall die after I do but prior to the distribution of this trust," his interest should not go to his heirs, but was to vest equally in the remaining beneficiaries or their survivors.

The trustor, Eugene Sommer, died September 21, 1941. The issues here involved arose after his death, and we are concerned only with the provisions of the declaration referring to the "trust after my death". The trust was to continue for ten years after the death of the trustor, but was to end sooner upon the death of defendant Kahn or upon the purchase of the stock by Kahn, or upon Kahn's sale of the assets of the corporation. The declaration also provided: "Notwithstanding anything hereinbefore set forth, I hereby authorize you at any time to terminate this trust in your absolute discretion, notwithstanding the fact that the said period of ten years has not elapsed." The declaration further specifically authorized defendant Kahn to purchase the trust shares from himself as trustee, at book value, excluding therefrom good will or going concern value. The trust instrument stated, after authorizing such purchase by the trustee Kahn, "it is my hope that you may be able to do so to the end that the institution which I helped to build up may be perpetuated by you."

Kahn had been associated with trustor in the book shop for many years, and was vice-president of the corporation, trustor being president, at the time of the declaration of trust. The trust instrument provided that no beneficiary should have the right to sell or anticipate his interest. Upon termination of the trust, whether by expiration of the ten-year period from trustor's death or by one of the earlier events specified, the trust property (whether it was then cash or remained corporate shares) was to go to the beneficiaries equally. It is clear that this was to occur despite the provision against alienation or advance, and despite the provision that Siegfried's interest, if he died before termination, was not to go to his heirs. The declaration further specified that the trustee should "not be liable or accountable to any of the beneficiaries for any losses or liabilities" incurred while he was managing the corporation or voting the stock, and authorized him to vote the stock and manage the corporation in his "absolute discretion; but in the event that you may find it necessary to advise with counsel, then the opinion of counsel in writing signed by him * * * shall be a full protection and justification to you for anything suffered or done in good faith and in accordance with such opinion."

Shortly after trustor's death, two of the beneficiaries, Levy and Lazarus, desired to realize upon all or a portion of their interests in the trust. Through their attorney, they opened negotiations to this end. In November, 1945, these beneficiaries made written request to the trustees for partial termination of the trust, this termination to be effective as to 75 shares each. They assigned such shares to defendant Kahn for an agreed price which they recognized was less than book value. The trustees, after having received the written opinion of their counsel (the same attorney who had drawn the declaration of trust), terminated the trust as to 75 shares of the interest of Levy and a like amount as to Lazarus, surrendered the certificate for 538 shares issued to them as trustees, and caused new certificates for 150 shares to Kahn and 388 shares to the trustees to be issued. Thereafter, the interests of Levy and Lazarus were treated as entitling them to 59½ shares each, rather than their original beneficial interest in 134½ shares each.

In 1948 Siegfried Sommer, then 81, was ill and in need. He, his wife and his daughter urged defendant Kahn to terminate the trust. On May 7, 1948, Kahn, again acting upon advice of counsel, gave notice of termination to himself and Akers, as trustees. The two trustees then joined in surrendering the stock certificate held by them as trustees, and in causing issuance, in exchange therefor, of certificates for 134½ shares each to plaintiff and Siegfried Sommer, and for 59½ shares each to Levy and Lazarus. The certificate issued to Siegfried was, by arrangement made before the termination, sold by him to Kahn for a price less than book value. Plaintiff was notified of the termination of the trust, and on May 13, 1948, receipted for the certificate issued to her in distribution of the trust estate. Siegfried Sommer died September 1, 1948.

This action by plaintiff was filed December 16, 1955. She complained of both the 1945 "partial termination" and the 1948 termination. Her complaint prayed for an accounting by both trustees, for a decree that Kahn holds plaintiff's "distributive share" of 44.83 shares of the interest of Siegfried as constructive trustee for plaintiff, and for compensatory and punitive damages as against defendant Kahn.

Upon detailed findings of fact, the trial court concluded that plaintiff was not entitled to recover. Judgment and decree was entered in favor of defendants. Plaintiff appeals.

[1,2] The court found that the 1945 transaction was entered into by Levy and Lazarus with full knowledge of all relevant facts, and of the motives of the trustees, and without the use of any influence by the trustees. It also found that this transaction "did not cause or result in any decrease in the value of plaintiff's beneficial

interest in the trust." This finding is fully supported by the evidence. Under no contingency could the interests of Levy and Lazarus revert to the other beneficiaries. Their heirs, unlike those of Siegfried, were not excluded from participation in the trust. The loss, if any, was theirs alone. Their alienation of a portion of their interests had no effect upon plaintiff's trust interest or its value. Plaintiff's claimed remedy cannot be predicated upon an asserted injury to Levy and Lazarus. Plaintiff argues that each share of a majority stock holding has a higher market value than a share in a minority interest, and that the Levy-Lazarus transaction, which left the trust as owner of only a minority of the total shares of the corporation, caused a decrease in the value of plaintiff's beneficial interest. The testimony of one witness is relied upon to support this view. However, there was no showing that this witness considered the peculiar circumstances of this trust, which contemplated purchase by the trustee at book value, rather than sale in the open market, if a sale were made; and which did not require any sale of the trust shares during the period of the trust. In fact, no sale of the shares, as a block, was made during the term of the trust. Also, cross-examination of the same witness produced testimony susceptible of the construction that no such loss would be suffered. Thus there was at most a conflict of evidence, to be resolved by the trial court. Its finding against plaintiff will not be disturbed here. It is unnecessary to consider the validity of the partial termination since plaintiff, having suffered no injury, can invoke no remedy based upon this alleged breach.

[3] As to the total termination of the trust in 1948, plaintiff argues that the interest of Siegfried Sommer would cease in the event of his death before termination, that this would increase the interests of the other beneficiaries, including plaintiff, and that thus when Siegfried died after termination of the trust, but before the expiration of ten years, plaintiff was entitled to one-third of his 134½ shares. This argument would be sound if the trust were required to continue for the full ten-year period from Eugene's death. But that was not the trust provision. The declaration specifically vested in Kahn full authority "to terminate the trust in your absolute discretion, notwithstanding the fact that the said period of ten years has not elapsed." There is no question that the interest of plaintiff in the Siegfried share, contingent upon his death before the end of the trust period, was defeasible by termination of the trust. The court found that this termination was not intended to secure any personal advantage to Kahn and that it was not in violation of any fiduciary duty of the trustees. This finding is supported by substantial evidence. Since the trustees' motives are found to be sound, the 1948 termination of the trust was valid, and plaintiff's claim must fall.

[4] Plaintiff also contends that Kahn alone terminated the trust in 1948, and that the trust declaration required action by both trustees. There is an ambiguity in the declaration. As originally drawn, it named only Kahn. By addendum of the same date, Akers was added as a trustee, and wherever "powers or duties are conferred or imposed upon [Kahn] as trustee," such powers and duties are made those of Kahn and Akers as joint trustees. The right to Kahn to terminate the trust was not vested in Kahn "as trustee", and respondent argues strongly that this is one of the several powers which the instrument reposed in Kahn as an individual. In any event, it is clear that Akers, although he did not sign the "notice of termination" addressed to Kahn and himself, did receipt therefor and join in all acts necessary to terminate the trust. Far from objecting to the termination, he participated in it. This ratification is sufficient (Hill v. Peoples, 80 Ark. 15, 95 S.W. 990), and it would be hypertechnical, in this action commenced seven years after the termination, to vacate the termination for failure of one trustee to execute the written notice upon which both thereafter acted jointly.

In view of the above conclusions, it is unnecessary to consider the other points raised by appellant. It follows that Kahn was entitled to judgment quieting title in his shares, as prayed in his cross-complaint.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

151 Cal.App.2d 476

BUDGET WAY CLEANERS & LAUNDRY, Inc., a corporation, Plaintiff and Appellant,

v.

David L. SIMON, Defendant and Respondent.

David L. SIMON, Plaintiff and Respondent,

v.

BUDGET WAY CLEANERS & LAUNDRY, Inc., a corporation, Defendant and Appellant.

Civ. 22031.

District Court of Appeal, Second District, Division 3, California.

June 4, 1957.

Rehearing Denied July 2, 1957.
Hearing Denied July 31, 1957.

Actions by sublessee for declaratory relief and money judgment and by sublessor for money judgment. The actions were consolidated for trial. The Superior Court of Los Angeles County, Newcomb Condee, J., entered judgment in both actions for sublessor and sublessee appealed. The District Court of Appeal, Vallée, J., held that where original lease from landlord to tenant provided that tenant was to pay all public utilities, but sublease from tenant back to landlord failed to make any provision respecting payment of public utilities, landlord under sublease was required to pay for utilities ordered by it.

Affirmed.

1. Landlord and Tenant 🔑124(3)

Where original lease from landlord to tenant provided that tenant was to pay all public utilities ordered by him for his own use, but sublease from tenant back to landlord failed to make any provision with respect to payment of such bills, landlord and sublessee was obligated to pay all bills for utilities ordered by it for its own use.

2. Appeal and Error 🔑1051(1)
Evidence 🔑450(4)

In action involving construction of sublease, testimony of witness who drew the sublease as to oral negotiations was inadmissible since sublease was definite and unambiguous, but under circumstances, admission of such evidence was harmless since it was to the same effect as the sublease itself. West's Ann.Civ.Code, §§ 1638, 1639, 1647.

3. Contracts 🔑175(2)
Statutes 🔑223.2(1)

Statutes providing that language of a contract must govern if it is clear, that when contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible, and that a contract may be explained by reference to circumstances under which it was made, must all be construed together and therefore, evidence of circumstances under which an unambiguous contract is made is inadmissible to add to or take away from a writing. West's Ann.Civ.Code, §§ 1638, 1639, 1647.

4. Landlord and Tenant 🔑199½, 200.5

Where sublease provided that sublessor agreed to remove certain property from demised premises and to waive rent until property had been removed and sublessor asked sublessee for permission to remove property and stated that if any were left sublessee should advise him and sublessor removed everything except some fence posts but sublessee did not advise him to remove those posts doctrine of substantial performance was applicable and court properly deducted reasonable cost of removing posts from rent due.

Herbert W. Simmons, Jr., Los Angeles, for appellant.

David Hoffman, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a consolidated judgment entered in two actions: one action brought by Budget Way Cleaners & Laundry, Inc., called Budget, is for declaratory relief and a money judgment; the other, brought by Simon, is for a money judgment.

On February 17, 1949 Budget, as lessor, and Simon, as lessee, entered into a lease of a parcel of improved realty at a rental of $100 a month and Simon took possession. Simon in the lease agreed to pay for all public utilities supplied to the property. On February 26, 1951 Simon, as sublessor, and Budget, as sublessee, entered into a sublease of the property at a rental of $150 a month and Budget took possession. On taking possession Budget made arrangements for public utility services in its own name. No provision was made in the sublease as to who should pay for public utility service. Between February 17, 1949 and March 18, 1955 bills for public utilities service supplied to the property in the amount of $4,239.34 were rendered. Simon did not pay them; Budget did.

In the action for declaratory relief Budget sought a declaration of the rights of the parties with respect to whose obligation it was to pay for the public utilities and a judgment for $4,239.34. In the action for money Simon alleged Budget had not paid rent in the amount of $100. Budget admitted the fact. Budget filed a cross-complaint in the Simon action in the same form as its complaint in the action for declaratory relief. As affirmative defenses to the cross-complaint Simon alleged that at least part of Budget's demand was barred by the statute of limitations; his only obligation under the sublease was to remove certain equipment; after the execution of the sublease Budget paid all utility bills as and when rendered; he only agreed to pay for such utilities as were furnished to the property for his use.[1]

The actions were consolidated. The court found the provision in the lease that Simon should pay for all public utilities supplied the demised premises "was intended to mean, and did mean, that Simon would pay for all water, power, gas and utility bills rendered for services supplied at Simon's request and for Simon's own use. That said provision in said lease was surplusage only, since under the law, if said provision had been left out Simon would have been obligated to pay such bills anyway"; the sublease contained no covenant on the part of Budget to pay for the public utilities; it was the intention of the parties that the rentals under the lease and sublease would be set off one against the other; Budget never did make a demand on Simon to pay the public utility bills rendered and paid by Budget until April 1954 and the parties never did intend that Simon should pay Budget's bills; Budget is indebted to Simon in the sum of $100 on account of rent but Budget is entitled to a setoff of $20 for the reasonable cost of removing three fence posts.

The court concluded that Simon was entitled to judgment against Budget for $80; Budget is obligated to pay for all public utilities supplied to the demised premises during such time as it occupies them; Simon is under no obligation to pay for public utilities supplied to the property which he did not order or use; Budget is not entitled to judgment against Simon in any sum. Judgment was rendered accordingly. Budget appeals.

[1] It is first asserted that the obligation Simon assumed in the lease to pay for public utilities continued after the execution of the sublease and the taking of possession by Budget. It is argued that since

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[1] The first action filed was by Budget for declaratory relief in the superior court. Later Simon filed the action for rent in the municipal court. Budget filed its cross-complaint in that action. It was transferred to the superior court and the two actions consolidated.

the sublease says it is "subject" to the lease, it is subservient thereto and Simon's obligation was not affected. We think the court's construction of the lease and sublease was correct. In the lease Simon obligated himself to pay for public utilities supplied to him. He would have been so obligated had the provision been omitted. No doubt the provision was inserted in the lease to make certain that Budget was not responsible for utilities Simon used while he was in possession. When the sublease was executed Budget took possession, ordered the utilities in its name, and paid for them as bills were rendered. If Simon were compelled to pay for all utilities supplied to Budget, he would be paying for all the latter's utilities regardless of how much it used. Simon had no obligation under either the lease or the sublease to supply Budget with utilities. Budget in making its own arrangements for the supplying of the utilities did so as sublessee and not as lessor. As the court found, a reasonable construction of the lease is that it means Simon would pay all utility bills rendered for services supplied at his request and for his own use.

[2, 3] Over Budget's objection Simon's attorney, who drew the sublease, was permitted to testify that in the negotiations for the sublease he talked to Levy, owner of Budget, and to Budget's attorney and that "I called him [Budget's attorney] and told him that—I recall one clause here that I didn't think it was proper, and I asked Stanley what he thought about it, and he said, 'Look, as long as you and I are in the picture, there will be no problem. Dave [Simon] will get about $50 net a month, and that is it.' And Morris [Levy] was in my office then, and I said, 'Understand, as long as you pay Dave what he is entitled to under this sublease, and he makes an advancement on the master lease, there will be no problem.' And he said, 'Don't worry. You have known me long enough; there will be no problem. You know me and you know Dave.'" Also over Budget's objection Simon was permitted to testify to conversations with Levy relative to the terms of the proposed sublease prior to its execution. Budget asserts error. The evidence was not admissible on the theory that it was to explain an ambiguity. The sublease is definite, certain, and unambiguous. Evidence of the circumstances under which an unambiguous contract was made is inadmissible to add to or take away from a writing notwithstanding section 1647 of the Civil Code permitting a reference to such circumstances to explain contracts since sections 1638, 1639 and 1647 must be construed together.[2] United Iron Wks. v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 84–85, 141 P. 917; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 227–228, 78 P.2d 1154; Courtright v. Dimmick, 22 Cal.App.2d 68, 70–71, 70 P.2d 269; Leonard v. Huston, 122 Cal.App.2d 541, 548–549, 265 P.2d 566; Pinsky v. Sloat, 130 Cal.App.2d 579, 588, 279 P.2d 584. The evidence was not prejudicial. It was to the same effect as the sublease itself. It did not raise any doubt as to the meaning of the clear terms of the sublease nor did it vary its terms. It did not add anything to or take anything away from it. Nor did it show that the parties meant something other than what they said. The evidence was harmless.

[4] Budget contends a condition precedent to its paying rent had not been met. In the sublease Simon agreed to remove certain property including a fence from the demised premises and to waive rent until the property had been removed. Prior to April 1, 1955 he asked Budget for permission to remove the property and

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[2] Civil Code, section 1638: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."
Civil Code, section 1639: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title."
Civil Code, section 1647: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

said that if any items were left after the work was completed Budget should advise him. Simon removed everything except three steel fence posts. Budget did not advise him the posts had not been removed. The court found the reasonable cost of removing the posts would not amount to more than $20 and deducted that amount from the rent due Simon. In other words, the court applied the doctrine of substantial performance. (Rest., Contracts, § 275.) The court's solution of the problem was fair and equitable. The point is trivial.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

151 Cal.App.2d 407

The PEOPLE of the State of California, Plaintiff, Respondent and Appellant,

v.

Wade HENDERSON, Defendant, Appellant and Respondent.

Cr. 3294.

District Court of Appeal, First District, Division 2, California.

May 29, 1957.

Defendant was convicted of assault with a deadly weapon. He was sentenced to one year in the county jail, but execution of the sentence was suspended and he was admitted to probation for three years on condition that he served six months in the county jail. The Superior Court, County of Marin, Thomas F. Keating, J., entered orders granted probation and suspending execution of sentence, and the People of the State of California appealed, and defendant cross-appealed. The District Court of Appeal, Draper, J., held that verdict of guilty was necessarily a finding that knife used by defendant in cutting complainant was a "deadly weapon" within meaning of statute providing that probation shall not be granted to a defendant who used a "deadly weapon" on a human being in connection with the perpetration of a crime of which he was convicted.

Orders reversed, case remanded with directions, and appeal of defendant dismissed.

1. Criminal Law 🔑1001

In prosecution for assault with a deadly weapon, verdict of guilty was necessarily a finding that knife used by defendant in cutting complainant was a "deadly weapon" within meaning of statute providing that probation shall not be granted to a defendant who used a "deadly weapon" on a human being in connection with the perpetration of a crime of which he was convicted. West's Ann.Pen.Code, §§ 245, 1203.

2. Criminal Law 🔑1001

The definition of a "deadly weapon" in section of the Penal Code dealing with minimum terms for armed or prior offenders is not applicable to statute providing that probation shall not be granted to a defendant who used a "deadly weapon" on a human being in connection with the perpetration of the crime of which he was convicted. West's Ann.Pen.Code, §§ 1203, 3024.

3. Criminal Law 🔑1188

Where trial court clearly stated its view in prosecution for assault with a deadly weapon that six months in the county jail was adequate punishment for the offense, and defendant was sentenced to one year in the county jail, but execution of sentence was suspended, and defendant was admitted to probation for three years on condition that he serve six months in county jail, and the People appealed from orders granting probation and suspending execution of sentence, and all orders were interwoven in the single act of pronouncing judgment, District Court of Appeal in reversing judgment because probation could not be granted, would remand the case with directions to the trial court to impose a sentence without probation. West's Ann. Pen.Code, §§ 245, 1203.

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Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for appellant.

Carl B. Shapiro, Fairfax, for respondent.

DRAPER, Justice.

Defendant was tried upon an information charging assault with a deadly weapon in violation of Penal Code Section 245. A jury found him guilty. He was sentenced to one year in county jail, execution of the sentence was suspended and he was admitted to probation for three years upon condition he serve six months in county jail. The People appeal from the orders granting probation and suspending execution of sentence. Defendant filed a cross-appeal, but concedes that he has abandoned it by limiting his brief to reply to the People's assignments of error.

"Probation shall not be granted * * * to a defendant who used * * * a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted * * *" (Pen. Code, § 1203).

[1] Self-defense was the only ground of defense urged. Defendant testified "I * * * got a knife and cut him." Thus there can be no question that defendant "used" the knife upon complainant. He argues, however, that the knife was not a deadly weapon. The verdict of guilty necessarily is a finding that the knife was a deadly weapon, since it was the only weapon used by defendant and under the statute and the instructions it must have been found to be deadly to support the charge here made (see In re Sheffield, 18 Cal.App. 2d 177, 63 P.2d 829).

Defendant cites People v. Southack, 39 Cal.2d 578, 248 P.2d 12 and People v. Johnson, 140 Cal.App.2d 613, 295 P.2d 493. Those decisions are clearly distinguishable from the case at bar. In each of the cited cases, defendant was found guilty of manslaughter. In each, the fatal wound was inflicted by a deadly weapon, but in each there was a question whether the weapon was "used" by defendant. Southack testified that the "hair-trigger" gun he held was discharged when he was jostled by another. The Supreme Court pointed out that "under the evidence and the instructions, the defendant could have been convicted of involuntary manslaughter," since it "could be inferred that defendant * * * 'did not use the gun,' but merely held it without due caution." "If defendant's crime was voluntary manslaughter, then the trial court was correct in its stated conclusion that 'there is nothing further the court can do but send this man to the penitentiary'" (39 Cal.2d at page 591, 248 P.2d at page 20). In the Johnson case, defendant had pleaded guilty to manslaughter, and no evidence was taken to determine whether the offense was voluntary or involuntary. Each case was remanded for determination whether defendant had in fact "used" the weapon. Obviously, neither decision is applicable to the facts of this case. Here, it would be idle to require further determination of the question whether a deadly weapon was used by defendant upon a human being.

[2] Defendant also contends that a weapon is not "deadly," within the meaning of Penal Code Section 1203, unless it is within the definition of Penal Code Section 3024. For purposes of the latter section, a knife is a deadly weapon only if it has a blade longer than five inches. But the definition of Section 3024 by its terms applies only to that section. It "has no bearing upon the meaning of the same words when used in other provisions of the Penal Code" (People v. Raner, 86 Cal. App.2d 107, 112, 194 P.2d 37, 39; People v. Petters, 29 Cal.App.2d 48, 84 P.2d 54).

[3] Although sentence was to one year in county jail, the effect of suspension and probation was to impose but six months confinement. The trial court clearly stated

its view that six months is adequate punishment for this offense. Merely to reverse the orders of suspension and probation would impose a sentence greater than that apparently intended by the trial court. All three orders are interwoven in the single act of pronouncing judgment. Mere reversal here would amount to interference with the discretion of the trial court. Accordingly, the orders admitting defendant to probation and suspending sentence are reversed, and the case is remanded with directions to the trial court to impose sentence without probation. The appeal of defendant is dismissed.

KAUFMAN, P. J., and DOOLING, J., concur.

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151 Cal.App.2d 356

In the Matter of the ESTATE of Naomi E. MARSH, Deceased.

John S. MARSH, Administrator, Appellant,

v.

James L. HUGHES, Objector, Respondent.

Civ. 22073.

District Court of Appeal, Second District, Division 1, California.

May 28, 1957.

Rehearing Denied June 18, 1957.

Hearing Denied July 24, 1957.

Proceeding on objections of decedent's son by former marriage to final account and petition for distribution of surviving husband as administrator of estate. The Superior Court of Ventura County, Charles F. Blackstock, J., entered judgment for son, denied administrator's motion for new trial, and administrator appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence, though conflicting, substantially supported trial judge's findings of undue influence and fraud on part of husband and that realty was purchased from separate funds of decedent.

Affirmed.

1. Husband and Wife 🔑14(3), 264

In proceeding on objections of decedent's son by former marriage to final account and petition for distribution of surviving husband as administrator of estate, evidence, though conflicting, substantially supported trial judge's findings of undue influence and fraud on part of husband and that realty placed in joint tenancy was purchased from separate funds of decedent.

2. Husband and Wife 🔑36

Transactions between husband and wife are subject to rules that control persons occupying confidential relations with each other.

3. Husband and Wife 🔑36

If husband obtains advantage over his wife, his failure to show that transactions with her were fair and just and fully understood by her, raises presumption that such transactions were made under undue influence and were fraudulent.

4. Husband and Wife 🔑255, 257

Ordinarily, real property purchased with separate property of one spouse, together with rents, issues, and profits therefrom, and any increase in value thereof, remains separate property.

5. Evidence 🔑269(2)

Decedent's declarations, out of the presence of her husband, that she was deterred from making will by husband, that husband would see that her son by former marriage would get one half her property as she desired, and that she wanted husband to have life estate in certain joint tenancy realty purchased with her money, remainder to her son, were admissible in proceeding on objections of her son to administrator's final accounting and petition for distribution, as exception to hearsay rule, for purpose of explaining decedent's intention when signing joint tenancy instructions.

6. Evidence 🔑269(1)

Whenever intent, feelings, belief or other mental state of person at particular time is material to issue under trial, evidence of such person's declarations that will tend to show mental state at time are admissible in evidence.

7. Executors and Administrators ⚷510(4)

Allegation by decedent's son in proceeding on objections to final account and petition for distribution, that administrator by fraud and undue influence persuaded decedent to vest title to realty in joint tenancy with administrator, fully advised administrator of grounds of objection, and administrator could not object to such allegation for first time on appeal, in absence of demurrer or timely objection thereto at trial.

8. Appeal and Error ⚷1072

Denial of motion for new trial was not prejudicial error where appellant presented no argument and cited no supporting authority, and proposed additional evidence would have been only cumulative in effect.

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Neil D. Heily, Oxnard, for appellant.

Gilligan & Pratt, John A. Gilligan, George H. Pratt, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Naomi and John Marsh were married in 1942. She had a son by a former marriage.

In the same year Naomi's aunt died, leaving a will by which Naomi was paid approximately $80,000. She got the first installment of $11,000 from her aunt's estate in 1944.

In 1943 Mr. and Mrs. Marsh contracted to purchase a motel in Hollywood Beach, in Ventura County, California. The contract provided that they were to take title as joint tenants. The purchase price was to be $17,000; $1,000 down, and the balance in installments of $250 a month. They borrowed the $1,000 from the attorney for the executrix of the aunt's estate, and Naomi paid that money back out of her inheritance. They later borrowed $4,000 from Naomi's relatives, and applied that money too to the purchase price of the motel. And Naomi paid that money back also out of her inheritance.

Earnings from the motel paid the balance of the purchase price. Mr. Marsh took care of the property, but did very little work there. There were twelve units that were rented all the time.

Money from the aunt's estate and from the motel was invested in several more parcels of real property. With the exception of one item of real property listed in the inventory of the value of $600, the deeds of conveyance of the later purchases vested title in Mr. and Mrs. Marsh as joint tenants. This was done pursuant to written instructions, signed by Mr. and Mrs. Marsh at the time the purchases were made.

Mr. Marsh had about $500 when he married Naomi. During the marriage he received no money or property by gift or devise. And he married again a month or two after Naomi died.

Naomi had high blood pressure. In 1947 she had a minor stroke, from which she never completely recovered. Other strokes followed. As time went on she became partly paralyzed and incontinent. Her mental powers were affected by her first stroke. And she progressively deteriorated physically and mentally. "Her thinking kept declining up until the time of her death," her son said.

Mr. Marsh took good care of his wife in her illness, and he treated her kindly all during the marriage. He did cause her worry and concern by going on occasional drunken sprees that lasted for weeks at a time.

Relations between the mother and her only son were close and friendly. The mother didn't entirely approve of the son's wife, or the son's wife's mother; but it is the common experience of mankind that that situation does not indicate any lack of love or affection between a mother and her married son.

Naomi died in 1953, without leaving a will. Her husband was appointed administrator of her estate. He filed his inventory and appraisement, listing as community property the $600 of real property already mentioned; and, for inheritance tax purposes, $47,000 worth of property in joint tenancy.

During the marriage the motel paid $55,000, and Naomi received approximately $80,000 from her aunt's estate, a total of $135,000.

The son, James L. Hughes, filed objections to the administrator's final account and petition for distribution. Grounds alleged were that all the property in joint tenancy was Naomi's separate property, and that her husband by fraud and undue influence had persuaded her to sign the instructions that the deeds were to be made that way.

The objector also alleged that the administrator had failed to list in the inventory a fur coat, a diamond ring, and the furnishings in the motel.

Upon trial of the issues thus presented, the superior court found that the husband and the son were Naomi's only heirs; that all of the real and personal property, joint tenancy and community, listed in the inventory (including the motel) was the separate property of the decedent; that a confidential relationship existed between husband and wife, that the husband had great influence over her, that she was dominated by him, and did not have the will power to resist his influence and suggestions; that it was never her intention to give to her husband a true joint tenancy estate so that all the real property would go to him upon her death, and thus disinherit her son; and that he holds title to the property as trustee for the heirs at law of the decedent.

The judgment sustained the son's objections to the final account and petition for distribution, and disapproved it; directed the administrator to list the personal property and the real property held in joint tenancy in an amended and supplemental inventory; to account for the income from the real property; and declared that title to all of the property, real and personal, is in the heirs at law of the decedent, determined to be the husband and the son in equal shares.

Motion for a new trial was made and denied.

Mr. Marsh appeals from the judgment.

He contends on appeal:

That there is no substantial or legal evidence to support the findings and judgment.

That, if it be determined there was any such evidence, then it was error for the trial court to refuse to grant a new trial or to make different findings, in the light of the affidavits in support of his motion therefor.

That it was error to admit in evidence declarations of Naomi made during her lifetime and out of the presence of her husband.

That, in any event, the motel property was not purchased from separate property of decedent.

That the objector's pleadings failed to raise the issue of undue influence.

At the threshold of a discussion of these contentions, it must be said that most of them are refuted by the trial judge's affirmative answer to the question: Was the vesting of title in joint tenancy of the wife's separate property secured by fraud and undue influence by the husband upon his wife?

This is the important question in this case.

[1] It appears from an examination of the record that while the evidence conflicts as to many details, it substantially supports the judge's findings of undue influence and fraud and that the motel was purchased from the separate funds of the wife.

The parties were husband and wife. The husband was with his wife when she signed the instructions to vest title to the property purchased in joint tenancy. The property was paid for with her money. She was partially paralyzed, and her mental powers were impaired.

One of her sisters testified as to her mental condition:

> "Q. After that time [the first stroke], did you notice any difference in Mrs. Marsh's mental condition? A. Yes.

"Q. What difference did you notice? A. Well, I noticed she was getting, with every stroke, that she was becoming more incoherent and wasn't herself.

"Q. Were her mental powers affected by the first stroke, in your opinion? A. Yes, indeed.

"Q. To what extent? A. Well, she seemed childish. She didn't seem to take hold like she did, and she would cry a lot and she just wasn't herself. She got better and then she got several more strokes but she never was herself again. She never regained her health again."

In his memorandum of opinion the trial judge said:

> "The entire situation and the evidence proves to me that Mrs. Marsh did not have the slightest conception of what joint tenancy meant. She thought that in the event of her death without a will the property would go one-half to her husband and one-half to her son and she so expressed herself. In my opinion, if she had had the slightest idea that her son would not get one-half of her estate she would have sought capable legal advice and would have taken the necessary means to destroy the joint tenancy and have the title to the property which she inherited and which belonged to her as her separate estate in such form as would render it subject to her testamentary disposition so that she could be assured that her son would get his just share of her estate. In any event, she was led to believe, and she did believe, that regardless of what joint tenancy meant her son in the final analysis would get one-half of her estate and her husband the other one-half."

[2] It is well settled that transactions between husband and wife are subject to the general rules that control persons occupying confidential relations with each other. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708.

[3] If a husband obtains an advantage over his wife he must show that he has not abused the confidence reposed in him by her. He has the burden of showing that his transactions with her were fair and just and fully understood by her. And if he fails to so show, the presumption arises that such transactions were made under undue influence and were fraudulent. Jorgenson v. Pardee, 101 Cal.App.2d 96, 224 P.2d 884.

Appellant stresses his contention that in any event the motel was acquired with community funds. This presents only a conflict in the evidence as to whether or not the motel was bought with Naomi's separate property. The judge's finding, together with his finding of fraud and undue influence, is final.

[4] Unless there are some factors that alter the situation, real property purchased with the separate property of one spouse, together with the rents, issues, and profits therefrom, and any increase in value thereof, remains separate property. Huber v. Huber, supra, 27 Cal.2d 784, 167 P.2d 708.

There then remains to be considered appellant's contentions as to error in the admission of Naomi's declarations, that the objector's pleading of undue influence is not sufficient, and that the motion for a new trial should have been granted.

Referring first to Naomi's declarations.

[5] As stated in appellant's opening brief these declarations may be summarized substantially as follows: That Naomi wanted to make a will, that her husband didn't believe in wills, and that she thought that if anything should happen to her, her son would come into half anyway, and that her husband had promised to do right by her son. Further that Naomi intended making arrangements for her son and that she knew her husband would take care of him and see that he received what was due to him, which she figured to be one-half. Also that the son testified that he asked Naomi, out of her husband's presence, about a will in 1945, and she said that she would like her husband to have a life estate in the motel and

then return it to the son upon her husband's death, and everything else that she wanted the son to have.

Appellant relies upon rules set forth in Socol v. King, 36 Cal.2d 342, 223 P.2d 627; Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656, and Chamberland v. Whitney, 19 Cal. App.2d 660, 66 P.2d 220.

Reference to these cases, however, shows that they are not controlling here, because the facts are not the same. For example, in the Socol case the major consideration for property taken in joint tenancy was other joint tenancy property. In the Gudelj case a husband's separate property found its way into a joint tenancy with his wife. In such circumstances the rules and presumptions are not the same as in this case. And in the Chamberland case the reviewing court commented that it was a suit to enforce an alleged unwritten contract to transfer property.

[6] The general rule is that whenever the intent, feeling, belief, or other mental state of a person at a particular time is material to an issue under trial, evidence of such a person's declarations that will tend to show his mental state at the time are admissible in evidence. Estate of Carson, 184 Cal. 437.

In Emden v. Verdi, 124 Cal.App.2d 555, at pages 560–561, 269 P.2d 47, at page 51, this court said:

> "Appellant's final argument is that 'The court erred in admitting testimony of alleged statements made by the decedent shortly before his death.' Reference is here made to the conversation between decedent and his attorney and the letter dictated by decedent to his nurse and sent to Mr. Jones covering essentially the matters discussed by them in their previous conference. Objection is made particularly to decedent's reference to a deed from appellant to him conveying the property here in controversy and his direction to Mr. Jones to tell appellant, if such were necessary to secure the cashier's checks, that he would cause the destruction of the deed upon delivery of the checks. This testimony was not admitted for the purpose of establishing the existence of such a deed, but for the purpose, as the trial judge ably pointed out, of throwing light upon the intention with which the conveyance was caused to be made * * *. For such purpose this testimony was admissible in evidence as an exception to the hearsay rule and it is immaterial that such statements were self-serving. [Citing cases.]"

Referring now to appellant's objection to the pleading.

The allegation is as follows:

> [7] "Objector hereby alleges that all of the above described real property was actually the separate property of the decedent, and objector further alleges that John S. Marsh by fraud and undue influence persuaded the decedent to place said property in his name and her name as joint tenants prior to the death of the decedent."

This objection is made for the first time on appeal, and, therefore, need not be further considered. Cases cited in support of the objection to the pleading tend to hold that fraud and undue influence should be pleaded with greater particularity.

But the pleading here in question fully advised the administrator of the grounds of objection, and no prejudicial error may now be predicated upon the sufficiency of the pleading, long after that could have been submitted to the trial court by demurrer, or timely objection on the trial of the case.

Referring finally to appellant's contention that his motion for a new trial should have been granted.

[8] Beyond the statement that it was error not to grant the motion, appellant presents no argument and cites no authority in support of this proposition. And respondent's brief does not touch upon the subject.

However, this court has examined the affidavits upon which the motion was based, and can find nothing that would require a reversal of the judgment. The new and additional evidence proposed would have been no more than cumulative in its effect. Therefore, no abuse of discretion has been shown that would constitute prejudicial error in denying the motion.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

* * *

151 Cal.App.2d 244

The PEOPLE of the State of California, Plaintiff and Respondent.

v.

Earl LUNDY, Defendant and Appellant.

Cr. 3300.

District Court of Appeal, First District, Division 1, California.

May 23, 1957.

Defendant was convicted in the Superior Court, City and County of San Francisco, Orla St. Clair, J., of keeping and occupying premises for purpose of receiving bets upon horse races, and he appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence sustained the conviction.

Affirmed.

1. Arrest 🔑63(4)

In prosecution culminating in conviction for keeping and occupying premises for purposes of receiving bets upon horse races, evidence would not sustain defendant's contention that arrest and search (made without a warrant) had been unreasonable, and furnished ample support for finding, to contrary, that officers had had reasonable cause for believing that defendant had committed a felony. West's Ann. Pen.Code, § 836, subd. 3.

2. Gaming 🔑98(5)

Conviction for keeping and occupying premises for purposes of receiving bets upon horse races was sustained by evidence. West's Ann.Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

In prosecution culminating in conviction for keeping and occupying premises for purposes of receiving bets upon horse races, it was not necessary for Prosecution to establish by direct evidence the purpose for which room was being occupied by defendant; such purpose being inferable from all of surrounding circumstances. West's Ann.Pen.Code, § 337a, subd. 2.

4. Criminal Law 🔑1036(1)

When a party consents that information received by officer go into evidence, "limited" to issue of reasonableness of search, he should speak up if he wants later to assert error for ruling out question as to identity of informer, and he should at least state reason why public policy of full disclosure should prevail over policy of nondisclosure applicable in case of informers. West's Ann.Code Civ.Proc., §§ 1881, subd. 5, 2064, 2065.

Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant appeals from an order granting probation after conviction of violating Penal Code section 337a(2) by keeping and occupying premises for the purpose of receiving bets upon horse races.[1]

Upon arraignment the defendant made a motion, which the court denied, to set the information aside on the ground that he was committed without reasonable or probable cause. That denial is not assigned as error but defendant does claim that the arrest and search (made without a warrant) were unreasonable, resulting in a verdict that rests upon evidence that was illegally seized.

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[1] He was found not guilty of recording and registering bets (count II), of making, offering and accepting bets (count III), or of violating Health & Safety Code, section 11500, possessing marijuana (count IV).

The case was tried before the court without a jury and upon the reporter's transcript of the proceedings had before the magistrate upon preliminary examination.

[1] (1) *Does the verdict rest, in part, upon illegally seized evidence? No.*

The officers placed a certain apartment under observation upon being informed that bookmaking was going on at a particular phone number, which they ascertained was at that apartment. The informant on a number of occasions had furnished them information as to illegal activities, information which proved reliable, having led to the detection of bookmaking activities.[2]

The officers kept the apartment under observation for several days. Defendant was seen to leave the premises each morning with his dog, drive to a certain cigar store and there purchase a racing form. He would then drive to one of the nearby parks and allow his dog to go for a run, returning at approximately 10:30 a. m. to the apartment. He would then remain at the apartment until about 6:00.

On one of these occasions, while his dog was running in the park, defendant tore up some papers and put them in a garbage can. The papers were recovered from the garbage can by the police. They proved to be three Daily Bulletins and Sports Reviews, and several pieces of lined white paper with figures written in pencil. One of the officers testified that these papers were bookmaking paraphernalia and correlated with each other as records of bets on the dates reflected on the rundown sheets or Sports Review.

On the day of the arrest one of the officers had the informant call the phone number listed for this apartment and place a bet. The officer, who listened in, testified that he watched the informant dial the number, heard a person at the other end of the line say "Yep" and then the informant related a series of numbers, plus the amount, plus his own initials, and that was all. The conversation ended at that point.[3]

Thereupon, the officers told the informant to go on his way and they proceeded to the apartment and made the arrest and search.

It seems clear that this evidence furnished ample support for the magistrate's and the trial court's implied findings that the officers had "reasonable cause for believing" that defendant committed the felony which it was later found (upon sufficient evidence) had been committed. Pen. Code, § 836, subd. 3. The evidence included not only the information furnished by the unnamed informant[4] but the quite tangible circumstantial evidence observed and obtained by the officers themselves.

[2,3] (2) *Is the evidence sufficient to support the verdict? Yes.*

When they arrived at the apartment, three of the officers stationed themselves at the front door, one at the back door and one in the back yard. The officers at the front rapped on the door, heard a window going up and then forced their way into the apartment. The officer in the back yard saw defendant tear up pieces of paper and throw them out of the window. These papers were pieced together and proved to be current records of bets for the day of the arrest. In the apartment the officers found a copy of the Daily Bulletin and Sports Review, dated April 6, 1956 (the day of the arrest), a paper-bound booklet entitled "Racing Parlay Manual," a ruled note pad, and a number of other items which one of the officers (whom defendant stipulated is an expert) testified constitute bookmakers' paraphernalia, describing the use made of various of these items.

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[2] This evidence concerning the informant and the information given by him (limited to the question of the reasonableness of the search) went in without objection.

[3] This evidence concerning the informant's phone call (limited to the issue of the reasonableness of the search) went in without objection.

[4] In this connection we exclude from consideration the evidence concerning the informant's phone call made in the presence of the officer (identified by note 3, above). It is of little, if any, value. The other evidence is ample without it.

Defendant contends that there is insufficient evidence to establish his guilt since he might have been only academically interested in the literature found in his apartment. This might be true as to the Daily Bulletins and Sports Reviews and to a lesser extent concerning the Racing Parlay Manual, if this were all. But actual records of bets were found. Such records in the defendant's own handwriting were treated as furnishing support for a conviction in People v. Carson, 101 Cal.App.2d 555, 225 P.2d 652. There is no direct evidence here that the records were in the defendant's own handwriting, but since the defendant and his wife were the occupants of the apartment and defendant told the officers that his wife was not responsible for "anything that was transpiring in the apartment there", direct evidence would not seem to be necessary here.

Nor is it necessary for the prosecution to establish by direct evidence the purpose for which the room is being occupied. The purpose in keeping the room can be inferred from all the surrounding circumstances. People v. Tepper, 36 Cal.App.2d 525, 527, 97 P.2d 1002.

It is a factual question: What reasonable inferences could the trial court have drawn from the evidentiary facts in the record? Of course, no two cases present identical sets of facts. But the following cases are sufficiently similar to each other and to this case, upon the facts, to convince us that here the evidence supports the verdict: People v. Donaldson, 130 Cal.App.2d 250, 278 P.2d 739; People v. Fox, 126 Cal.App.2d 560, 272 P.2d 832; People v. Davis, 65 Cal.App.2d 255, 150 P.2d 474; People v. Shapiro, 50 Cal.App.2d 60, 122 P.2d 382.

[4] (3) *Was defendant unreasonably restricted in his cross-examination? No.*

During his direct examination officer Martin testified that he received information from a confidential source, that the confidential informant had given information that had proved reliable in the past, and was asked "what was the information that you had from your informant," when defendant's counsel interposed: "I presume that this line of questioning is for the limited purpose of the reasonableness of the seizure. For that limited purpose, I will not object," whereupon the prosecutor said "It is for that limited purpose" and the court, "It is allowed for that limited purpose." The direct examination was then resumed and the witness narrated without objection, the information given by the confidential informant.

During cross-examination of this witness, the following occurred:

> "Q. [By defense counsel] From what source did you receive information that bookmaking activities were involved on the premises?
>
> "Mr. Maurer: I am going to object to any part of the answer, on the ground that it would tend to disclose the identity of the confidential informant, your Honor.
>
> "The Court: The objection is sustained."

Without comment, defendant's counsel desisted, asking such questions as whether the informant was a member of the police department, male or female, and so on, all of which were answered but none of which was calculated to identify the informant.

A similar incident occurred during the testimony of officer Lawler. He was about to relate the informant's phone call, which he had monitored, when defense counsel interposed:

> "Again, counsel, I think if this is for the limited purpose as to the rea-

sonableness of the search, there will be no objection.

"The Prosecutor: It is for that limited purpose, your Honor.

"The Court: That may be made a part of the record."

Defendant cross-examined Lawler concerning this phone call, during the course of which the following occurred:

"Q. [by defense counsel] Now, will you tell us as closely as you recall the conversation, what your informant stated over the phone? A. Well, I can't relate the whole conversation; that is, I don't think I can disclose the informant.

"Mr. Maurer: I will, of course, object to any part of the conversation that would tend to disclose the informant.

"Mr. Zwerin: Q. I am not asking that. I am more interested in the conversation in which you concluded that a bet had been placed? A. Well, the conversation went something like this: The man dialed the number, and he got a response on the other end, and the answer was somewhat like 'Yep.' And he immediately commenced to give him a rundown number.

"Q. A rundown number. What you are telling us is what your conclusions are. I want the conversation.

"Mr. Maurer: Just a moment.

"The Court: The objection is sustained. When an *answer* was asked of this witness as to what the defendant's words were, he said that it *dicloses* the identity of the informant. So you may not ask him that.

"Mr. Zwerin: I am not asking the identity. The witness says there was a rundown number.

"The Court: That is what I was just saying. The rundown number is a part of the conversation you may not ask him about, because that, he says, will disclose the identity."

Thereupon the prosecutor asked a few questions the answers to which showed how it was that the "rundown number" would serve to identify the person placing a bet. Defendant then, without comment, turned to a different line of questions.

We see in this no infringement upon defendant's rights. The evidence concerning the informer and the information received from him had already gone in, without objection, limited to the question of reasonableness of the search. Sustaining of the objections noted would not operate to disallow any of that evidence or to strike it from the record. Also, it looks very much as if defendant acquiesced in those rulings. At any rate, he did not give the magistrate any basis for holding inapplicable the statutory mandate that "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." Code Civ.Proc. § 1881, subd. 5. He did not even hint at a need for the name of the informant, whether for the purpose of impeachment or any other purpose. When a party consents that information such as this go into evidence "limited" to the issue of the reasonableness of the search (no probative bearing upon his guilt or innocence), he should speak up if he wants later to assert error for ruling out a question or two as to the identity of the informant. He should at least state a reason (perhaps a need for impeachment purposes; perhaps, for use in preparing his defense) why the public policy of full disclosure (Code Civ.Proc. §§ 2064, 2065) should in this instance prevail over the policy of nondisclosure (Code Civ.Proc. § 1881, subd. 5). Utter silence in that regard (he did not even say the informant was unknown to him) cannot under the circumstances of this case serve as a predicate for reversal.

Moreover, defendant was not bound by the silence which he thus observed before the magistrate. He was not there on trial and he need not have submitted the case (after information filed) upon the record of the preliminary examination. By doing the latter without reservation or exception of any kind (save as to his motion pursuant to section 995, Penal Code) he gave the trial court no more assistance than he had given the magistrate in determining whether the state policy of disclosure or nondisclosure should prevail.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

151 Cal.App.2d 271

In the Matter of the ESTATE of William S. HART, Deceased.

William S. HART, Jr., Objector and Appellant,

v.

COUNTY OF LOS ANGELES, Proponent, and Francis A. Gudger, Executor, Respondents.

Civ. 21899.

District Court of Appeal, Second District, Division 2, California.

May 27, 1957.

Hearing Denied July 24, 1957.

Probate proceeding. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment decreeing settlement of final account and ordering final distribution, and objector appealed. The District Court of Appeal, Richards, J. pro tem., held, inter alia, that where testator devised to county all of certain described realty for park purposes and provided for reversion to state should park cease to be used for park purposes, there was a devise of the fee simple estate upon condition that the property should not be used for business purposes or for exploration for oil, but decedent did not die intestate as to the oil, gas, and mineral rights in the property.

Judgment affirmed.

1. Courts 🔑198

Only when authorized by express statute may the probate court, sitting as such and disassociated from the superior court, entertain matters of a nature distinct from the settlement of deceased persons' estates.

2. Executors and Administrators 🔑314(11)
Wills 🔑656

Violation, in regard to a testamentary bequest, of constitutional provision limiting indebtedness of county would not render the bequest void but would only prevent county from expending current revenue to carry out conditions of the bequest after entry of decree of distribution, and such would not be a matter for determination by the probate court in proceeding upon final account and final distribution. West's Ann. Const. art. 11, § 18.

3. Counties 🔑150(2)

County's resolution of willingness to accept charitable devise of park property did not constitute an incurring of an "indebtedness or liability" within constitutional provision limiting indebtedness of county, even though no appropriation was budgeted in such year to cover cost of making improvements required by will to be made on the park property within five years after recordation of decree of distribution. West's Ann.Const. art. 11, § 18.

See publication Words and Phrases, for other judicial constructions and definitions of "Indebtedness and Liability".

4. Counties 🔑150(2)

Under constitutional provision that no county shall incur "indebtedness or liability" in any matter or for any purpose exceeding in any year the income and revenue provided for such year without assent of two-thirds of electors, quoted words refer only to a legally enforceable obligation. West's Ann.Const. art. 11, § 18.

5. Wills 🔑727

Title of property devised to county for park purposes vested upon testator's death, subject to administration of the estate, and right to possession was deferred until distribution of estate, and ultimate distribution was contingent upon the will not being set aside by a contest after probate or upon the property not being removed as an estate asset. West's Ann.Prob.Code, § 300.

6. Wills ⇨560(1), 639

Where testator devised to county all of certain described realty for park purposes and provided for reversion to state should park cease to be used for park purposes, there was a devise of the fee simple estate upon condition that the property should not be used for business purposes or for exploration for oil, but decedent did not die intestate as to the oil, gas, and mineral rights in the property. West's Ann.Prob. Code, § 120.

7. Wills ⇨449

Fact that testator makes a will raises a presumption that he intended to dispose of all his property.

8. Wills ⇨448, 449

Where testamentary provision may be given either of two meanings, the meaning which will prevent either partial or entire intestacy should be given to it.

9. Wills ⇨727

Landowner's exclusive right to drill for petroleum products is part of his fee estate and, under a devise of the fee, all those rights are conveyed as an incident to the devise except such rights as have been previously transferred or are reserved or excepted by the instrument of transfer.

10. Deeds ⇨155
Wills ⇨601(6)

Deed or devise subject to a condition limiting the use of the granted or demised property is a transfer of the fee estate subject only to possibility of a reverter upon breach of the condition.

11. Deeds ⇨155

Grantor, who conveys fee simple on condition subsequent, has no actual estate remaining with him, and grantee takes the entire estate of the grantor and, unless he breaches the conditions, is in the same position as an owner in fee simple absolute, and grantor's interest is merely a right or power to terminate and retake grantee's estate upon breach of the condition.

12. Charities ⇨21(1)

Indefiniteness in beneficiaries of a charitable trust is not an objection to its validity but, as a rule, is of the essence of all charitable trusts of a public or quasi public character.

13. Charities ⇨21(1)

In creation of a charitable trust, it is essential that the class, as distinguished from the members comprising the class, be established with certainty.

14. Charities ⇨10, 21(1)

Charitable testamentary trust, which provided for grant of realty to county for park purposes, and which provided that county, as a body politic, would share in benefits of the trust, was sufficiently definite as to class of beneficiaries and was limited to a charitable purpose.

15. Municipal Corporations ⇨223

Public trust arises by operation of law where a municipal corporation accepts a grant of realty for park purposes. West's Ann.Prob.Code, § 103.

16. Wills ⇨81

Presence of an invalid provision in a will does not render the entire will void where it appears, from a construction of the entire will, that the valid provisions are so far independent from the invalid provision that the invalid provision can be eliminated without interfering with testator's main scheme.

17. Charities ⇨47
Evidence ⇨83(1, 4)

Presumption was that county and state officials would perform their duties under testamentary trust devising realty for park purposes, and court of equity would not allow a gift for charitable uses, otherwise valid, to fail for want of trustee but would, if necessary, appoint a trustee to carry out the charitable purpose expressed by testator, and, therefore, testator would not be held to have died intestate as to the trust estate upon event that both county and state defaulted in acceptance of the trust, even though will made no provision for distribution of the trust estate in such event.

◆

S. V. O. Prichard, Hollywood, and Joseph L. Reina, Beverly Hills, for appellant.

Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for respondent County of Los Angeles.

Krystal & Paradise, and Spray, Gould & Bowers and Geo. W. Henderson, Los Angeles, for respondent executor.

RICHARDS, Justice pro tem.

This is an appeal by William S. Hart, Jr., the son of William S. Hart, deceased, from a judgment settling the executor's seventh and final account and report; decreeing, among other things, the final distribution of the decedent's estate to the County of Los Angeles and overruling appellant's sixteen specific objections to the final account and petition for distribution.

The testator, William S. Hart, died on June 23, 1946, leaving a will executed September 9, 1944, which was duly admitted to probate on July 26, 1946. The decree of distribution here appealed was entered December 2, 1955 in accordance with the provisions of the decedent's will which made certain bequests, and, so far as here material provided:

> "Second: I further declare that I have but one child, a son by the name of William S. Hart, Jr., who is the issue of my marriage to said Winifred Westover Hart. I have made no provision in this Will for my son for the reasons that I have amply provided for him during my lifetime.
>
> "* * *
>
> "*Fourth:* I hereby give, devise and bequeath to the County of Los Angeles, State of California, a body politic and corporate, (hereinafter sometimes referred to as 'the County'), for the uses and purposes, and upon and subject to the conditions, hereinafter set forth, all that certain real and personal property described as follows, to-wit:
>
> "[description of property]
>
> "A. That the said real and personal property (hereinafter sometimes referred to as the 'Park') shall be forever used and maintained by the County and its successors in interest and estate, exclusively as a public park and pleasure grounds, and for exhibition purposes, for the amusement, recreation, health and pleasure of its inhabitants. That the Park shall be open to public use at all times subject to proper restrictions to be provided by the Board of Supervisors of the County. That a charge or fee shall never be made of the public for admittance to the said premises, provided, however, that the Board of Supervisors may fix and collect a nominal charge for the use of camping facilities located on the Park Property in an amount of approximately the cost of the public utilities likely to be used by the person to be charged.
>
> "B. That the name of said Park shall be established by ordinance to be 'William S. Hart Park', and that 'William S. Hart Park' shall be continued as the official name and designation of said Park.
>
> "C. That, within twelve months from and after the date of the recordation of the decree of distribution distributing the said property to the County, the County shall
>
> "(1) Construct and thereafter maintain at the present location of the main entrance to said property a plate on which shall be inscribed in letters of suitable size and character the words 'William S. Hart Park'; and, that at a proper location on or adjacent to the Museum Property, place or erect a tablet on which shall be inscribed in let-

ters of suitable size and character the following words:

'This Park has been dedicated
by
William S. Hart
for the benefit of the American
Public of every race and
creed'

"D. That, within five years from and after the date of the recordation of said decree of distribution, the County shall

"(1) Lay out, construct and thereafter maintain roads and paths throughout the said property so as to give the public access to the various points and places of interest throughout the Park.

"(2) Construct and thereafter maintain comfort stations for the use of the public at convenient and proper places throughout the Park.

"(3) Construct and thereafter maintain picnic grounds at suitable locations with accommodations for cooking, tables and seats and drinking fountains.

"(4) Lay out, construct and thereafter maintain an adequate electric lighting system, irrigation system and storm drain throughout the Park.

"(5) Plant and thereafter maintain throughout the Park, at suitable places, for the purpose of ornamentation and flood control, plants, shrubs, trees, grass and flowers preferable [sic] indigenous to California.

"* * *

"J. Whenever any of said property, or any part thereof, shall cease to be used as a park and for pleasure, amusement, recreation, health and uses incident to the aforesaid uses according to the intents and meanings hereof, or if the said County, or its successors in interest or estate, shall at any time change the official name of said Park from 'William S. Hart Park' to some other name or designation, or or if the County, or its successors in interest or estate, shall fail, neglect or refuse to perform each or any of the other conditions hereby imposed, the said property shall, immediately upon the happening of either or any of said events, revert, and shall go and be distributed, to the State of California for the same uses and purposes and upon the same conditions imposed upon the State of California as are herein set forth and imposed upon the County.

"K. That, prior to the hearing before the Superior Court upon the final account and petition for distribution of my estate, the Board of Supervisors of the County shall advise my executors of its willingness to accept the property herein devised and bequeathed to the County for the uses and purposes and upon the conditions herein provided. In the event the County fails to so advise my executors prior to the hearing before the Superior Court upon the final account and petition for distribution of my estate, the said real and personal property shall go and be distributed to the State of California for the same uses and purposes and upon the same conditions imposed upon the State of California as are herein set forth and imposed upon the County.

"L. All the domestic animals which I may own at the time of my death shall be allowed to spend their remaining days in the Park and shall be properly fed and cared for at all times by the County.

"Fifth: For the purpose of providing for the maintenance and upkeep of the said Park, I hereby give and bequeath to the County the sum of One Hundred Fifty Thousand Dollars ($150,000.00), and such other sums of money as shall go and be distributed to the County under the provisions hereof, In Trust, for the following uses and purposes, and upon the following conditions, to-wit:

"* * *

"C. The County shall have the right to use annually the sum of Ten Thousand Dollars ($10,000.00) of the principal and the accrued and collected income, of the Trust Estate for the purpose of aiding and assisting the County in defraying and carrying out and performing the conditions as expressed in par. Fourth hereof to be done and performed, but I hereby declare it to be a condition of this Trust that the County shall not expend or obligate any portion of the principal or income of this Trust Estate in excess of the said amounts, and that it is a further condition of this Trust that the County shall not expend any portion of the said principal or income of the Trust Estate for any purpose whatsoever except as herein expressly authorized.

"* * *

"Seventh: All the rest, residue and remainder of my estate of every kind or nature and wheresoever situate, including any property over which I may have any power of appointment, after paying all my just debts, all expenses of my last illness and burial, all estate, inheritance, income and other taxes payable from estate funds, and all administration costs, expenses, fees and commissions, as provided in paragraph Third, I hereby give, devise and bequeath and appoint to the County of Los Angeles, In Trust, to be added to the property and/or fund hereinabove specified in paragraph Fifth hereof, and to be used and devoted as a part of said property and/or fund and under and subject to the same terms and conditions, and for the same uses and purposes, provided for in said paragraph Fifth."

The Park property was appraised at approximately $257,000 and the residue of the estate, after payment of taxes, commissions and fees, passing to the County of Los Angeles under the general residuary bequest, consists of cash, securities and other personal property having a total appraised value of approximately $586,000.

The lapse of over nine years between the admission of the will to probate and the entry of the final decree of distribution is explained in part by the time consumed in disposing of the various aspects of litigation in the estate which have been before this court on five previous occasions, as follows: In re Estate of Hart, 1949, 92 Cal.App.2d 691, 208 P.2d 59 (Appeal by William S. Hart, Jr., from order denying change of venue. Appeal dismissed on motion); In re Estate of Hart, 1951, 107 Cal.App.2d 60, 236 P.2d 884 (Appeal by William S. Hart, Jr., from adverse judgment in will contest. Affirmed); In re Estate of Hart, 1951, 107 Cal.App.2d 58, 236 P.2d 891 (Appeal by executors from order striking cost bill. Affirmed); Hart v. Gould, 1953, 119 Cal.App.2d 231, 259 P.2d 49 (Appeal by William S. Hart, Jr., from adverse judgment in action to declare void provision of the will devising real property to County of Los Angeles as violative of Mexican grant. Affirmed); and In re Estate of Hart, 1953, 119 Cal.App.2d 310, 259 P.2d 703 (Appeal by William S. Hart, Jr., from order assessing costs of will contest. Affirmed).

Three basic questions are presented by this appeal:

(1) Did the charitable bequest of the Park property fail as to the County of Los Angeles by reason of any violation of section 18 of article XI of the Constitution?

(2) Did the decedent die intestate as to the Park property oil, gas and mineral rights?

(3) Is the residuary bequest to the County of Los Angeles void as a charitable trust?

Park Property Bequest

The decedent's will, as we have noted, bequeaths the Park property to the County of Los Angeles and imposes a condition that within five years from and after the date of the recordation of the decree of distribution, the County shall make and maintain certain improvements thereon. Another condition of this bequest is that, prior to the hearing upon the final accounting and petition for distribution, the Board of Supervisors of the County shall advise the executors of "its willingness to accept the property herein devised and bequeathed to the County for the uses and purposes and upon the conditions herein provided". The will further bequeaths to the County of Los Angeles the sum of $150,000 together with the residue of the estate for the purpose of providing for the maintenance and upkeep of the Park and provides that the County shall have the right to use annually the sum of $10,000 of the principal and accrued and collected income of the entire trust estate for the purpose of aiding and assisting the County in defraying and carrying out and performing the conditions imposed on the County to make and maintain the specified improvements. The will further provides that if the County shall fail to perform the conditions adverted to, the Park property shall revert to the State of California for the same purposes and upon the same conditions. The court found that on November 5, 1947 the Board of Supervisors of the County of Los Angeles adopted a resolution notifying and advising the executors of the estate of "the willingness of this Board and the County of Los Angeles to accept, and they do hereby accept" the property bequeathed by decedent's will for the uses and purposes and upon the conditions provided in the will, and further found that on or about November 12, 1947 and prior to the hearing on the petition for distribution, a copy of said resolution was served on the executors of the estate. It was further found that the budget of the County of Los Angeles for the fiscal year 1947–1948 contained no appropriation of money for the purpose of making improvements on the Park property and that, as of the date of the hearing on the petition for final distribution, all moneys appropriated by the County for the fiscal year 1947–1948 had been exhausted and that no sums remained available out of the funds of that year. There was an additional finding that no appropriations were budgeted by the County for the improvement of the Park property in any year thereafter until the fiscal year 1954–1955, the budget for that year providing an appropriation of $118,248 for the capital project of making improvements on the Park property, and the budget for the succeeding year contained a similar appropriation.

It is the appellant's contention that the resolution of the Board of Supervisors adopted on November 5, 1947 constituted the incurrence of an "indebtedness or liability" under section 18 of article XI of the Constitution and inasmuch as no appropriation was budgeted in that year to cover the cost of making the improvements to the Park property required by the will to be made within five years after the recordation of the decree of distribution, the bequest of the Park property failed as to the County of Los Angeles and the court erred in making distribution thereof to the County. We are satisfied that this contention is untenable.

Section 18 of article XI of the Constitution provides: "No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year" without the assent of two-thirds of the electors.

[1, 2] In the first place, appellant has misconceived the nature of the proceeding involved and the inapplicability of a violation of the constitutional provision, if any, to the probate proceeding. The court having found that the Board of Supervisors had advised the executors of its willingness to accept the bequest of the Park property prior to the hearing on the decree of distribution, was obliged to distribute the Park property to the County under the will and to provide in the decree that upon the failure of the County to comply with the conditions subsequent, the property should revert to the State of California for the same purposes and upon the same conditions. "As distinguished from the settlement of the estate, whatever additional legal business connected with the administration of the affairs of the estate may require judi-

cial attention must ordinarily be administered in another forum. It is only when authorized by some express statute that the probate court, sitting as such, and disassociated from the superior court, may entertain matters of a nature distinct from the settlement of estates of deceased persons" (Parkman v. Superior Court, 77 Cal.App. 321, 323, 246 P. 334, 335). As an example, the court sitting in probate is without jurisdiction to construe the Retail Sales Tax Act, Revenue and Taxation Code, § 6001 et seq. as it might apply to a probate sale (In re Estate of Schneider, 62 Cal.App.2d 463, 145 P.2d 90). "It would seem to be well settled that, while the superior court is a court of general jurisdiction, the powers which it exercises in proceedings in probate are entirely statutory, and that in the administration and distribution of estates it exercises a special limited jurisdiction, and that in the exercise of such jurisdiction it is not authorized, in the absence of express statutory authority, to determine controversies which do not strictly arise within the course of its probate procedure" (In re Estate of Polito, 51 Cal.App. 752, 754, 197 P. 976, 978). A violation of the constitutional provision would not render the testamentary bequest void but would only prevent the County from expending current revenue to carry out the conditions of the bequest after the entry of the decree of distribution, and that was not a matter for the determination by the probate court in this proceeding. We are aware of no authority holding that the court sitting in probate is precluded from making a distribution of a devise containing a condition subsequent on the ground that the devisee, subsequent to a distribution of the estate, may be prohibited from the performance of the condition.

[3–5] Secondly, we are of the opinion that the resolution adopted by the County of Los Angeles in 1947 of its willingness to accept the charitable devise of the Park property did not constitute the incurring of an "indebtedness or liability" within the purview of said section 18. "The quoted words [indebtedness or liability] obviously refer only to a legally enforceable obligation" (City of Oxnard v. Dale, 45 Cal.2d 729, 735, 290 P.2d 859, 862). Whereas the title of the property devised to the County vested upon the testator's death in 1946 subject to the administration of the estate (Prob.Code, sec. 300), the right to possession was deferred until the distribution of the estate (Trippet v. State, 149 Cal. 521, 530, 86 P. 1084, 8 L.R.A.,N.S., 1210; In re Estate of Piercy, 168 Cal. 750, 753, 145 P. 88), and under the terms and conditions of paragraph Fourth of the will, the duty to make the required improvements within five years after distribution or suffer a reverter of the property to the State commenced upon the recordation of the decree of distribution. At the time of the adoption of the resolution in 1947, the ultimate distribution of the property to the County was contingent upon the will not being set aside by a contest after probate, which was in fact made, and it was also contingent upon the Park property not being removed as an asset of the estate, as was in fact attempted.

Chester v. Carmichael, 187 Cal. 287, 201 P. 925, which appellant contends is decisive of the present case, was an appeal from a judgment sustaining a demurrer to a taxpayers' suit to enjoin the City of Sacramento from carrying out the conditions of a grant of land to the City for park purposes. The complaint therein alleged in substance that in 1919 a conveyance of certain land for Park purposes was accepted by the City, the conveyance reciting that it was executed in consideration of the covenants and conditions expressed therein and certain conditions subsequent. The conditions expressed were that the City should maintain the premises as a public Park and should make certain permanent improvements within five years and should expend a minimum of $5,000 each year until the required improvements were completed, and in the event of the failure of the City to comply with the conditions the property should revert to the grantors. It was further alleged that the cost of the required improvements would exceed $50,000 and that the moneys incident to the proposed work would be paid out of the revenue received in 1920 and subsequent years and that there was no assent by the electors to the carrying out of the proposed plan. In holding that the complaint stated a cause of action, the court held that the transaction fell within the inhibition of section 18 of article XI of the Constitution for the reason that a liability to the grantors was created by the City's acceptance of the conveyance and as to the grantors, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvements to be made by the City of the conveyed premises, and the court said at page 294, 201 P. at page 928: "Here the full liability to the grantors was created *upon the acceptance of the deed;* the entire consideration therefor having been furnished." In distinguishing McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556; and Doland v. Clark, 143 Cal. 176, 76 P. 958, which hold that a municipality may contract for the furnishing of services or materials *in futuro* without violating the constitutional inhibition, the court cited City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 S. Ct. 77, 43 L.Ed. 341, as follows: "In the one case the indebtedness is not created until the consideration has been furnished; in the other (where the consideration on the other side is fully furnished at the time of the transaction) the debt is created at once, the time of payment being only postponed". The manifest rationale of the Carmichael case is that the acceptance of the conveyance in 1919 constituted the receipt of the entire consideration for the performance of the conditions imposed and that consequently an obligation from the City to the grantors arose *eo instanti*. The doctrine of the Carmichael case has no application to the state of facts here presented. Carmichael was an *inter vivos* transaction, consummated by the delivery of the grant and the acceptance thereof by the City. The instant case involves a charitable bequest of real property, title to which vested upon the testator's death and the beneficial use of which was deferred until the distribution of the testator's estate. No consideration of any kind passed to the County of Los Angeles in 1947 when it passed the resolution of willingness to accept the charitable bequest and the resolution so adopted is not violative of section 18 of article XI "because it does not create a financial liability, measurable in terms of the [County's] annual income" (City of Oxnard v. Dale, supra, 45 Cal.2d at page 736, 290 P.2d at page 862).

Intestacy as to Oil Rights

[6–9] Appellant contends that the decedent died intestate as to the oil, gas, and mineral rights in the Park property, and since the appellant is the only heir, the court erred in not distributing such rights to him. His argument on this point is that inasmuch as a land owner does not own the oil in place, but rather, has only an exclusive right on his premises to drill for oil and gas, if he conveys the land subject to a condition that the grantee shall not use the land for the purpose of development of oil and gas, the grantor has in effect excepted from the grant the right to drill for oil, gas, or minerals. This contention is untenable. Probate Code sec. 120 provides, "A devise of land conveys all the estate of the testator therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate." The fact that a testator makes a will raises a presumption that he intended to dispose of all of his property (In re Estate of Olson, 144 Cal.App.2d 694, 301 P.2d 501; In re Estate of Olsen, 9 Cal.App.2d 374, 379, 50 P.2d 70) and wherever a testamentary provision may be given either of two meanings, that meaning should be given to it which will prevent intestacy, either entire or partial (In re Estate of Akeley, 35 Cal.2d 26, 29, 215 P.2d 921, 17 A.L.R.2d 647; In re Estate of Duncan, 145 Cal.App.2d 612, 302 P.2d 892; In re Estate of Carroll, 138 Cal. App.2d 363, 369, 291 P.2d 976). The land owner's exclusive right to drill for petroleum products is part of his fee estate and under a devise of the fee all of those rights are conveyed as an incident to the devise except such rights as have been previously transferred or are reserved or excepted by the instrument of transfer. Standard Oil Co. of California v. J. P. Mills Organization, 3 Cal.2d 128, 132, 43 P.2d 797; Brown v. Copp, 105 Cal.App.2d 1, 6, 232 P.2d 868.

[10, 11] Paragraph Fourth of the testator's will begins: "I hereby give, devise and bequeath to the County of Los Angeles, * * * all that certain real * * * property described as follows * * *". Manifestly this is a devise of the fee simple estate upon various conditions, one of which is that the property shall not be used for business purposes or for the exploration for oil. A deed or devise subject to a condition limiting the use of the granted or demised property is a transfer of the fee estate subject only to the possibility of a reverter upon breach of the condition. "[W]hen the grantor conveys the fee simple on condition subsequent, he has no actual *estate* remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right or power to terminate the estate of the grantee and retake the same, if there is a breach of condition" Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 425, 74 P.2d 738, 740, 114 A.L.R. 562.

Is the Charitable Trust Void

Appellant's first contention on this point is that the trust created by paragraphs Fifth and Seventh of the will is void for the reason that the trust is not limited to charitable purposes because (a) the County of Los Angeles is the only beneficiary of the trust, and (b) the feeding and caring for domestic animals is not a charitable purpose, and hence the decedent died intestate as to the "trust estate".

[12–15] Paragraph Seventh bequeaths the residue of the estate to the County of Los Angeles, in trust, to be added to the bequest in paragraph Fifth and for the uses and purposes and upon the same terms and conditions set forth in paragraph Fifth, which in turn bequeaths to the County of Los Angeles the sum of $150,000, in trust, for the purpose of providing for the maintenance and upkeep of the Park, devised to the County of Los Angeles by paragraph Fourth of the will. In support of this contention, appellant argues that paragraphs Fifth and Seventh are each self-contained and that in determining the validity of the trust therein created we may not look to any other part of the will. This hypothesis is directly contrary to the statutory rule that all parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole (Prob.Code, sec. 103). Moreover, it is clear from the will itself that the bequests in paragraphs Fifth and Seventh are but a part of the testator's general scheme or plan of a charitable devise of the Park property as provided for in paragraph Fourth together with money for its maintenance and upkeep as provided by paragraphs Fifth and Seventh. "[I]ndefiniteness in the beneficiaries of a charitable trust is not only not an objection to its validity, but, as a rule, is of the essence of all charitable trusts of a public or *quasi* public character" (Collier v. Lindley, 203 Cal. 641, 652, 266 P. 526, 530). Conceding this principle, petitioner urges that in the creation of a charitable trust it is essential that the class (as distinguished from the members comprising the class) be established with certainty. In re Estate of Hinckley, 58 Cal. 457; In re Estate of Sutro, 155 Cal. 727, 102 P. 920; In re Estate of Vance, 118 Cal.App. 163, 4 P.2d 977; In re Estate of Peabody, 21 Cal.App.2d 690, 70 P.2d 249. That this is the law admits of no doubt; however, we are convinced that the requirement of the ascertainment of the class of beneficiaries is adequately met in the instant matter upon construing the decedent's testamentary plan or scheme as a whole, for a public trust arises by operation of law where a municipal corporation accepts a grant of real property for park purposes (People ex rel. Britton v. Park & Ocean R. Co., 76 Cal.

156, 161, 18 P. 141; Archer v. Salinas City, 93 Cal. 43, 51, 28 P. 839, 16 L.R.A. 145; Slavich v. Hamilton, 201 Cal. 299, 302, 257 P. 60, from which it follows that there is an ascertainable class of beneficiaries under such a charitable grant—namely the public in general. The fact that the County of Los Angeles as a body politic will also share in the benefits of the charitable trust in no way vitiates the trust, as gifts in aid of governmental purposes are uniformly held to be for charitable purposes (McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132; 14 C.J.S. Charities § 13, p. 442; Scott on Trusts, sec. 373; Restatement of the Law of Trusts, sec. 373; and see, Annotation, 50 A.L.R. 593, p. 594). The trial court therefore properly concluded that the devises and bequests to the County of Los Angeles are for the benefit of that County as a body corporate and politic and its inhabitants and also for the benefit of the American public of every race and creed, as contemplated by the testator in paragraph Fourth, subparagraph C(1) of his will.

[16] In the devise of the Park property, the will provides that the domestic animals owned by the testator at the time of his death shall be kept in the Park and properly fed and cared for by the County. Petitioner contends that the maintenance of animals is not a charitable purpose and that the charitable trust is therefore void in its entirety. After nearly ten years of litigation, it appears that at the time the final accounting and petition for distribution was filed on January 10, 1955 there were then surviving two dogs, one burro, one mare, and six horses. How many of these animals have since passed away we are not advised. In Re Estate of Coleman, 167 Cal. 212, 138 P. 992, the decedent's will contained a $30,000 bequest to the City of Sacramento to be used in erecting a suitable fountain for the benefit of thirsty animals and birds. The court found this to be a charitable use, saying, 167 Cal. at page 214, 138 P. at page 993: "It is not necessary, however, that the persons constituting the general public be the direct beneficiaries of the gift. 'Gifts to benefit man through the medium of benefiting animals are good charities.'" In any event, the decedent's will contained a severability clause, and it is a well-established principle that the presence of an invalid provision in a will does not render the entire will void where it appears from a construction of the entire will that the valid provisions are so far independent from the invalid provision that the latter can be eliminated without interfering with the main scheme of the testator. In re Estate of Van Wyck, 185 Cal. 49, 62, 196 P. 50; In re Estate of Sewall, 14 Cal.App.2d 554, 555, 58 P.2d 744.

[17] Petitioner's final contention as to the charitable devise and bequest is that the will makes no provision as to the distribution of the "trust estate" in the event both the County of Los Angeles and the State of California default in the acceptance of the trust or breach the conditions thereof and that, therefore, the decedent died intestate as to the trust estate upon the happening of such a contingency and the court erred in not so providing. Petitioner's argument here is totally unsupported by the citation of any authority. As heretofore pointed out, it is obvious that the decedent's primary intent as expressed by his will was to devote the Park property and the residue of his estate to a charitable use. The court so found and we agree. In the first place, we may presume that the public officials of both the County and the State will perform their duties and, second, a court of equity will not allow a gift for charitable uses, otherwise valid, to fail for want of a trustee but will, if necessary, appoint a trustee to carry out the charitable purpose expressed by the donor. People ex rel. Ellert v. Cogswell, 113 Cal. 129, 141, 45 P. 270, 35 L.R.A. 269; In re Estate of McDole, 215 Cal. 328, 332, 10 P.2d 75; In re Los Angeles' County Pioneer Society, 40 Cal.2d 852, 864, 257 P.2d 1.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

151 Cal.App.2d 322

ESTATE of Josephine DARILEK, Deceased.

Leo HONSA, also known as Leo R. Honsa, Plaintiff, Contestant and Appellant,

v.

Annie HOSPODARSKY et al., Defendants, Proponents and Respondents.

No. 17208.

District Court of Appeal, First District, Division 1, California.

May 28, 1957.

Rehearing Denied June 27, 1957.

Hearing Denied July 24, 1957.

Will contest. From a judgment of nonsuit by the Superior Court, San Francisco City and County, Eustace Cullinan, Jr., J., contestant appealed. The District Court of Appeal, Bray, J., held that evidence was insufficient to take to jury question of testatrix' mental incapacity at time of executing will, but that testimony of a friend of testatrix and will proponent that proponent, shortly before testatrix' death, told witness that testatrix had made a will leaving nothing to contestant and that "I fixed that," was sufficient to take to jury question whether will was result of proponent's undue influence over testatrix.

Judgment reversed on issue of undue influence, and otherwise affirmed.

1. Wills 🔑324(1)

In will contest, evidence of statements, claimed to have been made by testatrix' attending physician for impeachment purposes, as to persons present at time of execution of will, presented no conflict in evidence for jury's consideration as to what occurred at such time.

2. Wills 🔑302(1)

Where proponent of will proves prima facie case of due execution thereof, burden is on contestant to show lack of due execution by positive and affirmative evidence.

3. Wills 🔑303(4)

Forgetfulness of one of attesting witnesses does not destroy other proof of due execution of will.

4. Wills 🔑324(2)

In will contest, opinion of witness, qualifying as physician, psychiatrist and handwriting expert, that, on basis of portion of hospital records for day before execution of will and testatrix' signatures on will, testatrix was not competent to know what she was doing at time of executing will, was too speculative to constitute substantial evidence of her testamentary incapacity for submission of such question to jury.

5. Wills 🔑52(6), 55(5)

Evidence of testatrix' extreme feebleness, sickness, old age, etc., does not prove her mental incapacity at time of executing will nor shift to proponent burden of proving her mental capacity at such time.

6. Wills 🔑324(2)

Substantial evidence is necessary to create conflict required to submit to jury question of testatrix' mental incapacity at time of executing will.

7. Wills 🔑21, 52(1)

A will contestant must prove testatrix' alleged testamentary incapacity at very moment of execution of will; presumption being that she was of sound mind at that very time.

8. Wills 🔑52(3)

One contesting will on ground of testatrix' mental incapacity must prove that will was not made by testatrix at a lucid interval.

9. Evidence 🔑574

An expert witness' opinion, not based on facts otherwise proved or assuming facts contrary to only proof, is not substantial evidence sufficient to create conflict requiring submission of question to jury.

10. Wills 🔑324(2)

In will contest, evidence was insufficient to take to jury question of testatrix' mental incapacity at time of executing will.

11. Wills 🔑155(1)

A person's opportunity to exercise undue influence over testatrix and interest in so doing are not alone sufficient to set aside will.

12. Wills 🔑326

In will contest, a nonsuit may be granted when, disregarding all conflicting evidence and giving contestant's evidence all value to which it is legally entitled, indulging every legitimate inference therefrom, there is no evidence of sufficient substantiality to warrant verdict for contestant.

13. Wills 🔑155(1)

The usual indications of "undue influence" over testatrix are unnatural provisions in will, dispositions therein at variance with testatrix' expressed intentions, beneficiary's opportunity to control testamentary act, such condition of testatrix as to permit subversion of her freedom of will, confidential relationship between her and beneficiary, and beneficiary's activity in procuring execution of will.

> See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

14. Wills 🔑166(5)

Provisions of will, giving $100 to testatrix' nephew and one seventh of her estate to his son, children of each of her deceased sisters, and an old friend named as executrix, were not unnatural, so as to indicate undue influence by such friend, who was given nothing by testatrix' previous will giving 5/15ths of estate to nephew's mother and remaining two-thirds to testatrix' sisters then living, as there was nothing unnatural or unusual in testator giving an old friend a share in estate and reducing amount left to nephew, who was not a natural object of testatrix' bounty.

15. Wills 🔑324(3)

In will contest by testatrix' nephew, testimony of a friend of testatrix and will proponent, named as a beneficiary in will, that proponent told witness shortly before testatrix' death that testatrix had made a will leaving contestant nothing and that "I fixed that," was sufficient to take to jury question whether will was result of proponent's undue influence over testatrix; such witness' credibility being question for jury, not trial court or appellate court.

Jesse A. Mueller, Courtney L. Moore, San Francisco, for appellant.

Harold J. Scott, Alvin A. Lobree, San Francisco, for respondents.

BRAY, Justice.

Respondent Annie Hospodarsky, named therein as executrix, offered for probate a will of decedent dated December 2, 1953. Appellant, Leo Honsa, filed a contest thereof on three grounds: (1) lack of due execution; (2) lack of testamentary capacity; (3) undue influence of respondent. Appellant appeals from a judgment of nonsuit, presenting as the sole question the sufficiency of the evidence as a matter of law.

Evidence.

Decedent at the time of the execution of the will was approximately 84 years of age. She died 14 days after its execution. Appellant is a nephew of decedent, being the son of her predeceased sister. Respondent is a friend of decedent, the widow of Frank Hospodarsky, a predeceased cousin of decedent.

1. Execution of Will.

[1–3] Alice Bickel, a registered nurse at St. Joseph's Hospital where decedent was confined, went to the latter's room at the request of a student nurse. There she found, besides decedent, Dr. Haage and Attorney Scott. Scott informed her she was to be a witness to the will. Scott read the will aloud and asked decedent if she wanted any changes. She said "no". He asked her if she wanted Mrs. Bickel and Dr. Haage to act as witnesses. She said "yes." Decedent was propped up in bed. Mrs. Bickel held a book in front of her upon which decedent signed both pages of the will. Although weak, no one guided her hand. The first pen did not work well and decedent had trouble writing up hill. She started to sign with Scott's pen, finishing with Mrs. Bickel's. Decedent acknowledged the document to be her will in the presence of Dr. Haage and Mrs. Bickel. Both witnesses signed it in decedent's presence and in the presence of each other.

Dr. Haage, decedent's attending physician, the other witness to the will, was called in to the room by Attorney Scott. Present were decedent, Mrs. Bickel and Scott. Dr. Haage could not remember whether she or Mrs. Bickel came into the room first. Respondent and a man were in the room but Dr. Haage could not remember whether they came in before or after Dr. Haage witnessed the will. She first stated that respondent and her son were in the room; then she testified that she was not sure about it; that she could not remember. Scott read the will. Dr. Haage signed the will in the presence of decedent but does not remember seeing Mrs. Bickel sign it. On cross-examination she testified she could not remember telling appellant that only Scott and respondent were in the room or that she did not know of any nurse witnessing the will, nor of telling appellant's attorney that there was no nurse present when she witnessed the will. Appellant testified that Dr. Haage had told him that decedent, Scott, a stout lady and a young man were present at the execution of the will, and that no nurse was present. Other than the evidence concerning statements claimed to have been made by Dr. Haage for impeachment purposes appellant offered no evidence concerning the execution of the will. Such impeachment evidence does not present a conflict in the evidence as to what occurred at the execution of the will. In re Estate of Kent, 1911, 161 Cal. 142, 148, 118 P. 523; Moffatt v. Lewis, 1932, 123 Cal.App. 307, 310, 11 P.2d 397; 19 Cal.Jur.2d 115. The evidence, without conflict, made out a prima facie case of due execution. Once the proponent of a will proves a prima facie case of due execution the burden is on the contestant to show lack of due execution by positive and affirmative evidence. Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6; In re Estate of Morey, 75 Cal.App.2d 628, 171 P.2d 131. The forgetfulness of one of the attesting witnesses does not destroy the other proof. In re Estate of Harvey, 143 Cal.App.2d 368, 372, 299 P.2d 712. At argument appellant conceded that the probate court correctly granted a nonsuit on this issue and stated that he was not appealing therefrom.

2. Testamentary Capacity.

In the latter part of November, Mrs. Nelson, a friend of decedent's phoned respondent, who had known decedent for a long period, of her illness. Respondent went to decedent's basement flat. Decedent was cold. Therefore respondent and her son Frank took decedent to respondent's home where she stayed for 10 days. No doctor was called. Around Thanksgiving decedent wanted to go home. Respondent and Frank took her to her cold apartment and left her there alone. Respondent knew appellant and that he was the nephew and she also knew his phone number. Respondent did not call him about his aunt's illness. A couple of days later, November 29th, Mrs. Nelson again phoned respondent concerning decedent. At decedent's apartment a doctor informed respondent that decedent must go to the hospital. Respondent accompanied her to the hospital in the ambulance. The next day respondent phoned appellant's home and informed his wife that decedent was in the hospital. December 3rd appellant learned of this from his wife. He immediately left Healdsburg, where he lives, for San Francisco. He had last seen his aunt in October when her condition seemed fairly good and she seemed to be happy. At the hospital she appeared thin and sunken, her eyes glassy. She was inattentive to anything that was said. Her only response was "Oh." She could not talk. She did not say a word that was plain enough to understand. After 10 to 15 minutes the nurse requested him to leave. After his aunt's death appellant asked Dr. Haage's opinion as to decedent's mental condition and was told that the doctor believed her to have been of sound mind.

Marian Van Gieson, a registered nurse, saw decedent the night before she was taken to the hospital. Decedent was weak, with a bad pulse. Her lips were blue. She was a very sick woman.

[4–6] Obviously there is no evidence in any of the above of lack of testamentary capacity at the time of the execution of the will. It is the testimony of Dr. Kelley, a licensed physician, upon which appellant relies as evidence to meet the presumption of capacity and lack of evidence of incapacity. He did not see decedent but described her condition on December 1st (the day before the execution of the will) as it appeared from the hospital records. The record showed that she had congestive heart disease; her heart was not getting the blood around; she had auricular fibrillation, which meant that the heart instead of pumping the blood was merely fluttering. The basic diagnosis was bronchial pneumonia and hypertensive cardiovascular disease (high blood pressure). At 9 p. m. the nurse noted "She talks to herself. Difficult to make patient understand instructions."[1] Dr. Kelley then stated that he would feel that "probably at this point she was quite confused, and since she then got worse, I would think this confusion continued until the oxygen was administered on the 3rd." Dr. Kelley qualified as a physician and psychiatrist and also as a handwriting expert. He was shown exemplars of decedent's handwriting written in November and her signatures on the will of December 2nd. Basing his opinion on the portion of the hospital records hereinbefore referred to and his examination of her signatures on the will he gave it as his opinion that decedent was not competent to know what she was doing at the time of the execution of the will. He further testified that she was unable to "know who their heirs were or the persons entitled to their bounty, or anything connected with their affairs." The trial court held, and we think properly so, that upon this meager background Dr. Kelley's opinion was too speculative to constitute substantial evidence of testamentary incapacity. Proof of extreme feebleness, sickness, old age, etc., does not prove mental incapacity nor shift the burden of proof on the proponent. In re Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; In re Estate of Casarotti, 184 Cal. 73, 192 P. 1085. Substantial evidence is necessary to create the required conflict. See Witkin, California Procedure, p. 1858, § 126. See In re Estate of Little, 1920, 46 Cal.App. 776, 189 P. 818, where judgment of nonsuit was affirmed, the court rejecting expert opinion that the testator was insane based on a comparison of the testator's writing as being insufficient evidence.

[7, 8] A contestant is required to prove testamentary incapacity at the very moment of the execution of the will. There is a presumption that a person is of sound mind at that very time. In re Estate of Greenhill, 99 Cal.App.2d 155, 166, 221 P.2d 310. Also a contestant must prove that the will was not made at a lucid interval. In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990; In re Estate of Barr, 69 Cal. App. 16, 230 P. 181.

[9] The medical testimony here was similar to that in Re Estate of Powers, 81 Cal.App.2d 480, 184 P.2d 319, where the court held that as a matter of law the testimony was not substantial enough to support the jury's finding that the testatrix lacked testamentary capacity. There, as here, a comparison of the testatrix's handwriting on the will with other exemplars of her handwriting was made. There, two medical experts, while here only one, examined the hospital records and "accepted only those portions of the hospital records which supported their opinions and rejected those portions which contradicted their opinions." 81 Cal.App.2d at page 485, 184 P.2d at page 322. By coincidence, the hospital record in that case, just as in our case, had no entry on the day the will was executed. Stronger than our case, the hospital records there showed that the day before the execution of the will the testatrix

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[1] There was also an entry that on this day decedent was of "clear" mind. There is no entry of any kind on December 2nd except one at 4 a. m. to the effect that decedent had a good night. Dr. Kelley testified that this was probably due to sedation.

was not only confused but at times irrational. Concerning this situation the court said, and its statement is particularly applicable (except that no irrationality appears in our hospital records) (81 Cal.App.2d at pages 482–483, 184 P.2d at page 320): "We cannot agree with appellant that the entries on the hospital charts constitute substantial evidence that the testatrix did not possess testamentary capacity on June 18. The critical inquiry is directed to the condition of the testatrix' mind at the very time of the execution of the will [citations] and there is a presumption of testamentary capacity which it requires substantial evidence to overcome [citations]. The most that can be said for the hospital records is that they show intermittent periods of mental confusion and irrationality and as we approach the critical date of June 18 we find that the record shows on June 17 'Confused, irrational at times,' which carries the clear implication that the testatrix was only intermittently confused and irrational on that date, and on June 18 there is a complete absence of any entry which would tend in the slightest to prove that the testatrix lacked testamentary capacity on that day." Concerning the opinion of the experts in relying only on the portion of the hospital records which they considered supported their opinions the court said (and again, we deem the language particularly applicable to our case) (81 Cal.App.2d at pages 485–486, 184 P.2d at page 322): "It is impossible for any expert basing his testimony solely upon other evidence introduced in the case thus to lift himself by his own bootstraps. If his opinion is not based upon facts otherwise proved or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence. * * * If the evidence of the two doctors who purported to base their testimony on the records, but actually assumed the portions of the records to be inaccurate which contradicted their expressed opinions, was allowed to prevail we would have a situation in direct conflict with the statement quoted by the supreme court in Alaska Packers' Ass'n v. Industrial Acc. Comm., supra, 1 Cal.2d 250, 263, 34 P.2d 716, 722, that: 'there was no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist or rested upon the testimony of physicians who had actually treated and examined the patient.'"

[10] The probate court was right in holding that there was no substantial evidence to support a jury's finding of mental incapacity had one been made. The facts in Re Estate of Fosselman, 48 Cal.2d 179, 308 P.2d 336, are so dissimilar to those here as to make that case completely inapplicable.

3. Undue Influence.

[11] As will appear from a recital of the evidence on this subject, there was no direct evidence of actual undue influence. At the most, except as to the testimony of Mrs. Crowley, there is shown opportunity and interest, which, of course, alone are not sufficient to set aside a will. In re Estate of Holloway, 195 Cal. 711, 235 P. 1012. Respondent testified to knowing decedent, her husband's cousin, for 29 years, during which decedent had never discussed her business affairs with respondent. When Mrs. Nelson phoned her in November that decedent was sick she went to decedent's flat and found that she was cold. Respondent and her son took decedent to their home, where she stayed for 10 days, after which time decedent wanted to go home. Respondent and a Mr. Blahy took her home to her cold flat where she remained alone. Respondent did not phone appellant about decedent's condition. On November 29th Mrs. Nelson again phoned respondent about decedent. Respondent went to the flat. Dr. Haage had been called by someone other than respondent. Respondent did not remember whether the doctor was there or came in after respondent's arrival. Respondent accompanied decedent to the hospital. Respondent informed the hospital authorities of appel-

lant's relationship. The next day she phoned appellant's wife. Decedent asked respondent to obtain a lawyer for her. Respondent suggested Attorney Mueller, who had represented decedent before, but decedent rejected him. Respondent then suggested Attorney Scott and decedent agreed. Respondent had a "nodding acquaintance" with Scott as they had adjacent summer homes on the Russian River. Respondent called her son asking him to call Scott. At the hospital respondent introduced Scott to decedent. Respondent did not inform him of decedent's relatives because she only knew appellant and of a nephew in Chicago. Respondent was not present when the will was discussed nor during its execution. She entered the hospital room just as the nurse and Scott were leaving. Respondent did not know that a will had been made until decedent so informed her two days later. She was not told its contents. She learned that she was executrix and a beneficiary only after decedent's death. She told appellant the day he visited his aunt in the hospital that decedent had made a will.

Appellant's mother had lived with decedent from the death of the latter's husband until her own death five years before that of decedent. Appellant got along well with his aunt whom he visited three to four times a year. It was not until after her funeral that respondent told him that decedent had made a will and torn up the old one. In 1938 decedent told him of a will she had made. About that time she set up a joint tenancy with him in a safe deposit box, giving him a key which he still possessed. She never requested its return. The 1927 will was still in the box at the time of her death. Neither he nor any member of his family had ever quarreled with decedent.

The night before she went to the hospital decedent told Mrs. Van Gieson that respondent had treated her badly when she was at respondent's home. Decedent nearly froze because they threw all the windows open. Decedent had made respondent bring her home.

Barbara Crowley had been friendly with decedent and respondent for a long time. On Wednesday or Thursday before decedent died, respondent told Mrs. Crowley that decedent had made a will in which appellant was excluded, saying "I fixed that"; that decedent had left a little to sisters, to Bobbie (appellant's son) and to respondent. Respondent had gotten a lawyer for the will and a doctor and nurse had signed it. The witness had seen decedent at respondent's home about a week before she went to the hospital and the house was cold. The heater was not operated until the witness complained.

Katherine Leap lived across the street from decedent and knew her for about six years. While decendent was at respondent's home decedent told the witness on the phone that she was frozen; that all the windows were kept open, that she wanted to go home but they would not let her, and that she taken there by respondent and her son grabbing each arm and taking her to the automobile.

Attorney Mueller prepared the 1927 will. The attorney-client relationship between him and decedent commenced in 1926 and continued. From time to time he had performed services for her and gave her advice. There never had been any misunderstanding between them nor any disagreement. Respondent testified that decedent did not want Mueller because he had previously attached her safe deposit box in order to collect a bill and that he had beaten her out of $1800.

[12] A nonsuit may be granted when disregarding all conflicting evidence and giving contestant's evidence all the value to which it is legally entitled indulging every legitimate inference that may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to obtain a verdict in favor of contestant. In re Estate of Teed, 112 Cal.App.2d 638, 247 P.2d 54; In re Estate of Bemmerly, 110 Cal.App. 550, 294 P. 33.

[13] "Substantial" evidence means more than a mere "scintilla" of evidence. The usual indications of undue influence are (1) unnatural provisions in the will, (2) the dispositions of the will being at variance with the expressed intentions of the testatrix, (3) an opportunity of the beneficiary to control the testamentary act, (4) decedent's condition to be such as to permit of a subversion of her freedom of will, (5) confidential relationship between beneficiary and testatrix, and (6) beneficiary active in procuring the execution of the will. See In re Estate of Lingenfelter, supra, 38 Cal.2d 571, 241 P.2d 990.

[14, 15] (1) Here the provisions of the will were not unnatural. Comparing it with the will of April 28, 1927, upon which appellant relies, there is no such difference as would be expected in a will obtained by undue influence. The early will made respondent's husband the executor, with appellant alternate executor. The later will makes respondent executrix. The earlier will gave appellant's mother 5/15ths of the estate and the other 2/3rds to decedent's sisters in shares of 2/15ths each, and nothing to respondent. At the time of the later will the sisters were all dead. It gives appellant $100, 1/7th of the estate to appellant's son Robert, 1/7th to the children of each of the deceased sisters, and 1/7th to respondent. Thus it increases slightly the interests of the descendants of the sisters, over that given their mothers in the first will, except as to appellant's mother's descendants. As to them there is a reduction from 5/15ths to 1/7th plus $100. It places appellant's branch of the family upon the same footing as that of the other branches. There is nothing unnatural or unusual in a testator giving an old friend a share in the estate, nor in reducing an amount left to a nephew. A nephew is not a natural object of a person's bounty. In re Estate of Nolan, 25 Cal.App.2d 738, 742, 78 P.2d 456; In re Estate of Martin, 170 Cal. 657, 151 P. 138. Respondent was the person a neighbor called in when decedent was sick and was the one who accompanied decedent to the hospital. At the hospital she made a $100 deposit in order to obtain entry for decedent. From the record she apparently was the only one interested in the old lady's welfare. The will shows that in spite of her old age and illness testatrix had a clear conception of who her relatives were. It is unusual to find a situation in which one who it is claimed has the power to unduly influence a testator, is content with receiving a modest 1/7th interest for herself. (2) We have no expressed intentions of the testator with which the will is at variance, other than the difference in wills made 26 years apart. (3) While the evidence upon the subject is not strong, there is evidence of an opportunity by respondent to control the testamentary act. Respondent procured the lawyer for decedent; she claimed that decedent declined to use the lawyer who had represented her for years because of a reason which that lawyer denied existed. While the testimony of Dr. Haage is unsatisfactory and confused, a jury could have determined therefrom that respondent and her son were in decedent's room at the time of the execution of the will. (4) Likewise it can be inferred that because of decedent's physical weakness she would have been unable to resist a subversion of her freedom of will had such subversion been exerted by respondent.[2] (6) Other than the testimony of Mrs. Crowley, there is no evidence of the exertion on decedent by respondent of pressure to bring about the testamentary act. There are some suspicious circumstances, such as respondent's false testimony in her deposition that she did not know the lawyer, had not suggested him to decedent, did not know of the will until after the latter's death. But Mrs. Crowley testified that shortly before decedent's death respondent told the witness that decedent had made a will leaving appellant nothing, and stated "I fixed that." We know of no way in which a court in order to grant a nonsuit may completely

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[2] (5) There is no evidence of confidential relationship between testatrix and respondent.

disregard this testimony. If believed, it puts respondent in the position of having admitted in effect that the will in respect to its treatment of appellant was the will of respondent and not of testatrix. The determination of the credibility of Mrs. Crowley is not a matter for the trial court on nonsuit, nor for this court, but for the jury. It is with reluctance that we reverse the judgment on this issue, because it must be admitted that the evidence other than the testimony of Mrs. Crowley is exceedingly weak. However, we have no alternative as Mrs. Crowley's testimony, if believed, would support a finding of a jury, if made, that the will was the result of respondent's "fixing" rather than the judgment of the decedent.

The judgment is reversed as to the issue of undue influence. In all other respects it is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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151 Cal.App.2d 298

W. J. MARINUCCI, Plaintiff and Respondent,

v.

Richard BRYANT, Defendant and Appellant.

Richard BRYANT and Lillian Bryant, Cross-Complainants and Appellants,

v.

W. J. MARINUCCI and Mrs. W. J. Marinucci, Cross-Defendants and Respondents.

Civ. 22032.

District Court of Appeal, Second District, Division 3, California.

May 27, 1957.

Hearing Denied July 24, 1957.

Action against husband and wife for injuries sustained by plaintiff in barroom brawl, wherein husband and wife filed cross complaints for injuries sustained. From adverse judgment of the Superior Court, Los Angeles County, Harold P. Huls, J., and from order denying motion for new trial, the husband and wife appealed. The District Court of Appeal, Shinn, P. J., held that questioning of juror by court as to whether he understood the verdicts was proper when juror was confused by use of the terms "cross claim and cross complainant and cross defendants."

Judgment affirmed and purported appeal from order denying motion for new trial dismissed.

1. Trial 🔑313

In action against husband and wife for injuries sustained in barroom brawl wherein defendants filed cross-complaint for injuries sustained, no irregularity resulted from court's questioning of one of jurors, who was confused by use of terms "cross complainants" and "cross defendants", as to whether he understood the verdicts, which were in favor of plaintiff. West's Ann. Code Civ.Proc., §§ 618, 619.

2. Assault and Battery 🔑29

In action against husband and wife for injuries sustained in barroom brawl which occurred when plaintiff pinched wife's posterior after she had requested him to go away, testimony concerning plaintiff's former alleged indiscreet behavior, offered by wife to rebut any impression that she had been rude to plaintiff, was properly excluded.

3. Assault and Battery 🔑40

In action against husband and wife for injuries sustained in barroom brawl which occurred when plaintiff pinched wife's posterior, whereupon husband and plaintiff commenced fight in which plaintiff claimed one of his legs was twisted, bent and sat on by husband, evidence was sufficient to justify verdict in favor of plaintiff for $10,000.

4. Appeal and Error 🔑217

Contention that error had been committed in permitting jury to separate from Friday night until Monday morning could not be raised on appeal when no objection had been made to separation during trial.

5. Appeal and Error ⚷1069(1)

Mere separation of jury after submission of case does not require reversal of judgment.

6. Appeal and Error ⚷197(6)

Contention that allegations of complaint were insufficient to support recovery of special damages cannot be raised for first time on appeal when evidence of special damages was introduced without objection and no objection had been made to submission of issue of special damages to jury under appropriate instructions.

7. New Trial ⚷104(3)

In action against husband and wife for injuries sustained in barroom brawl by plaintiff, who contended that husband grabbed his leg and came down on it with all his weight, alleged newly discovered evidence, consisting of testimony of witnesses that they saw fight and husband did not at any time grab plaintiff's leg, was merely cumulative and furnished no reason for granting new trial.

8. Trial ⚷344

In action against husband and wife for injuries sustained in barroom brawl which occurred when plaintiff pinched wife in posterior, evidence of statements made by jurors to third persons concerning pinching experiments in jury room were incompetent to impeach verdict. West's Ann.Code Civ. Proc., § 657.

Edward H. Blixt, Los Angeles, for appellants.

Robert S. Butts, Hollywood, for respondent.

SHINN, Presiding Justice.

As the aftermath of a brawl in a barroom, Mr. Marinucci brought suit against Mr. Bryant, seeking compensation for personal injuries, consisting of fractured bones and sprained tendons in one of his legs; by cross-complaint Mr. Bryant sought damages for his injuries, consisting principally of a cut lip and an injured fist, and Mrs. Bryant also sued for compensation, claiming physical and mental suffering as a result of a pinch allegedly administered by Mr. Marinucci. Verdict and judgment were in favor of Mr. Marinucci in the sum of $10,000 and the Bryants appeal.

All was quiet and peaceful when the encounter took place at about 1:30 a. m. in the Cock'n Bull, where the parties regularly foregathered with numerous others, in the late hours, to participate in songfests led by Rudy, the bartender, a tenor. The singing had subsided and most of the patrons had departed. Marinucci was a foreman in the erection of structural steel and a writer of novels and short stories. His weight was 190, his height 6 feet three. For a year and a half he had patronized the Cock'n Bull weekly in the hope of finding someone who would purchase his writings. Mr. Bryant was a salesman. His size was not disclosed. Marinucci and the Bryants were slightly acquainted. They were seated on stools at the bar, drinking; other patrons seated at tables had been served with food. Mr. Bryant, after walking about, retired from the room and was absent about five minutes. Mr. Marinucci who had had "a couple of drinks, anyhow" left his stool and approached that of Mrs. Bryant, who had had only two drinks. He testified that he was going to leave. Remarks of a casual and innocuous nature passed between Mr. Marinucci and Mrs. Bryant; nothing offensive was said by either, but, according to Mrs. Bryant, she did not enjoy having Mr. Marinucci around, and requested him to go away. Instead of complying Mr. Marinucci pinched her where she sat, which caused her to jump, but not to arise. This Mr. Marinucci firmly denied. Mr. Bryant appeared and questioned whether Mr. Marinucci was giving Mrs. Bryant a bad time, and when she answered in the affirmative, the combat started. Each participant accused the other of having struck the first blow. Mr. Marinucci wound up on the floor. He testified that Mr. Bryant grabbed one of his legs, twisted it, bent it and came down upon it with all his weight, which Mr. Bryant denied. The injuries, however, were severe. They necessitated surgical treatment, including the use over a period of weeks of a plaster cast. Mr. Bryant suffered a cut lip and injured his fist. Mrs. Bryant testified that the pinching was painful; when she got home she observed two "finger marks" on her left buttocks and the following day they had turned purple; they remained for a couple of weeks and she suffered pain when she sat down hard. She received no medical attention for her injuries.

The points on the appeal are the following: (1) There was irregularity in questioning one of the jurors whether he understood the verdicts; (2) the questioning of Mrs. Bryant by her counsel as to her reasons for telling Mr. Marinucci to go away was unduly restricted; (3) the evidence was insufficient to justify the verdict; (4) the jurors were improperly permitted to separate from Friday until Monday; (5) there was an insufficient pleading of the items of special damages; (6) the court should have granted a new trial upon the ground of newly discovered evidence and misconduct of jurors.

[1] On Friday afternoon the jurors had not agreed upon a verdict. They requested to be reinstructed in the law relating to punitive damages and the instructions were reread. At 5:30 p. m., a verdict had not been agreed upon and the court allowed the jurors to separate until Monday morning. On Monday morning a judge, other than Judge Huls, was presiding. After an hour's deliberation the jurors returned three verdicts. One was in favor of plaintiff against Richard Bryant in the sum of $10,000, compensatory damages. When polled as to this verdict, eight jurors answered "yes" and four answered "no." The jury was polled again, still with four negative answers. Juror Berest answered "no" and Mrs. Bean (No. 7) stated that in the jury room he had answered "yes." Juror Berest stated that he understood that he voted "no on punitive damages" and asked whether he had made a mistake. The court explained that the verdict was for $10,000 compensatory damages and the juror said: "Then I voted yes in that case. I didn't understand it was on the question of punitive damages only." His vote was changed from "no" to "yes" and the verdict was received. The clerk then read a second verdict in favor of Marinucci and against Richard Bryant on the latter's cross-complaint. Mr. Berest was confused but when the verdict was explained voted "yes." The vote being nine to three, the verdict was received.

The clerk then read the verdict on the cross-complaint of Lillian Bryant which read that it was for "cross-defendant W. J. Marinucci and against cross-complainant Lillian Bryant." Mr. Berest was still confused and the court asked him: "Well, did you vote in favor of either of the defendants and cross-complainants Bryant to receive anything? Juror No. 3: Against *cross-defendant* Bryant to receive any punitive damages." The court then stated: "Well, as I understand it, the two defendants filed cross-complaints, so they have cross-claims against the plaintiff. In that respect they, in effect, occupy the position of plaintiffs against the plaintiff who, in effect, is a defendant. They are called cross-complainants, that is, the defendants, and the plaintiff is called a cross-defendant. Now, do you understand that? Juror No. 3: Yes. The Court: In this instance this verdict is in favor of the cross-defendant and against the cross-complainants. This means that this verdict awards the defendants on their cross-claim, in which they are the cross-complainants, nothing as against the cross-defendant, who is the plaintiff. Juror No. 3: In other words, nothing is for whom, exactly?" Caught unawares by this surprising lack of understanding of the court's painstaking explanation, the court stated: "Nothing for either of the defendants. This particular verdict names which cross-defendant? The Clerk: Cross-defendant is W. J. Marinucci. The Court: I mean *cross-complainant*. The Clerk: The cross-complainant in this one we are polling is Lillian Bryant." As a last and late resort the court had Mrs. Bryant and Mr. Marinucci stand and explained which one was the cross-complainant and which the cross-defendant. When it was ascertained that the juror was voting that the lady who was standing would not get anything against the man who was standing, the third verdict was received.

Appellants say the jurors should have been sent back to the jury room. They rely upon section 618 of the Code of Civil Procedure which provides in part that if "more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case." The section is to be read with section 619: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out." There was no real disagreement. Juror Berest was confused by the use of the terms "cross-complainants" and "cross-defendant" and the court's explanation that in one aspect of the case the plaintiff was the defendant and the defendants were the plaintiffs. When the juror could forget those terms, and the court's elucidation of them, which was the sole cause of his confusion, and could identify the litigants in person, he had no difficulty in making it clear that he was on the side of Mr. Marinucci and against Mrs. Bryant. It was the duty of the court to ascertain the cause of the juror's confusion and to explain the meaning of the verdict. It is problematical whether this could have been accomplished without the assistance of the court. The questioning by the court was entirely proper.

The incident is of interest to us for the reason that it illustrates the difficulty the lay mind encounters in the comprehension of legal phraseology. The need for clarity and simplicity exists whenever it is the duty of the court to give assistance to jurors in the performance of their duties. The incident should also be of some interest to those naive composers of involved statements of legal principles who theorize that jurors have the mental capacity to understand and keep in mind not only the basic principles but also the finespun legal distinctions in as many as 81 instructions in a simple case. See, Butigan v. Yellow Cab Co., — Cal. App.2d —, 310 P.2d 132.

[2] The next point is that defendants were not allowed to offer evidence as to Mrs. Bryant's reasons for requesting Marinucci to go away. On cross-examination she had testified that she had had only general conversations with him before the night in question, and that she had not addressed him on that occasion before he had spoken to her; also that there had not been any prior difficulties between them. On redirect examination counsel for defendants questioned her as to what she had observed of former conduct of Marinucci at the same bar and also at the home of her mother. Plaintiff's objection was sustained. Defendants' counsel then offered to prove that she had seen Marinucci put his arms around women and "molest them by conversation" and "that the fellow is more or less of a buttinsky—he butts into all groups and conversations—and that he is known as being a freeloader, that is, a fellow who gets into parties to get free drinks, and that is the reason she asked him to leave." The purpose of the offer was to rebut any impression that Mrs. Bryant had been rude toward Mr. Marinucci. Plaintiff objected to the offer of proof upon the ground that it would bring in issue Marinucci's character in a manner prejudicial to him. The court stated: "It is sufficient that she told him to go away, she didn't want him there, and that is the only material thing, as I see it, at the moment. The offer is rejected." The trial court was also of the opinion that evidence that Marinucci was possessed of extroversive propensities to the extent so lucidly described by counsel might create prejudice against him; and it is apparent that it would have had that effect in the mind of anyone who held to higher standards of barroom etiquette than those sought to be attributed to Mr. Marinucci. The court properly refused to permit the

trial of the collateral issue of Mr. Marinucci's former allegedly indiscreet behavior. Moreover, if the jurors had believed Mrs. Bryant's testimony, Mr. Marinucci would have been portrayed as a distinct nuisance in a barroom. If they had disbelieved it they would not have been impressed by her testimony that he fitted her counsel's unflattering description of him. The offer was properly rejected.

[3] The next contention is that the evidence was legally insufficient to prove that Bryant was the aggressor or that he inflicted the injuries which plaintiff described. Marinucci testified explicitly to the extent of the injuries and the manner in which they were inflicted. That was legally sufficient.

[4, 5] There is no merit in the contention that the court was in error in permitting the jurors to separate from Friday night until Monday morning. The matter of the adjournment and separation of the jurors was discussed openly, the jurors expressed a desire to go home, and counsel in the case stated no objection. Their silence was the equivalent of express consent to the separation of the jury. The contention that error was committed cannot be raised on appeal when no objection was made during the trial. And it has been held that the mere separation of the jury after the submission of the case does not require a reversal of the judgment. McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797.

[6] Appellants' next point is that the verdict for $10,000 no doubt included an award of special damages and that the same could not be recovered because of insufficiency of the allegations of the complaint. The complaint alleged that plaintiff had incurred liability for medical expenses and services to the date of the commencement of the action and would be liable for further expense of the same nature, the amount thereof being unknown. In the complaint recovery was asked for medical expenses incurred and to be incurred. The complaint was not amended to state a specific amount, but evidence of the items of plaintiff's special damages was introduced without objection, and no objection was made to the submission of the issue of special damages to the jury under appropriate instructions. The point may not be raised for the first time on appeal.

[7] The final contention is that the court should have granted appellants' motion for a new trial on the ground of newly discovered evidence and misconduct of the jury. On the motion for new trial appellants filed affidavits of Richard Wright and Larry Crosby stating that they saw the fight between Marinucci and Bryant and that Bryant did not at any time grab Marinucci's leg. Aside from the inadequacy of the showing of diligence on the part of appellants, the proposed evidence of the two witnesses would have been merely cumulative and furnished no reason for granting a new trial. 34 Cal.Dig., New Trial, 🔑 104, p. 480.

[8] It was stated in an affidavit of Mr. and Mrs. Bryant as follows: "That both these affiants were present, both in the court room, and in the corridors outside the court room, when many newspapermen were interviewing all members of the jury. Many jurors told the reporters in the court room, and outside the court room, that in their deliberations in the jury room, that the women had pinched themselves on the first day of the deliberations, and that some women had pinched other women in the jury room. That when the jurors returned the next day, none of the jurors had any pinch marks, or black and blue marks in the places that were pinched by the women jurors, and the jurors stated that this was one of the reasons that they decided the case for Marinucci and against these affiants. That the statements of the jurors indicated that women pinched other women, and themselves, and that there were no statements overheard where the men jurors pinched the women jurors." Appellants say in their brief: "Secondly, it would appear to this counsel that when the jury women pinched themselves on Friday, women jurors would pinch themselves, pur-

suant to affidavits, or women jurors would pinch other women jurors. This is apparently taking evidence out of court, and apparently this is partially some experiments upon which they based their judgment. The evidence, in Court, was a man pinching a woman. Generally speaking men have more strength than women. Further, whether the trial court granted a motion for a new trial or not on the grounds that the jury pinched themselves in the jury room. It would appear to be a very good ground for reversal on appeal. It would appear that the jury is basing their decision on evidence taken outside of Court, and that jury experiments were conducted in a manner different than the factual situation in court, to-wit, women pinching themselves, which we know they would not pinch hard. Secondly, women pinching each other, which we know a woman juror would not pinch a fellow juror hard." We agree with counsel for the appellants that if during their deliberations, the women jurors pinched themselves or pinched each other, and on the following day found that the pinching left no bruises, this would have amounted to taking evidence out of court, and it could have influenced some of the jurors to question that the anatomy of Mrs. Bryant was or could have been bruised to the extent she described. We also agree with the earnest argument of counsel for appellants that the alleged pinching that took place in the jury room was highly improper and that it constituted misconduct upon the part of the jurors who participated. He is also correct in saying that in any event evidence of such experiments would have been incompetent for the reason that no comparison can be drawn between a puny pinch administered by one woman juror to another and the surreptitious squeeze of a stimulated steelworker in a barroom, such as the one described by Mrs. Bryant.

But evidence of statements made by jurors to third persons concerning their experiments in the jury room would be hearsay and, in any event, incompetent to impeach the verdict. Even the affidavits of jurors as to occurrences during their deliberations are inadmissible except for the purpose of showing that the verdict was arrived at by resort to chance. Code Civ. Proc. § 657; 24 Cal.Jur. 877.

The trial proceedings were conducted without error.

The judgment is affirmed; the purported appeal from the order denying motion for new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

151 Cal.App.2d 410

CUTTER LABORATORIES, Inc., a corporation, Plaintiff and Appellant,
v.
R. W. OGLE & CO., a corporation, and Robert W. Ogle, an individual, Defendants and Respondents.
Civ. 21962.

District Court of Appeal, Second District,
Division 2, California.
May 29, 1957.

Action by pharmaceutical firm, against inventor of disposable syringe and company which he had created to manufacture it, for declaration of joint venture between parties and for accounting of royalties due. From a judgment of the Superior Court of Los Angeles County, William P. Haughton, J., holding that plaintiff was entitled only to royalties on first two types of syringes manufactured and not on the most commercially successful one and that there was no joint venture, plaintiff appealed. The District Court of Appeal, Richards, J. pro tem., held, inter alia, that evidence sustained trial court's finding that there had been no joint venture and that plaintiff was not entitled to royalties under the agreements on the commercially successful syringe.

Affirmed.

1. Joint Adventures 🔑1.1

A "joint venture" is an undertaking by two or more persons to carry out jointly a single business enterprise for profit.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venture".

2. Joint Adventures 🔑1.4, 1.5

Relationship of joint adventurers is founded on contract, and whether parties have created such a relationship as between themselves depends on their actual intentions, to be determined in accordance with ordinary rules governing interpretation of contracts.

3. Contracts 🔑169

In determining the intent of parties in making contract, trial court may look to circumstances surrounding making the agreement, its object, nature and subject matter, and preliminary negotiations between parties and thus place itself in the same situation in which the parties found themselves at time of contracting.

4. Joint Adventures 🔑2
Patents 🔑218(1)

Agreements between one who had applied for patent for disposable syringe, company which he had formed to manufacture it, and pharmaceutical firm, providing that parties would mutually cooperate toward successful commercialization of syringe in all aspects, that inventor assigned half interest in "said invention" to pharmaceutical company which agreed to purchase stated number of these syringes and that inventor's company would divide specified royalties between pharmaceutical firm and inventor, properly construed, contemplated payment of royalties to be derived from manufacture of only the syringe which had been developed to point of filing application and not a joint venture giving firm rights in subsequently developed syringes.

5. Joint Adventures 🔑1.15

Question of existence of relationship of joint venture was primarily for trial court to determine from facts and inferences to be drawn therefrom.

6. Appeal and Error 🔑1011(1)

Where there is conflict in evidence, appellate court will not disturb findings of trial court, unless it be demonstrated that there is no substantial evidence to support findings.

7. Patents 🔑219(5)

In pharmaceutical firm's action, against inventor of syringes and firm which he had organized to manufacture and sell them, on royalty agreement providing that inventor's company was to pay pharmaceutical firm half of royalties on described syringes, trial court's findings that royalty agreement related only to disposable syringes of stoppered needle type and that it did not include the syringes which were subsequently developed by inventor was supported by the evidence.

8. Jury 🔑14(3)

Action brought to declare existence of partnership or joint venture and for an accounting thereon is equitable in nature and neither party is entitled to jury trial as a matter of right. West's Ann.Code Civ. Proc., § 1060.

9. Trial 🔑370(2), 374(2)

In equitable action, court in its discretion may permit jury trial but verdict is merely advisory.

10. Appeal and Error 🔑1062(1)

Since jury's verdict in equitable action to declare existence of joint adventure was advisory only, submission of equitable issues to jury could not be properly assigned as error. West's Ann.Code Civ.Proc., § 1060.

11. Appeal and Error 🔑1065

No error in instructions could be ground for reversal in equitable action, since verdict was merely advisory.

12. Appeal and Error 🔑1060(1)

No conduct of counsel in argument to jury or in making statements in presence of jury could justify reversal in equitable case, since jury acted only in advisory capacity.

13. Corporations ⚿1

In action against inventor and corporation he founded, on agreement between them and plaintiff providing that certain royalties were to be divided between inventor and plaintiff, isolated fact that inventor deposited one check of company funds to his own bank account was insufficient to prove bad faith or abuse of exercise of corporate control so as to disregard corporate entity.

◆

John W. Preston, Jr., Los Angeles, Eckhoff & Slick, San Francisco, and Robert P. Schifferman, Los Angeles, for appellant.

Gray, Binkley & Pfaelzer, John T. Binkley and Orville A. Armstrong, Jr., Los Angeles, for respondent.

RICHARDS, Justice pro tem.

This is an appeal by the plaintiff from a judgment in its favor against the defendant R. W. Ogle & Co. for $14,445 in an action brought by the plaintiff against R. W. Ogle and R. W. Ogle & Co., a corporation (hereinafter referred to as "Ogle Company"), upon an alleged joint venture between the plaintiff and the defendants Ogle and Ogle Company relating to the development of disposable syringes. A second cause of action sought an accounting of royalties alleged to be due to the plaintiff on all syringes manufactured and sold by the defendants; and a third cause of action sought judgment against the defendants for $25,749.60, with interest, for money had and received by the defendants for plaintiff's use and benefit.

The matter was tried before a jury, which rendered an advisory verdict only, and the court thereafter made and entered its findings of fact that, among other things, certain agreements entered into between the parties dated July 27, 1951 did not create or constitute a joint venture or partnership between them and that there was no joint venture between the plaintiff and the defendants or either of them for the development, manufacture or sale of any syringe; that under the agreements, the royalties payable by the Ogle Company to plaintiff and Ogle were on two types of syringe only and not on any other type or types of syringe manufactured and sold by the defendants; that the amount of royalties due and owing to the plaintiff from Ogle Company was $14,445. Judgment was entered accordingly, and whereas the defendants contended at the trial that no royalties were due the plaintiff, Ogle Company has not appealed from the judgment against it.

Plaintiff makes the following contentions on this appeal: (1) Insufficiency of the evidence to support the finding that the parties did not sustain the relation of joint adventurers, and the finding that appellant was entitled to royalties on only two types of syringe, (2) error in submitting the case to a jury for an advisory verdict, (3) errors in the jury instructions, (4) prejudicial misconduct by defense counsel, and (5) error in not awarding judgment against Ogle individually.

Viewing the evidence in the light most favorable to the respondents, as we must, it appears that the defendant Robert W. Ogle is an inventor, and during the years 1949 and 1950 he conceived an idea for a disposable syringe with a stoppered needle and corresponded with several pharmaceutical laboratories, including the plaintiff, concerning the development of such a syringe. On June 15, 1951 he executed an application for letters patent for a disposable syringe with a stoppered needle and this application was filed on July 9, 1951. The disposable syringe referred to in the patent application consists of a plastic barrel with a conventional steel needle in one end and a rubber piston in the barrel. Over the needle end of the barrel is a plastic cap or cork which, when pressed against the end of the barrel, forces the needle into the end of the plastic cap, thus providing a stopper or plug in the hollow end of the needle and hermetically sealing the needle against contamination and retaining the medicant in the barrel. Upon use, the cap or cork is removed and is screwed into the rubber piston and upon use of the packed dose the syringe is then disposed of. This invention was referred to throughout the trial as "Type 1 syringe". On July 27, 1951 a written agreement was entered into between the plaintiff, Ogle and Ogle Company reciting that Ogle had invented a disposable syringe for which application for letters patent had been made and that it was the desire of the parties "to mutually cooperate towards a successful commercialization of said Syringe in all its aspects" and by this agreement Ogle assigned to plaintiff one-half of his interest in "said invention of a Disposable Syringe"; plaintiff agreed to assign to Ogle a one-half interest in any invention it had or might acquire within any allowable claim of Ogle's invention; plaintiff and Ogle agreed to grant to Ogle Company the exclusive right to manufacture the syringe and plaintiff agreed to purchase 11,000 of said syringes from the company and to advance to the company $10,000 as purchase price thereof. Contemporaneously the same parties entered into a second agreement reciting that plaintiff and Ogle were the co-owners of inventions relating to a disposable syringe and that the Ogle Company was desirous of obtaining the exclusive manufacturing and sales rights thereto and that in consideration of the mutual covenants and conditions, plaintiff and Ogle granted such exclusive right to Ogle Company and the company agreed to pay a specified royalty "for each Disposable Syringe of the Stoppered Needle Type", and "for each Disposable Vial Syringe", the royalties to be equally divided between plaintiff and Ogle.

Following the execution of these documents, the company manufactured for plaintiff some of the Type 1 syringes, which proved unmarketable due to the fact that the plastic stopper or plug in the needle sometimes remained lodged in the hollow core of the needle when inserted into the patient. Thereafter, Ogle attempted to correct this condition and developed a second syringe, referred to as "Type 2 syringe". Instead of cutting a plastic plug from the head of the cap or cork in which it was imbedded as in Type 1, the mouth of the needle in Type 2 syringe was seated in a rubber cap and the rubber, being resilient, did not form an actual plug or stopper in the needle and with the development of Type 2 syringe the company discontinued the manufacture of Type 1 syringe. The Type 2 syringe also proved unmarketable due to the fact that minute particles of the soft rubber were sometimes chewed off by the sharp point of the needle and these small pieces of rubber remained lodged in the hollow needle and produced a similar hazard to that encountered in the use of Type 1 syringe. Some time later Ogle conceived a new idea for sealing the end of the needle, not involving the use of a stopper or plug but by inserting the needle into a conical hole in the cap or cork so that the diagonal aperture of the needle fitted snugly against the inside of the plastic cap, thus retaining the medicant in the barrel of the syringe. This type of syringe was referred to as "Type 3 syringe". Ogle's application for letters patent on the Type 3 was filed in May 1953 and letters patent subsequently issued thereon. This device proved marketable and was licensed by Ogle to Ogle Company and several million of the Type 3 syringes were sold. The same company also manufactured and sold, during the period in question, two other types of syringe not involving the use of either a needle or a stopper.

[1-3] The principal question involved in this appeal is whether a joint venture existed between the parties entitling the plaintiff to royalties on all types of disposable syringes manufactured and sold by Ogle Company. A joint venture has been defined as "an undertaking by two or more persons jointly to carry out a single business enterprise for profit". Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931, 933. The relationship of joint adventurers is founded on contract (Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 308, 149 P.2d

281), and whether the parties have created such a relationship as between themselves depends on their actual intention, to be determined in accordance with the ordinary rules governing the interpretation of contracts (Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 764, 128 P.2d 665), and "[a]s an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement [citations], including the object, nature and subject matter of the writing [citations], and the preliminary negotiations between the parties [citations], and thus place itself in the same situation in which the parties found themselves at the time of contracting" (Universal Sales Corp. v. California Press Mfg. Co., supra, 20 Cal.2d at page 761, 128 P.2d at page 671).

[4] The plaintiff contends that a joint venture was established as a matter of law by the written agreements between the parties and that the trial court erred in finding to the contrary. If we understand its argument correctly, the contention is that the object of the joint venture alleged to have been created by the agreements was the development of disposable syringes generally, and it is not contended that a joint venture was established for the business of manufacturing and selling syringes. Construing the two agreements together, as plaintiff insists we should, we cannot see that they contemplate the carrying out of a business enterprise of developing a disposable plastic syringe, but rather that the agreements contemplate the payment of royalties to be derived from the manufacture and sale of a described disposable syringe which Ogle had already developed to the point of filing a patent application. Plaintiff vigorously asserts that the recital clause in one of the agreements that "it is the desire of the parties to mutually cooperate towards a successful commercialization of said Syringe in all its aspects" shows the intent of the parties to create a joint venture in the development of any type of disposable syringe. It will be noted that in this clause reference is made to "said Syringe" which in the same agreement is previously referred to as the syringe for which Ogle had made application for a patent. The quoted clause, which we believe was an expression of the intent of the parties, fully justified an inference that the purpose of the agreement was not to establish a business of developing a syringe but the commercialization of a syringe already developed by Ogle, and we cannot say that the court erred in finding that the agreements did not establish a joint venture.

Universal Sales Corp. v. California Press Mfg. Co., supra, upon which the plaintiff places great reliance, involved a written contract by which plaintiff agreed to purchase a certain pellet press and defendant agreed to pay to the plaintiff a fixed percentage on all sales of similar presses manufactured and sold by defendant. The agreement therein further provided that defendant would endeavor to patent the machine or any improvements thereon and would transfer to plaintiff a 20 per cent interest in any such patent or in any improvements thereon that might be made by either party. Thereafter the defendant developed a variant form of press which was successful and the plaintiff sued for its interest in the patents on the new press and for its share of the sales thereof. The trial court found that the contract was an agreement of the parties to cooperatively endeavor to perfect the press and improvements thereon and that the plaintiff was entitled to a recovery. The question on appeal was whether the evidence consisting of the agreement itself and the negotiations and dealings of the parties was sufficient to sustain the findings of the trial court, and it was held that the evidence was sufficient to establish that there had been created between the parties a relationship akin to a joint venture, and that the construction given to the contract by the trial court appeared to be consistent with the intent of the parties and therefore another interpretation would not be given to the agreement although equally tenable. A careful reading of the decision indicates that the factor which differentiates it from the matter at bar is that the agreement in the Universal Sales case expressly covered improvements on the existing machine and that it was clear from the agreement that the parties intended to associate themselves for the development of a marketable machine, with the original model as provisional rather than a perfected machine. The decision does not necessitate a similar interpretation of the contracts before us. Pacific Atlantic Wine, Inc., v. Duccini, 111 Cal.App.2d 957, 245 P.2d 622, cited by plaintiff, reversed a judgment based upon a nonsuit on the ground that there was sufficient evidence upon which the court could have drawn an inference of the creation of a joint venture, but did not decide whether a joint venture was or was not created by the evidence. In Replogle v. Ray, 48 Cal.App.2d 291, 119 P.2d 980, also relied upon by plaintiff, the existence of a joint venture was conceded and the only question before the trial court and on appeal was the scope and duration of the venture.

[5, 6] Extensive testimony was presented by each side on the issue of joint venture, and the trial court found upon conflicting evidence that no joint venture existed for the development, manufacture or sale of any type of syringe, The question whether the relationship of joint venture was created was primarily a question for the trial court to determine from the facts and inferences to be drawn therefrom (Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138; Goldberg v. Paramount Oil Co., 143 Cal.App.2d 215, 220, 300 P.2d 329; Oscar Krenz Copper & Brass Works v. England, 109 Cal.App. 747, 751, 293 P. 689). Although the plaintiff contends that this finding is without evidentiary support, it has utterly failed to demonstrate that there is no substantial evidence to support it. Mr. Fred Cutter, Vice-President and Secretary of the plaintiff corporation, who was the principal representative in the negotiations with the defendants, testified that a joint venture was never intended as to the manufacture of syringes. A review of the correspondence between the parties relating to Ogle's development of Type 3 syringe clearly shows that plaintiff's only claim was to royalties on the Type 3 syringe pursuant to the royalty provisions of the agreements and not on any basis of a joint venture in the development of the syringe. Illuminating also is the fact that plaintiff had filed two previous actions against the defendants, each of which was subsequently dismissed, and in neither of them did plaintiff make any allegation that the parties were joint adventurers. There is in the record certain testimony of Mr. Cutter concerning the relationship of a joint interest in the syringe, but this testimony merely created a conflict in the evidence which was resolved by the trial court. It is an established rule that where the evidence is in conflict, an appellate court will not disturb the findings of the trial court unless it be demonstrated that there is no substantial evidence to sustain the trial court's findings. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

[7] We turn now to the finding that under the agreements of the parties, plaintiff was entitled to royalties on only Type 1 and Type 2 syringes and not on any other syringe manufactured and sold by the defendants. The court specifically found that the royalties payable under the agreements were only on "disposable syringes of the stoppered needle type" and further found that only Type 1 and Type 2 syringes were "stoppered needle" syringes. Notwithstanding testimony of plaintiff's expert witness that in his opinion Type 3 syringe was a stoppered needle syringe, there was testimony by Mr. Ogle that it was not a stoppered needle syringe, and the court had before it not only the patent application but samples of the various syringes from which it could make its own visual appraisal of the contention that Type 3 was a stoppered needle syringe. We have examined the same exhibits and cannot say that the trial court's finding that Type 3 syringe was not embraced within the royalty agreement lacks evidentiary support.

[8–12] Plaintiff's next three assignments of error revolve around the court's submission of equitable issues to the jury. Over the plaintiff's objection, the entire case was tried before a jury. At the conclusion of the trial, the court submitted certain issues of fact to the jury, which rendered a verdict only upon the issues so submitted and did not render a general verdict on any issue. An action brought under the provisions of Code of Civil Procedure sec. 1060 to declare the existence of a partnership or a joint venture and an accounting thereon is equitable in nature and neither party is entitled to a jury trial thereon as a matter of right (Dills v. Delira Corp., 145 Cal.App.2d 124, 302 P.2d 397). "If the action is addressed to equity powers of the court, the matter is one for the trial court alone or sitting with an advisory jury" (Dills v. Delira Corp., supra, 145 Cal.App.2d at page 128, 302 P.2d at page 400). In an equitable action the court in its discretion may permit a jury trial but the jury's verdict is merely advisory and does not bind the court. Bettencourt v. Bank of Italy, 216 Cal. 174, 179, 13 P.2d 659; Olson v. Foster, 42 Cal.App.2d 493, 498, 109 P.2d 388. It is clear that in the case at bar the court treated the entire case as an equity action and submitted the issues to the jury for an advisory verdict only. The court abdicated none of its functions to the jury, as the plaintiff contends, as it made findings of fact on all of the issues raised by the pleadings. Plaintiff is in no position to complain, as the entire case was tried by the court, the jury acting in an advisory capacity only. We find it unnecessary to consider the numerous claims of error in the jury instructions for the reason that if any of such instructions were erroneous such error is not a ground for reversal inasmuch as the verdict was merely advisory (Richardson v. City of Eureka, 110 Cal. 441, 446, 42 P. 965; Myrick v. Bruetsch, 13 Cal.App.2d 219, 225, 56 P.2d 591; Wells Fargo Bank & Union Trust Co. v. Brady, 116 Cal.App.2d 381, 402, 254 P.2d 71). Contention is made that defense counsel was guilty of misconduct in certain statements made in the presence of the jury, but such a matter would not justify a reversal in any event since the jury acted only in an advisory capacity and findings on all of the issues were made by the court (Myrick v. Bruetsch, supra, 13 Cal.App.2d at page 225, 56 P.2d at page 594).

[13] The only remaining question is whether the judgment should have been awarded against Ogle individually. The court found that the recognition of Ogle Company as a separate entity from Ogle, as an individual, would not sanction any fraud or promote any injustice. "In the absence of confusion of corporate with individual affairs, or failing to disclose to third parties the existence of the two entities, or abuse or bad faith in the exercise of corporate control, the corporate entity will not be disregarded" (Shafford v. Otto Sales Co., Inc., 119 Cal.App.2d 849, 862, 260 P.2d 269, 277). Here there was no confusion of corporate with individual affairs, all of the manufacturing and selling being carried on by Ogle Company and all of the patent development being carried on by Ogle individually. Also there was no failure to disclose the existence of the two entities, for in the inception of the transaction plaintiff entered into the joint patent ownership agreement with Ogle, as an individual, and into a licensing agreement with Ogle Company by which Ogle Company only was obligated to pay royalties which were to be divided equally between plaintiff and Ogle individually. Even after the dispute arose as to plaintiff's right to royalties on Type 3 syringe, the correspondence between the parties shows that it continued to recognize the separate entities of Ogle and Ogle Company. There is evidence that after plaintiff attached Ogle Company's machinery and equipment that one check of company funds was deposited in Ogle's personal bank account, but this isolated fact is clearly insufficient to prove abuse or bad faith in the exercise of corporate control and to necessitate a finding that the corporate entity should be disregarded.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

151 Cal.App.2d 380

Hermina Goncales TEIXEIRA et al., Plaintiffs and Respondents,

v.

Emily L. DOMINGOS et al., Defendants and Appellants.

Civ. 5604.

District Court of Appeal, Fourth District, California.

May 28, 1957.

Action to establish trust with respect to certain real and personal property brought by heirs of decedent, who had executed deed conveying interest in realty to her son. From an order of the Superior Court, Tulare County, Frederick E. Stone, J., granting heirs a new trial, the defendant appealed. The District Court of Appeal, Barnard, P. J., held that where trial court's decision in favor of son was based in part on conclusion that decedent had sought independent advice and consulted an attorney in making the conveyance, granting of new trial on ground of newly discovered evidence indicating that attorney consulted by decedent was in fact attorney for her son at time and that due diligence had been exercised in attempting to get such evidence was not an abuse of discretion.

Order affirmed.

1. Appeal and Error ⚷981

New Trial ⚷102(3)

Although a new trial cannot be granted upon ground of newly discovered evidence when it appears that evidence was obtainable at time of trial or that there was a lack of diligence in obtaining such evidence, court has wide discretion in such matter and its ruling will not be disturbed unless an abuse of discretion is clearly shown.

2. Appeal and Error ⚷933(1)

Every presumption is indulged in support of action of court in passing upon motion for new trial, and court's opinion that newly discovered evidence would make a different result probable is entitled to great weight.

3. New Trial ⚷102(3)

Where trial court's decision in favor of son and against other heirs was based in part on conclusion that decedent who conveyed land to her son, had sought independent advice and consulted an attorney, granting of new trial on ground of newly discovered evidence indicating that attorney consulted by decedent was in fact attorney for her son at time and that due diligence had been exercised in attempting to get such evidence was not abuse of discretion.

4. New Trial ⚷35

In action to establish trust with respect to certain real and personal property brought by heirs of decedent, who had signed deed conveying realty to her son, order granting new trial to heirs for error in exclusion of testimony that decedent had stated that in case she died she wanted her interest to go to her heirs was not abuse of discretion.

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Clarence H. Wilson, Hanford, for appellants.

John H. Machado, San Jose, for respondents.

BARNARD, Presiding Justice.

This is an action to establish a trust with respect to certain real and personal property. Frank G. Domingos and John Domingos, who were brothers and engaged in the dairy business, acquired 400 acres in Tulare County early in 1932. They were both single and their mother, Maria Delfina Domingos, kept house for them. John Domingos died in March, 1932. Thereafter, Frank and his mother continued to live on the ranch and two of the plaintiffs, who were then small children, lived with them for several years. These two are twin sisters and their deceased mother was a sister of Frank and a daughter of Maria Domingos. Through probate proceedings in the estate of John Domingos his mother, Maria Delfina Domingos, acquired John's half interest in the property in question.

On March 29, 1937, Frank Domingos left for a visit in the old home of the family in the Azores Islands. On the same day his mother, Maria Domingos, signed by her mark a paper claimed to be a deed conveying her interest in this property to Frank. She could not write her name, and she made her mark on this paper in the office of Mr. Freitas, a Portuguese attorney in Hanford. She went to a hospital shortly afterwards and died there on October 6, 1937. Shortly before that date Frank had returned from the Azores and the deed was delivered to him by the attorney. The deed was recorded on October 11, 1937. Frank continued to operate the ranch and invested some of the proceeds in other property. Frank and Emily L. Domingos were married in April, 1943, and Frank died on March 2, 1949. After his death Emily received a deed which had been executed by Frank under date of July 21, 1948, conveying the property to her.

This action is based on the theory that Maria Domingos conveyed her interest in this property to Frank in 1937 in trust, with the understanding and agreement that he would hold title until the twin sisters who were living with the grandmother at that time reached the age of 21 years, at which time her interest in the property would be distributed to her heirs, of which Frank was one. The plaintiff Hermina Teixeira was a sister of Frank, and the other plaintiffs are children of a deceased sister of Frank. The defendant in the action is the widow of Frank, who was sued individually and as administratrix of Frank's estate. In one count of the complaint the plaintiffs ask that Emily L. Domingos be held to be a trustee for the plaintiffs as to the property in question. In other counts the plaintiffs sought to quiet their title to the same real and personal property, respectively. In her answer the defendant denied that she held title to such real estate and personal property as trustee, claimed that she had full title to said real estate, and pleaded laches and certain statutes of limitation.

After a trial the court found in favor of the defendant, finding that there was no trust, that Emily held title to the estate in fee simple, and that the plaintiffs had no interest either in the real estate or personal property. It was further found that plaintiffs' right of action is not barred by their laches or by the statute of limitations. Judgment was entered accordingly. In a written opinion ordering findings for the defendant the court stated that he was led to that conclusion by three factors: (1) that the grantee Frank Domingos was not in the United States at the time his mother executed the deed; (2) that the mother had sought independent advice and consulted a lawyer; (3) that the mother, who was a Portuguese lady, had sought the services of an attorney who was also Portuguese, which greatly lessened the probability of a misunderstanding "on the part of either the person preparing the document or the one at whose request it was prepared."

Thereafter, the plaintiffs filed a motion for a new trial upon all of the statutory grounds. In support of the motion the plaintiffs filed the affidavits of one M. Teixeira, of plaintiffs' attorney, and of an investigator for plaintiffs' attorney. No affidavits in opposition were filed. At the hearing, after argument of counsel, the motion was submitted. An order was then entered granting the motion for a new trial "on grounds of newly discovered evidence and error in excluding evidence." The court filed a written opinion giving his reasons for granting the motion, stating that one of the affidavits filed in support of the motion "raises a matter which is so vital to the case that the court feels impelled to grant a new trial"; that in arriving at its original decision the court was greatly impressed by the fact that Maria Domingos presumably had independent advice given by an attorney who spoke her native tongue; that if Mr. Freitas, from whom Maria received her advice, was in fact the attorney for her son Frank at the time she consulted with him then all three presumptions which the court had drawn "are open to doubt and should be fully explored in the court trying the action"; that it may develop that Mr. Freitas was not and never had been the attorney for Frank, but in view of the uncontradicted affidavits "it would appear to this court that the plaintiffs are entitled to have that matter fully explored in this forum"; and that the exclusion of certain testimony of one Cardoza when considered with the relationship between Mr. Freitas the attorney, and Frank Domingos the grantee, "gives further impetus to the court's belief that in the interest of justice, a new trial should be granted in this matter." The defendants have appealed from this order granting a new trial.

It is first contended that the showing made in the affidavits was not sufficient to justify an order for a new trial on the ground of newly discovered evidence. It is argued that the affidavit of M. Teixeira was incompetent as it stated only a legal conclusion and because it was necessarily based on hearsay; that this affidavit did not disclose any new evidence because the affiant is the same person as the Miguel Teixeira who testified at the trial, and counsel could have then questioned him with respect to the matter stated in the affidavit; and that no diligence in procuring the newly discovered evidence was shown since counsel for the plaintiffs knew of the witness Miguel Teixeira some time before the trial.

Mr. Teixeira stated in his affidavit that subsequent to the trial the attorney for the plaintiffs informed him that the court had held that Maria Domingos had sought the independent advice of Mr. Freitas, an attorney who also was Portuguese, and that Freitas was the attorney for Maria. He then stated that Freitas "was not the attorney for Maria Delfina at the time of the making of this deed but was the attorney for her son, Frank G. Domingos, and said (Freitas) had been the attorney for said Frank G. Domingos for some time prior to the making of this deed"; and that he informed the attorney for the plaintiffs of this fact at this discussion. In his affidavit the investigator stated that he had taken various steps in making diligent search to find anyone who knew whom Freitas represented, and in particular to establish the fact that Freitas was the attorney for Frank Domingos at the time this deed was made; that he was unable to find such persons or ascertain this fact; and that his efforts continued from the time the preparation of the case for trial began and during the time of trial. The attorney for the plaintiffs stated in his affidavit many facts disclosing that he had made great effort to locate anyone who could establish the fact that Freitas was the attorney for Frank Domingos at the time in question; that he was unable to find such evidence; and that he first learned of it after the decision of the case when he was told by M. Teixeira that Freitas was attorney for Frank Domingos and not for Maria Domingos at the time in question.

[1,2] While the cases hold that a new trial cannot be granted upon the ground of newly discovered evidence where it appears that the evidence was obtainable at the time of the trial, or where a lack of diligence in obtaining such evidence appears, it is also well established that a court has a wide discretion in such a matter; that its ruling will not be disturbed unless an abuse of discretion is clearly shown; that every presumption is indulged in support of the action of the court in passing upon the motion; and that the court's opinion that such evidence would make a different result probable is entitled to great weight. Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497; Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062; Carvalho v. Lusardi, 114 Cal.App.2d 733, 251 P.2d 37; MacKenzie v. Angle, 82 Cal.App.2d 254, 186 P.2d 30; Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960, 961. In the latter case, the court said:

> "The discretion must be reasonably exercised to the accomplishment of justice, and, where there appears to be a reasonable or even fairly debatable justification therefor, an order granting a new trial will not be set aside, although a contrary order might not be disapproved or the appellate court

might be inclined to take a different view."

[3] The respondents' contention that the evidence referred to in the affidavit of M. Teixeira is not new is based on the statement that M. Teixeira is the same person as the Miguel Teixeira who testified at the trial, it being contended that plaintiffs' counsel could have then asked him about this matter. The appellants state in their brief that M. Teixeira is not the same person as the Miguel Teixeira who testified, and this statement is not denied although counsel for appellants stated in oral argument that it must be one of the two Teixeiras who testified at the trial. There is nothing in the record which discloses the facts in this regard. There was an ample showing of diligence in attempting to get such evidence and of the inability to do so. The contention that this new evidence stated only a legal conclusion is without merit insofar as present purposes are concerned. The argument that it must be hearsay is based on the fact that one Soares testified that he was the only person present when Maria Domingos made her mark to this deed, except for Mrs. Domingos and Mr. Freitas. Mrs. Domingos and Mr. Freitas were both dead at the time of the trial. It does not appear that this new evidence is necessarily hearsay. Other factors might appear at a new trial which would justify the admission of that evidence. It does appear that the trial court in originally deciding the case was largely influenced by the supposed fact that Maria Domingos had the independent advice of an attorney of her choice, who spoke the same language she did. The evidence given by the witness Soares is somewhat significant in this connection. He testified that on March 29, 1937, he went with Maria Domingos to Mr. Freitas' office; that the paper in question was on Freitas' desk; that Maria had no conversation there with Freitas, and that Freitas did not explain the paper to her; that the paper was blank and the name "Maria Delfina Domingos" was not written on the paper; that Freitas did not write her name or sign as a witness while they were there; that "She made the cross and I signed my name. There was nothing else done to it"; that "All we did was she made a cross, and I signed"; that he and Maria then left the office and went home; and that Frank Domingos had left for the Azores on that same day.

The situation and circumstances were better known to the trial judge than they could be to an appellate court. He felt that the proposed new evidence might change the result and was something which, in the interest of justice, should be fully explored in a new trial. The matter was one with respect to which the court has a wide discretion and it cannot be held, on the record before us, that this discretion was abused. The matter was a serious one, the evidence showed that the circumstances surrounding the execution of the deed in 1937 had been questionable, the new evidence would cast doubt on the presumptions on which the court had relied, and the trial judge felt that justice required a new trial.

[4] The only other point raised is that the court had committed no error in striking out one question and one answer of the witness Cardoza. In this connection Cardoza had testified that a few days before the death of Maria Domingos she sent for him and he visited her in the hospital; that she asked him to fix up a paper for her saying she wanted it fixed so that the property belonging to her which she got from John should go to her heirs, and suggested that he call an attorney; that he told her that since Frank would arrive in a week or two he would wait and see Frank, and if Frank did not want to do it he would call an attorney; that she replied "Yes, but I don't think Frank will catch me alive"; that she began to cry and said she did not want her property to go to Frank because he had plenty and she wanted everything that came to her from John to go to her legal heirs, especially "those two little twins that lost their mother when they were younger"; that he asked her if she had gotten a paper made and

she said that she had made one paper in Freitas' office, that she made a cross and Soares was a witness, and that she did not know what kind of a paper it was; and that she wanted it fixed so that her legal heirs would receive their legitimate shares of her estate. This evidence was admitted as going to the question of her intent.

Cardoza was then asked concerning an earlier conversation he had with Maria Domingos. The appellants argue that this conversation was in the summer of 1936 but the record shows that although Cardoza was asked twice if it occurred in the summer of 1936 he gave no date, merely saying that it was "one evening, late in the evening." As to that conversation he testified that Frank Domingos had asked him to go with him to see his mother; that Frank took a deed out of his pocket and laid it on the table, and told the witness to go into the kitchen and talk to his mother; that they went in the kitchen and the witness told her that this was a deed from her to Frank for the consideration of $300, and that Frank was to take care of her the rest of her life; that Maria refused to sign the deed; that Maria then had an argument with Frank telling him that he was trying to steal something that did not belong to him, and that she would never sign that deed; that Frank then told him "You can sign as a witness, and I will take you to a Notary, and he'll get one of the witness"; and that he refused to do so, saying "Your mother doesn't want to." The witness was then asked "Did she say to him that she wanted her property to go—" and he replied, "She said that Frank was entitled to his share of her share, he would receive his share but no more. She wanted something to go to her heirs, she says, 'in case I die this interest goes to my heirs'." On motion of appellants' counsel this last answer was stricken. The time of this conversation was not brought out but apparently it was not too long before the deed of March 29, 1937 was supposedly executed. While the exclusion of this answer does not seem too important the court apparently thought it was closely connected with the intention of the grantor in this deed, and thus had some bearing on the matter about which the newly discovered evidence was concerned, and that it furnished an additional reason for a retrial of the case. While nothing conclusive here appears, with respect to the final result, we think the record justifies the order made, and that it may not reasonably be held that an abuse of discretion clearly appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Lorenzo ROBISON, Petitioner,

v.

SUPERIOR COURT OF the State of CALIFORNIA, IN AND FOR The CITY AND COUNTY OF SAN FRANCISCO, et al., Respondents.*

Civ. 17641.

District Court of Appeal, First District, Division 1, California.

May 22, 1957.

Hearing Granted July 17, 1957.

Proceedings on petition for writ of prohibition. The District Court of Appeal, Peters, P. J., held that mere presence of defendant at place where narcotics had recently been sold was, without more, legally insufficient to establish reasonable and probable cause for searching him.

Writ issued.

1. Searches and Seizures 🔑3(1)

Mere presence of defendant at place where narcotics had recently been sold was, without more, legally insufficient to establish reasonable and probable cause for searching him. West's Ann.Health & Safety Code, § 11500.

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* Opinion vacated 316 P.2d 1.

2. Arrest ⚿63(3), 71

Poisons ⚿2

Health and Safety Code section making it unlawful to be in any place where narcotics are being, or have recently been, unlawfully smoked or used was unconstitutional, and ineffective to justify arrest and search without warrant of one found at such place. West's Ann.Health & Safety Code, § 11556.

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Gregory Stout, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Robison was charged with illegal possession of amidone, a narcotic, in violation of section 11500 of the Health and Safety Code. By this proceeding he challenges the sufficiency of the evidence to hold him to answer.

The facts, disclosed at the preliminary hearing, are that one Hall occupied premises at 2945A Bush Street, San Francisco. On the day in question two purchases of heroin were made from these premises by a police informer. The officers arrested Hall and proceeded to search his apartment and the adjoining premises. They found some marked money used by the informer in Hall's apartment and also found some narcotics there and in the adjoining apartment. While the police were still in Hall's apartment, and about an hour after the police entry, Robison knocked on the apartment door. He was invited to enter by a policeman, and greeted several of the officers then present by name. The officers immediately arrested Robison and searched him. In his jacket pocket was discovered a paper-wrapped tablet which turned out to be an illegal narcotic. Robison denied knowing that he had such a tablet in his possession and denied knowing what the tablet was.

[1] It is obvious that, so far as the record discloses, when Robison was arrested and searched, all that the officers knew was that Robison was a visitor to a place where narcotics had recently been sold. Mere presence of the accused, without more, is legally insufficient to establish reasonable and probable cause. As was said by this court in People v. Yet Ning Yee, 145 Cal.App.2d 513, 302 P.2d 616, 618: "At the moment of search the only fact bearing on the question was that defendant was on premises which the officers had reason to believe contained opium. That fact alone would not justify either his arrest or a search of defendant's person. [Citations.] There was nothing to indicate to the officers that defendant was anything other than a casual visitor to the room." See also People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45; People v. Kitchens, 46 Cal. 2d 260, 294 P.2d 17; People v. Schraier, 141 Cal.App.2d 600, 297 P.2d 81.

[2] These authorities would be conclusive on the issue of lack of reasonable and probable cause for the arrest and search were it not for the provisions of section 11556 of the Health and Safety Code, as amended in 1953. That section provides: "It is unlawful to visit or to be in any room or place where any narcotics are being or have recently been unlawfully smoked or used." This section has been in our law, in one form or another, since 1940. (1st Ex.Sess.1940, Chap. 9, § 31, p. 23.) If it be assumed that one who visits a place where narcotics have recently been "sold" is visiting a place where narcotics have been recently "unlawfully smoked or used," a point not without doubt, the statute purports to make mere presence on the premises a public offense, which would, of course, if the statute is constitutional, justify an arrest and search without a warrant. In the recent case of Bonwell v. Justice Court, 148 Cal.App.2d 906, 307 P.2d 716 (hearing denied) the statute was held unconstitutional for the very reason that it purports to prohibit persons from entering such premises no matter how innocent-

ly or for even a lawful purpose. We agree with the Bonwell case.

Without the statute, the proof at the preliminary merely showed "mere" presence at a place where narcotics were recently sold. That is not enough to constitute reasonable and probable cause. Thus, there was a complete failure of proof on the issue of reasonable and probable cause.

Let the writ of prohibition issue as prayed for.

BRAY and FRED B. WOOD, JJ., concur.

151 Cal.App.2d 286

UNION OIL COMPANY OF CALIFORNIA, a corporation, Petitioner,

v.

The SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

and

Roberta Lynn Williams, et al., Real Parties in Interest.

Civ. 22375.

District Court of Appeal, Second District, Division 2, California.

May 27, 1957.

Hearing Denied July 24, 1957.

Petition for writ of prohibition to restrain Superior Court from enforcing portions of an order for inspection in wrongful death actions. The District Court of Appeal, Richards, J. pro tem., held that plaintiff's affidavit which alleged generally that records sought to be inspected were in defendant's possession and were admissible did not allege facts sufficient to support order of inspection.

Writ issued enjoining Superior Court from enforcing portion of order relating to inspection of records.

1. Prohibition 🔑3(3)

Trial court's order for inspection is not appealable and prohibition is the proper remedy.

2. Appeal and Error 🔑1011(1)

Where there is a conflict in affidavits on a factual issue before the trial court, the determination of that issue is binding upon an appellate court.

3. Discovery 🔑84

The right of inspection is remedial in character and should be liberally construed.

4. Discovery 🔑30

In a wrongful death action, there are more compelling reasons for granting discovery than in the ordinary personal injury action where the plaintiff is able to testify as to the circumstances surrounding accident.

5. Appeal and Error 🔑961

Discovery 🔑85

The trial court's action with respect to an inspection is discretionary within the field of reason and justice, all intendments are in favor of the validity of the court's order and the order will not be interfered with unless a clear abuse of discretion is shown. West's Ann.Code Civ.Proc., § 1000.

6. Discovery 🔑90

In actions for deaths of independent contractor's employees killed in refinery accident, where witnesses' statements were secured by refinery pursuant to Petroleum Safety Order and also for use by refinery's attorney in event claim or suits were filed, trial court did not abuse its discretion in permitting plaintiffs to inspect such statements. West's Ann.Code Civ.Proc., § 1000.

7. Discovery 🔑97(4)

An affidavit in support of demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried.

8. Discovery 🔑97(4)

Plaintiff's affidavit which alleged generally that records sought to be inspected were in defendant's possession and were admissible did not allege facts sufficient to support the order of inspection. West's Ann.Code Civ.Proc., § 1000.

9. Depositions ⚿

Necessary information for use in making affidavit which will disclose to the court the identity of the desired evidence in the documents sought to be inspected and its materiality and relevancy to the issues presented may be secured by deposition.

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Ball, Hunt & Hart and Joseph A. Ball, Long Beach, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Walter W. Heil, Beverly Hills, for real parties in interest.

RICHARDS, Justice pro tem.

The petitioner, Union Oil Company, seeks a writ of prohibition to restrain the respondent court from enforcing portions of an order for inspection. The order was made in an action in which the surviving heirs of Francis P. Williams and William P. Farry seek to recover damages from the petitioner for the wrongful death of the decedents, caused by poisonous gases while the decedents were on the petitioner's premises as business invitees, and alleged to have resulted from petitioner's negligent operation and management of its premises and equipment. The plaintiffs in the action filed a motion under section 1000 of the Code of Civil Procedure[1] for an order permitting them to inspect, among other things, (1) written statements of petitioner's employees and independent witnesses who witnessed the accident, and (2) records of all inspections, orders, work orders, approvals and safety precautions issued or made prior to and immediately following the accident.

The affidavit filed on behalf of plaintiffs in support of the motion for the order of inspection alleged that the decedents, at the time of their death, were at the petitioner's refinery as employees of an independent contractor and that while so engaged at approximately 2 a. m. they were overcome by fumes and killed; that at said time the surviving widows and children of the decedents were at their respective homes; that the petitioner, for whom the work was being done, had approximately 40 workmen in the immediate vicinity of the accident, some of whom assisted the decedents in the work being done and participated in the attempted rescue of the decedents, and that there were also independent witnesses at the scene of the accident; that pursuant to a Petroleum Safety Order (Title 8, California Administrative Code, sec. 6761[2]) said employees and independent witnesses made written statements and gave the statements to the petitioner and thereafter a committee was appointed to investigate the accident pursuant to the Petroleum Safety Order; that immediately following the accident each of the petitioner's employees having knowledge of the accident gave a written statement thereof to William Barber, Head of the Fire and Safety Department of petitioner, and a few days thereafter the same employees were questioned and the former statements which they had given were elaborated upon and given in more detail; that the signed witness statements and the committee investigation were each made pursuant to the Petroleum Safety Order and the members of the committee appointed were empowered by petitioner to make a report and recommendations as to unsafe or dangerous conditions on the premises and that the report of the committee contains evidence of the petitioner's participation, control and supervision over the work being done which resulted in the death of the decedents; that the written statements contain admissions against interest by the petitioner's employees and that the statements and report show the nature and extent of the control, care and supervision exercised by the petitioner over the work being done at the scene of the accident as well as the precautions taken by the petitioner for the safety of business invitees on the premises as well as for petitioner's own employees.

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[1] "Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, * * * of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. * * *" Code Civ.Proc. § 1000.

[2] "Reporting Unsafe Conditions (a) Unsafe or dangerous conditions, defects in or damage to machinery, apparatus, or equipment, resulting in unsafe or dangerous conditions, and accidents occurring in the course of operations which may result in personal injury, shall be reported by the employee observing them to his employer. The employer shall investigate such reports, and shall take such action as may be required to correct the condition, if in fact unsafe or dangerous." (Title 8, California Administrative Code, § 6761.)

In opposition to the motion, identical affidavits were made by James E. Hill, petitioner's Supervisor of Fire and Safety, and William Barber, Supervisor of Fire and Safety at the petitioner's refinery where the accident occurred. Each of these affidavits states that on or about the date of the accident, affiant conducted an investigation in collaboration with the other affiant surrounding the accident and that this examination was conducted under the direction of the petitioner's legal counsel with instructions to make all reports and to submit all information obtained together with the witness statements to a designated assistant counsel of the petitioner; that affiant interviewed many witnesses and caused witness statements to be prepared and signed and that all of such statements were forwarded to the petitioner's counsel "pursuant to his instructions and by reason of the fact that claims would be made and suits could be filed" against the petitioner in connection with the accident; that no committee was appointed to investigate the accident; that all written memoranda and records relative to the conditions existing at the time of the accident were delivered to the office of the petitioner's legal counsel and there is no record of any action or recommendation by any investigating committee appointed for that purpose in connection with dangerous or unsafe conditions at the refinery.

The foregoing affidavits comprise all of the evidence which was before the court on the motion for an order of inspection. The petitioner resisted the motion upon the ground that the written and signed witness statements were privileged communications. After the hearing of the motion the court filed its written memorandum of decision stating in substance that the principal issue presented by the motion to inspect the witness statements and report of investigation was the dominant purpose for which they were prepared, and that where it appears that such records are to serve a dual purpose, one for transmittal to the attorney and one not related to that purpose, the court must determine which purpose predominates. The trial court's memorandum reviews the contentions of the parties and concludes that the written statements were made primarily to comply with the Petroleum Safety Order and incidentally for the uses of the petitioner's counsel, and thereupon ordered the petitioner to permit plaintiffs or their attorney to inspect and copy, among other matters, the written witness statements. The petitioner has refused to comply with the court's order and is threatened with contempt proceedings unless the respondent court is restrained by this application for a writ of prohibition.

[1] The trial court's order for inspection is not appealable and prohibition is therefore the proper remedy. Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722; City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581; Franchise Tax Board v. Superior Court, 36 Cal.2d 538, 225 P.2d 905.

[2] In this proceeding the petitioner contends that the attorney-client privilege (Code Civ.Proc. sec. 1881, subd. 2) bars plaintiffs' inspection of the signed witness statements and therefore the order of the trial court was in excess of jurisdiction and an abuse of discretion. Petitioner asserts that its counter-affidavits clearly establish

that the statements were taken by an agent of petitioner's counsel for the purpose of allowing the petitioner to be prepared to defend itself against a claim for damages arising from the accident. However, plaintiffs' affidavit filed in support of the motion alleged, and it is not denied in the counter-affidavits, that the written statements obtained from the employees and independent witnesses participating in the rescue were made pursuant to the Petroleum Safety Order and incidentally for the use of the petitioner's attorney. It is a general rule that where there is a conflict in affidavits on a factual issue before the trial court, the determination of that issue is binding upon an appellate court. Voeltz v. Bakery etc. Union, 40 Cal.2d 382, 386, 254 P.2d 553; Hale v. Bohannon, 38 Cal.2d 458, 465, 241 P.2d 4; Gordon v. Perkins, 203 Cal. 183, 186, 263 P. 231. In this proceeding to prohibit the enforcement of the trial court's order for inspection, the petitioner relies principally upon City & County of San Francisco v. Superior Court, supra, and Holm v. Superior Court, supra. The City & County of San Francisco case involved a medical report made for the plaintiff's attorney and there was no contention that such report was made for any other purpose, which clearly differentiates the decision from the situation here presented. In Holm, the allegations in the counter-affidavits that the documents sought to be inspected were prepared as confidential communications to the city attorney were uncontradicted, and the only assertion of non-privilege was that the documents were prepared in the regular course of business. In the instant matter the problem of dual purpose was squarely presented to the trial court by the affidavits, as the plaintiffs' affidavit alleged, and it was uncontradicted by the petitioner's affidavits, that the written statements were prepared as reports of an accident pursuant to the Petroleum Safety Order. Whereas the petitioner's counter-affidavits alleged that the statements were prepared for its attorney, the affidavits do not allege that the statements were prepared solely for that purpose.

[3, 4] That the right of inspection is remedial in character and should be liberally construed is well established. "[I]n Union Trust Co. v. Superior Court, supra, 11 Cal.2d 449, at page 462, 81 P.2d 150, at page 157 [118 A.L.R. 259], this court stated: 'That the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings of which the inspection of documents is one method * * *.' It further quoted from Corpus Juris, volume 18, page 1116, to the effect that provisions such as Section 1000 are 'remedial in their nature and should be liberally construed.'" Holm v. Superior Court, supra, 42 Cal.2d at page 506, 267 P.2d at page 1028. Plaintiffs' affidavit is uncontroverted that "certain work was being done by them [the decedents] at which time at approximately 2:00 o'clock A.M., they were overcome by fumes and killed. That at that hour the two surviving widows and the four minor children surviving, who are all parties to this action, were all at their respective homes asleep; while on the other hand, the Union Oil Company of California, a corporation, for whom the work was being done had approximately 40 workmen in the immediate vicinity where the accident happened, as well as independent witnesses." We are in accord with the trial court's opinion that "[i]n a wrongful death action, such as this, there are more compelling reasons for granting discovery than in the ordinary personal injury action where the plaintiff is able to testify as to the circumstances surrounding the accident."

[5, 6] As to the discretion of the trial court to grant the motion, the rule is well established that "the trial court's action with respect to an inspection sought under section 1000 is discretionary within the field of reason and justice, that all intendments are in favor of the validity of the court's order, and that the order will not be interfered with unless a clear abuse of discretion is shown" (Dowell v. Superior Court, 47 Cal.2d 483, 304 P.2d 1009, 1014; see, also, American Fed. of Musicians v.

Superior Court, 150 Cal.App.2d 165, 309 P.2d 874; Construction Products Corp. v. Superior Court, 103 Cal.App.2d 403, 404, 229 P.2d 399). The order granting inspection of the signed witness statements was neither in excess of jurisdiction nor an abuse of discretion.

[7–9] The remaining question is whether plaintiffs' affidavit was sufficient to support the order of inspection of "[r]ecords of all inspections, orders, work orders, approvals and safety precautions issued or made prior to and immediately following the accident here in question". Of the seventeen classes of records for which plaintiff sought an order of inspection, the foregoing is a portion of one of seven classes included in the court's order. These records are described in the affidavit as "All records of * * * inspections, orders, work orders, approvals * * * safety precautions * * * made prior to and immediately after the accident here in question." Petitioner contends that the affidavit does not establish the admissibility of such records at the trial nor does it describe the matters to be inspected with sufficient particularity. "[T]he affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried" (McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 396, 159 P.2d 944, 950). Plaintiffs' affidavit contains a general allegation that the records sought to be inspected are in the petitioner's possession and are admissible, but this is a mere legal conclusion on the issue of admissibility. Notwithstanding the trend towards a relaxation in the rules of discovery, "[t]he relaxation of the rule, however, does not mean an abolition of the requirements that the papers be identified and that they be shown to be relevant and material" (McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d at page 397, 159 P.2d at page 950). We are convinced from a careful consideration of plaintiffs' affidavit that it does not allege facts sufficient to establish either the admissibility or identity of the records referred to in the court's order. Plaintiffs, however, are not precluded from obtaining documentary evidence in the possession of the petitioner if it exists and is relevant, for by deposition they "may thereby secure the necessary information for use in making an affidavit which will disclose to the court the identity of the desired evidence and its materialty and relevancy to the issues presented in the [wrongful death] action" (McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d at page 398, 159 P.2d at page 951).

Let a peremptory writ of prohibition issue, enjoining the respondent court from enforcing that part of its order which directs an inspection of records of all inspections, orders, work orders, approvals and safety precautions issued or made prior to and immediately following the accident in question.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; SPENCE, J., dissenting.

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151 Cal.App.2d Supp. 847

Max SNYDER, Plaintiff and Appellant,

v.

Leonard SWENSON et al., etc., Defendants,

Hugh Hooker, Defendant and Respondent.

C. A. 9194.

Appellate Department, Superior Court,
Los Angeles County, California.
May 17, 1957.

Garnishment proceeding. The Municipal Court, Los Angeles Judicial District, Lucius P. Green, J., following immediate release of one-half of judgment debtor's take-home pay impounded upon levy of the garnishment on one of judgment debtor's employers, entered order releasing other half, and judgment creditor appealed. The Superior Court, Appellate Department, Bishop, P. J., held that release of other half was not warranted.

Order reversed for new hearing in trial court.

1. Exemptions ⚷48(1)

Where, in garnishment levied by judgment creditor on one of judgment debtor's employers, one-half of judgment debtor's take-home pay for personal services rendered within 30 days of the levy was released as exempt, fact, if true, that judgment debtor needed sum in excess of one-half but less than all of such take-home pay for support of his family during the period in question would not justify release of other half. West's Ann.Code Civ.Proc., §§ 690, 690.11.

2. Exemptions ⚷48(1)

In garnishment proceeding, one-half of a judgment debtor's earnings, for personal services rendered within 30 days, is exempt regardless of his needs, and all such earnings is exempt provided that it is necessary for use of judgment debtor's family, but all such earnings is not exempt merely because debtor needs one-half for his family. West's Ann.Code Civ.Proc., §§ 690, 690.11.

3. Exemptions ⚷48(1)

Where, prior to levy of garnishment on one of debtor's employers, judgment debtor received money from another employer for services rendered during the 30-day period, amount received from such other employer would not have to be added to take-home pay due judgment creditor from employer levied on in determining what were "all of such earnings" upon which exemption from garnishment could be based. West's Ann.Code Civ.Proc., §§ 690, 690.11.

4. Appeal and Error ⚷994(3)

Where, in garnishment proceeding, effect of testimony, direct and cross, was not to create a conflict which would authorize trial court to believe judgment debtor's first statements as to his rent and medical expenses and to disregard the explanations which demonstrated that such statements were erroneous conclusions, reviewing court would not be bound by trial judge's choice in such matter.

5. Exemptions ⚷48(1)

Where levy of garnishment on one of judgment debtor's employers impounded judgment debtor's take-home pay for personal services rendered within 30 days of levy, but one-half thereof was immediately released as exempt, release of remainder was not warranted in view of fact that judgment creditor's expenses totaled more than amount impounded only if dental bill which was to be paid in monthly instalments, was included in its full amount and if payments to parents of judgment debtor's wife for money borrowed to buy house, which was free and clear of incumbrances, was considered as rent. West's Ann.Code Civ.Proc., §§ 690, 690.11.

6. Courts ⚷190(9)

Where, in garnishment proceeding, municipal court had, after immediate release of one-half of judgment debtor's take-home pay impounded by the levy, erroneously released remaining half of the amount impounded, the Superior Court, Appellate Department, would in exercise of its discretion, reverse municipal court's order for purpose of having rehearing before the municipal court, rather than modify the order to reduce the amount which should be released. West's Ann. Code Civ.Proc., §§ 690, 690.11.

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Simon Taub, Beverly Hills, for appellant.

Ellery E. Cuff, Public Defender, Los Angeles, for respondent.

BISHOP, Presiding Judge.

Each party to this appeal appears in three roles. The plaintiff, having obtained a default judgment against the defendants in an action upon a promissory note given upon the loan of money, thereby became a judgment creditor. He had a garnishment levied on one of the employers of the defendant-judgment debtor, Hugh Hooker, impounding, temporarily, his take-home pay to the amount of $452.53 due for personal services rendered within thirty days of the levy. One-half of this sum was immediately released because it was exempted under the first paragraph of section 690.11, Code of Civil Procedure. Thereupon the defendant-judgment debtor, desiring to obtain the half remaining in the Marshal's hands, filed a verified claim of exemption in which he averred that his earnings were urgently needed for the use of his family because of two things that he listed in this fashion: Home $125; Food $200. "Total listed urgent family needs for the money under levy $325.00." The judgment creditor filed a counter affidavit; the matter was brought on for a hearing; the trial court made an order releasing the half still held by the Marshal; and the plaintiff-judgment creditor became an appellant. We have reached the conclusion that the order should not have been made, the effect of which was to release all of the wages reached by the garnishment.

[1,2] We hold, first of all, that even assuming that the respondent-judgment debtor needed a sum in excess of $226.26 but less than $452.53 for the support of his family during the period in question, that fact would not justify releasing all of the $226.26 retained by the Marshal. Section 690.11, Code of Civil Procedure, is one of the sections listing property that is made exempt by section 690. It reads:

> "One-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30 days next preceding the levy of attachment or execution shall be exempt from execution or attachment without filing a claim for exemption as provided in Section 690.26.
>
> "All of such earnings, if necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) incurred by such debtor, his wife or family, for the common necessaries of life; or, (b) incurred for personal services rendered by any employee, or former employee, of such debtor."

Clearly, one-half of a judgment debtor's earnings (for personal services rendered within 30 days) is exempt, no matter what his needs, and all of it is exempt, provided that all of it is necessary for the use of the debtor's family. We do not see how the words used can reasonably be interpreted to mean that all of the earnings are exempt provided the debtor needs one-half for his family. The trial court apparently interpreted the section as we have, and by so doing, we repeat, it had to find that defendant's needs for his family amounted to at least $452.53 in order to release the balance still held under garnishment.

[3] The case of Medical Finance Ass'n v. Rambo, 1938, 33 Cal.App.Supp.2d 756, 86 P.2d 159, is not in conflict with the position we have taken. At the time that case was decided, section 690.11 provided that one-half of earnings levied upon were exempt if the half was needed by the debtor or his family, and the court was concerned only about one-half of the $78.85 that had been taken by the Marshal, out of some $130 earned, under a writ issued in a case where the debt sued upon was for the services of a doctor (a necessary). The case does, however, answer another question presented by our appeal. The evidence at the hearing revealed that prior to the levy the defendant had received $131 from another employer for services rendered during the thirty-day period. Should this be added to the $452.53, to determine what were "all of such earnings"? The case cited says "no", and we are not questioning the correctness of the answer.

Turning now to the evidence, we need do no more, to lay a foundation for a reversal or at least a modification of the order, than to discover that the evidence was insufficient to warrant the release of all the half retained, the effect of which was to release all the earnings that had been garnished. If, as we must, we eliminate all of an item of $65 for rent and all but $22 of an item of $195 for a dentist bill, the total remaining is $332.50, obviously too little to warrant the release of all the sum in the Marshal's hands.

As to the "rent" the defendant testified on direct examination that it amounted to $65 per month. Under cross-examination he explained his answer. It developed that the house in which he and his family lived had belonged to his wife since 1951; that it was free and clear; that the $65 per month was the sum paid his wife's parents, who gave them the money to buy the house; that the last time the payment had been made was "a year and a half ago." When it was argued to the trial judge that no allowance should be made for rent, in view of this evidence, he stated: "I know, but rent is a necessary item that everybody pays." Of course this is not so, and it was not so in defendant's case. His wife's parents were at most general creditors, and any payment made to them was not for rent, and should not have been included among the items that made up the total necessary for the use of defendant's family.

As to the dentist bill, the defendant on direct, in response to the question: "Did you have any medical bills for the period thirty days prior to September 11th, the date of the levy?" replied "I had a dental bill for $195.00." Then these facts came out on cross-examination: shortly before the levy the defendant took his son to a dentist to have two of his front teeth fixed; the dentist "quoted me $195 for the job. The payments are only $22.00 each month"; the work has not yet been done. The defendant produced a bill from the dentist for October; the amount was $22.00.

[4] The effect of the testimony, direct and cross, was not to create a conflict in the evidence that authorized the trial court to believe the first statements, and to disregard the explanations that demonstrated that the first were erroneous conclusions. In such a situation, the appellate court is not bound by the choice made by the trial judge. Wenban Estate, Inc., v. Hewlett, 1924, 193 Cal. 675, 693, 227 P. 723; Gardiner v. Holcomb, 1927, 82 Cal.App. 342, 350, 255 P. 523; Barton v. McDermott, 1930, 108 Cal.App. 372, 380, 291 P. 591; Baker v. I. A. C., 1933, 135 Cal.App. 616, 624, 27 P.2d 769, 772; Gamberg v. I. A. C., 1934, 138 Cal.App. 424, 427, 32 P.2d 413, 414, 415.

[5] At the conclusion of the hearing the trial court announced that it was going to allow the exemption in full, stating "This man's expenses are over $570 per month." They totalled $570.50, if the item of $65 for rent and the dentist bill for $195 are included. Eliminating the former and reducing the latter to the sum actually due each month, $22, brings the total to $332.50. The release of all of the earnings was clearly not warranted.

[6] A question remains, calling for the exercise of our discretion. We may modify the order appealed from to provide that all but $120.03 should be released, or we may simply reverse the order for a rehearing before the trial court. We have determined that the latter course is most likely to achieve justice, under the law, in this case. We are led to this conclusion because in much of his testimony the defendant evinced great uncertainty. We are unwilling to stand upon his present figures. Moreover, if they are approximately correct, the parties will recognize the uselessness of further hearing, and the matter will be ended.

The order is reversed for a new hearing in the trial court.

SWAIN and KAUFFMAN, JJ., concur.

48 Cal.2d 628

Dennis S. NEFF and Geraldine L. Neff, Plaintiffs and Respondents,

v.

Clement L. ERNST, Administrator of the Estate of Daniel L. Ernst, Deceased, Defendant and Appellant.

L. A. 23988.

Supreme Court of California,
In Bank.

May 31, 1957.

Proceeding involving plaintiffs' property rights, easements and rights of way in vacated streets bounding on their property. From an original judgment, and a modified judgment of the Superior Court, Los Angeles County, Leon T. David, J., the defendant appealed. The Supreme Court, Shenk, J., held that evidence as to appearance of one of vacated streets and as to use made of both streets supported determination that presumption should apply that grantor intended to convey title to center of street and that adjudication of fee title was properly made without reopening proceedings for further evidence.

Appeal from original judgment dismissed and modified judgment affirmed.

Opinion 302 P.2d 894, vacated.

1. Appeal and Error 🔑436, 442

A duly perfected appeal usually divests trial court of further jurisdiction in the cause and of power to act other than with respect to specified excepted collateral matters. West's Ann.Code Civ.Proc., § 662.

2. Appeal and Error 🔑438
New Trial 🔑½

A motion for new trial is recognized to be a matter collateral to the judgment, and trial court retains jurisdiction to hear and determine motion for new trial after appeal has been taken from the judgment. West's Ann.Code Civ.Proc., § 662.

3. Appeal and Error 🔑113(2)

It is not inconsistent nor improper to file both notice of appeal and motion for new trial, and if motion for new trial is granted, judgment is vacated and appeal therefrom becomes ineffective. West's Ann.Code Civ.Proc., § 662.

4. Appeal and Error 🔑428(2)
New Trial 🔑117(1)

Time limit prescribed by statute for filing notice of appeal and motion for new trial is jurisdictional. West's Ann.Code Civ.Proc., §§ 662, 936; West's Ann.Rules on Appeal, rules 1, 3.

5. Appeal and Error 🔑113(5)

Where trial court, after filing by defendants of motion for new trial and notice of appeal from judgment, revised its findings and conclusions of law and entered a modified judgment, from which defendant also appealed, modified judgment became final judgment of trial court and appeal from prior judgment became ineffective. West's Ann.Code Civ.Proc., §§ 662, 936, 963, subd. 2; West's Ann.Rules on Appeal, rules 1, 3.

6. Trial 🔑66

Where original pleadings raised general issue that defendant was interfering or threatening to interfere with plaintiffs' property rights, easements and rights of way in vacated streets, plaintiffs' deed was in evidence, and there was also evidence upon which findings adverse to defendant could be made on affirmative defenses of estoppel, mutual boundary agreement and adverse possession, defendant was not entitled to have proceedings reopened for taking of further evidence on issues. West's Ann.Code Civ.Proc., § 662.

7. Boundaries 🔑20(1)

Transfer of land, bounded by highway, passes title of person whose estate is transferred to soil of highway in front to center thereof, unless different intent appears from grant, and in case of doubt, deed must be construed in favor of grantee. West's Ann.Civ.Code, §§ 1069, 1112.

8. Boundaries 🔑20(5)

Generally, it will be presumed that where property is sold by reference to recorded map, grantee takes to center of street or streets shown on map as bounding property, even though streets shown therein appear to have been vacated or abandoned or deed itself refers to streets as having been vacated or abandoned, and presumption continues to apply in absence of clear expression in deed not to convey title to center line. West's Ann.Civ.Code, §§ 1069, 1112.

9. Boundaries ⚷20(5)

Notice ⚷5

Reference in deed to "matters of record" was sufficient to give constructive notice of vacation of public easement in streets shown on map, but it was not sufficient, of itself, to indicate that grantor intended to convey title only to side and not to center line of those streets. West's Ann. Civ.Code, §§ 1069, 1112.

10. Evidence ⚷461(4)

Where deed, which specifically conveyed title to vacated alley but made no reference to vacated streets, stated that it was made subject to matters of record and there was of record at that time vacation of public easements in streets, ambiguity appeared on face of deed as to intention of grantor and evidence of circumstances under which agreement was made could be considered by court in determining ambiguity, including parol evidence. West's Ann. Civ.Code, §§ 1069, 1112.

11. Boundaries ⚷37(4)

In proceeding involving plaintiffs' property rights, easements and rights of way in vacated streets, evidence as to appearance of one of streets as public way and as to use made of both streets for access to plaintiffs' property supported determination that presumption should apply that grantor intended to convey title to center of streets and that grantor and those claiming through him should be estopped to claim otherwise. West's Ann.Civ.Code, §§ 1069, 1112.

12. Boundaries ⚷20(1)

In determining whether parties to deed intended to convey title to center of street bounding property, consideration may be given not only to actual usage being made of streets at time of grant, but also to such uses as facts and circumstances show were within reasonable contemplation of parties at time of conveyance. West's Ann.Civ. Code, §§ 1069, 1112.

13. Municipal Corporations ⚷663(2)

Although public use ceases on vacation of public street, rights acquired by grant or otherwise by abutting owner to private easement in such streets are not affected. West's Ann.Civ.Code, § 812; West's Ann. Const. art. 1, §§ 13, 16.

14. Municipal Corporations ⚷663(2)

Where easements enjoyed by plaintiffs in half of vacated streets owned by defendant were not only necessary to plaintiffs' use of their property but were also private easements appurtenant to their property, failure of plaintiffs to comply with statute enacted long after they acquired property requiring recordation of verified notice of claim to private easement in vacated street within two years, did not divest plaintiffs of their rights in vacated streets. West's Ann.Civ.Code, § 812; West's Ann.Const. art. 1, §§ 13, 16.

◆

Caryl Warner, Los Angeles, for appellant.

William G. Bolton and John A. Michael, Inglewood, for respondents.

SHENK, Justice.

The defendant appeals from a judgment entered April 20, 1955, declaring that the plaintiffs have a private right of way and easement in, to and across the vacated portion of Bard Street adjoining their property in Hermosa Beach. The defendant also appeals from a judgment entered on June 10, 1955, pursuant to section 662 of the Code of Civil Procedure on the denial of his motion for new trial, which adjudicated that the plaintiffs have a fee title interest in one-half of vacated Bard Street and in one-half of vacated Oak Street which adjoins their property, and that they have easements in the other one-half of these streets. The defendant contends that the trial court had no jurisdiction to modify the first judgment while his appeal therefrom was pending; that it erred in construing the plaintiffs' deed to grant by implication either a fee title or a private easement in these vacated streets, and that it erred in holding that the noncompliance by the plaintiffs with the recordation requirements of section 812 of the Civil Code did not extinguish any easement they might own in these streets.

The common predecessor in title of the property involved in this action was the California Bank which acquired title in 1932 from Benjamin Hiss, the original subdivider. In 1938 the bank conveyed a portion of this property to the plaintiffs by a deed referring to a recorded subdivision map. This map showed that this parcel was bounded by public streets designated thereon as Pier Avenue (to the south), Bard Street (to the west), Oak Street (to the north), and Railroad Street (now Valley Drive) to the east; that Bard and Oak Streets terminated at their common intersection; and that a public alley bisected this parcel in an east-west direction between Bard and Railroad Streets. The surrounding property to the west and the north was then owned by the bank and is the property now owned by the defendant.[1]

The deed to the plaintiffs stated that it was made "subject to * * * matters of record." There was of record at that time the vacation in 1926 of the public easements in Oak Street, in the northerly portion of Bard Street, and in the alley above mentioned. A visual inspection at the time the plaintiffs acquired this property indicated that the whole of Bard Street was a continuous public street; that it had a hard dirt surface which had been oiled from time to time, and that it was being used for purposes of ingress and egress to this property and to the building located thereon. This building had been erected by Hiss in 1927, after the vacation of these streets. It had three garage doors which opened out over vacated Bard Street and a loading dock in the rear which abutted on vacated Oak Street, and it spanned the westerly portion of the alley. The plaintiffs' deed specifically conveyed to them the title to the "vacated alley" but made no reference to the vacated streets. After they acquired this property it was necessary for them to use both of these vacated streets, but principally Bard Street, for access to their property and these streets have been continuously so used by them, their friends, licensees and invitees.

In 1943 the defendant acquired title to the remaining Hiss property by a deed which specifically conveyed to him the fee title to "vacated Oak Street" and "vacated Bard Street." In June 1953 he commenced the construction of a permanent building and a six foot wall along the westerly line of the plaintiffs' real property which interfered with their access to the garages on vacated Bard Street and to the loading dock on vacated Oak Street. Their objections to this construction proved futile and they commenced this action, seeking preliminary and permanent injunctions, damages and other relief. Their application for a temporary injunction was denied and the defendant continued with the construction pending the outcome of this suit.

The deeds by which the parties acquired title were in evidence at the trial. There was substantial evidence that the construction commenced by the defendant interfered with the plaintiffs' use of vacated Bard and vacated Oak Streets for purposes of access to their property, and also that it had resulted in an impairment of the normal flow of surface waters from the northwesterly corner of their land. Judgment was entered permanently enjoining interference by the defendant with these easements and awarding $650 damages for the temporary loss of use by the plaintiffs of their garages.

On the motion for new trial there was raised for the first time the question whether under the language of the plaintiffs' deed the fee title to the center of the vacated streets had been conveyed to them in addition to the easements claimed at the trial. On May 31 the court took the motion under submission, including the determination whether, pursuant to the provisions of section 662 of the Code of Civil Procedure, the pleadings, findings and judgment could be amended without reopening the proceedings to adjudicate the issue of fee title. On June 5 the defendant filed a notice of appeal from the judgment. On June 10 the court ordered the plaintiffs to amend their pleadings to conform to the proof. The court revised its findings and conclusions of law, entered a modified judgment adjudicating the issue of fee title in favor of the plaintiffs, and directed the clerk not to perform any further function in perfecting the prior appeal. The defendant appealed from this modified judgment.

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[1] During the progress of this action the defendant Daniel L. Ernst died and an administrator with the will annexed was substituted as defendant-appellant. The decedent will be referred to as the defendant.

The question is: which appeal is properly before this court. Obviously it is one or the other and cannot be both. Section 662 provides: "In ruling on [a motion for new trial] in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code [referring to motion for new trial]."

It is the position of the defendant that after he filed his notice of appeal from the original judgment the trial court was divested of jurisdiction to later modify its judgment, even though the modification came about as a part of the proceedings in ruling on a motion for new trial. In this he is supported by the rule stated in Wagner v. Shapona, 1954, 123 Cal.App.2d 451, 464, 267 P.2d 378. An opposite result was reached in Rutledge v. Rutledge, 1953, 119 Cal.App.2d 112, 113, 259 P.2d 78, upon which the trial court relied in directing the clerk to disregard the prior appeal. This question has not heretofore been determined by this court and, as appears by the Wagner and Rutledge cases, a conflict appears in the decisions of the District Courts of Appeal.

[1-5] Prior to 1929, when section 662 was enacted, the trial court had no power to make substantial modifications in its findings or in its judgment after judgment was entered. This section grants new and specific powers to that court in the new trial proceedings. A duly perfected appeal usually divests the trial court of further jurisdiction in the cause and of the power to act other than with respect to specified excepted or collateral matters. Sacks v. Superior Court, 31 Cal.2d 537, 540, 190 P.2d 602. A motion for new trial is recognized to be a matter collateral to the judgment and the trial court retains jurisdiction to hear and determine a motion for new trial after an appeal has been taken from the judgment. City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084, 48 A.L.R. 610; In re Estate of Waters, 181 Cal. 584, 585, 588, 185 P. 951. It is not inconsistent nor improper to file both a notice of appeal and a motion for a new trial. The time limit prescribed by law for each of these motions is jurisdictional. Code Civ.Proc. § 936; Rules 1, 3, Rules on Appeal. If the motion for new trial be granted the judgment is vacated and the appeal therefrom becomes ineffective. Lantz v. Vai, 199 Cal. 190, 248 P. 665. An appeal may of course be taken from the order granting a new trial (Code Civ.Proc. § 963, subd. 2). When the court denies a motion for new trial and, as authorized by section 662 of the Code of Civil Procedure, enters a substantially modified judgment, that judgment becomes the final judgment of that court and the appeal from the prior judgment becomes ineffective. The conclusion reached in

Rutledge v. Rutledge, supra, 119 Cal.App. 2d 112, 113, 259 P.2d 78, appears to be in accordance with the intended purpose of section 662 and is approved. Anything to the contrary in Wagner v. Shapona, supra, 123 Cal.App.2d 451, 464, 267 P.2d 378, is disapproved. The appeal from the judgment of April 20, 1955, is therefore nonoperative. The appeal from the judgment of June 10, 1955, entered pursuant to the court's powers under section 662 in ruling on the motion for new trial, is properly before us.

[6] The defendant urges that the judgment embraces an issue upon which there was neither pleading nor proof at the trial, and that under principles of due process he is entitled to a jury trial on the issue of fee simple title and on various affirmative defenses including estoppel, mutual boundary agreement and adverse possession. A review of the record indicates that the original pleadings raise the general issue that the defendant was interfering or threatening to interfere with the plaintiffs' "property rights, easements and rights of way described in paragraph IV" of the complaint. While paragraph IV refers specifically to the rights of the parties in vacated Bard Street, there was evidence before the court upon which it could adjudicate the rights of the parties in vacated Oak Street. There was also evidence upon which findings adverse to the defendant could be made on the affirmative defenses of estoppel, mutual boundary agreement and adverse possession asserted on this appeal. It does not appear that the proceedings should be reopened for the taking of further evidence on these issues.

The plaintiffs' deed was in evidence and the determination whether by its terms a fee simple title or an easement was conveyed to the plaintiffs was properly before the court.

[7–9] The transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant. Civ.Code, § 1112; Moody v. Palmer, 50 Cal. 31. In case of doubt, the deed must be construed in favor of the grantee. Civ. Code, § 1069. It is the general rule that it will be presumed that where property is sold by reference to a recorded map the grantee takes to the center of the street or streets shown on the map as bounding the property, even though the streets shown therein appear to have been vacated or abandoned or the deed itself refers to the streets as having been vacated or abandoned. The presumption continues to apply in the absence of a clear expression in the deed not to convey title to the center line. Anderson v. Citizens' Sav. & Trust Co., 185 Cal. 386, 197 P. 113; Pinsky v. Sloat, 130 Cal.App.2d 579, 279 P.2d 584. Here the reference in the deed to "matters of record" is sufficient to give constructive notice of the vacation of the public easements in the streets shown on the map. However, it is not sufficient, of itself, to indicate that the grantor intended to convey title only to the side and not to the center line of those streets.

[10, 11] An ambiguity may be said to appear on the face of the deed as to the intention of the grantor by reason of the express conveyance of title to the vacated alley, and the failure to expressly convey title to the vacated streets. Evidence of the circumstances under which the agreement was made could be considered by the court in determining this ambiguity and parol evidence was admissible for that purpose. There was evidence as to the appearance of Bard as a public street and as to the use made of both Bard and Oak Streets for access to the plaintiffs' property. This evidence would support the determination that the presumption should apply that the grantor intended to convey title to the center of the street, and that the grantor and those claiming through him should be estopped to claim otherwise.

[12] In determining the intent of the parties, consideration may be given not only to actual uses being made at the time of the grant, but also to such uses as the facts and circumstances show were within

the reasonable contemplation of the parties at the time of the conveyance. Fristoe v. Drapeau, 35 Cal.2d 5, 10, 215 P.2d 729. It was reasonable to conclude that the grantor intended that the fee title should pass to the center of the street and as appurtenant thereto that there should pass to the plaintiffs easements in these streets for use as private ways. Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A., N.S., 1024; Prescott v. Edwards, 117 Cal. 298, 49 P. 178; Day v. Robison, 131 Cal. App.2d 622, 624, 281 P.2d 13.

The amendments ordered and made by the court were therefore within the general issues framed by the pleadings and the proof, and the adjudication of fee title was properly made without reopening the proceedings for further evidence.

One further question remains to be considered. That is the applicability of section 812 of the Civil Code. This section, enacted in 1949, provides: "The vacation or abandonment, pursuant to law, of streets * * * shall extinguish all private easements therein claimed by reason of the purchase of any lot by reference to a map or plat upon which such streets * * * are shown, other than a private easement necessary for the purpose of ingress and egress to any such lot from or to a public street * * * except as to any person claiming such easement who, within two years from the effective date of such vacation or abandonment or within two years from the date of the enactment of this section, whichever is later, shall have recorded in the office of the recorder of the county * * * a verified notice of his claim to such easement * * *." It is not disputed that the plaintiffs did not file a verified claim to a private easement in either vacated Bard Street or vacated Oak Street. The court concluded, insofar as the plaintiffs' easement in vacated Bard Street was concerned, that it came within the exception stated in section 812 but also concluded that if the section were given retroactive effect and be deemed applicable to any easement theretofore vested in the plaintiffs it was void in contravention of a vested right and an impairment of a contract right as prohibited by sections 13 and 16 of article I of the state Constitution.

[13, 14] The rule has always been that although the public use ceases on the vacation of a public street, rights acquired by grant or otherwise by an abutting owner to a private easement in such streets are not affected. See Danielson v. Sykes, supra, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024; Leverone v. Weakley, 155 Cal. 395, 101 P. 304; Severo v. Pacheco, 75 Cal.App. 2d 30, 170 P.2d 40; Cohn v. San Pedro, L. A. & S. L. R. Co., 103 Cal.App. 496, 501, 284 P. 1051; 39 C.J.S. Highways § 129, p. 1064; 150 A.L.R. 652. No relinquishment of the private easements in these streets by the plaintiffs or their grantor was shown, and the private rights of these parties therefore continued. Section 812 obviously is not designed nor could it be applied to divest the plaintiffs of their fee title to one-half of vacated Bard Street or to one-half of vacated Oak Street. The easements enjoyed by the plaintiffs in the one-half of these vacated streets owned by the defendant are not only necessary to their use of their property, and so come within the exception stated in section 812, they are also private easements appurtenant to their property of which they could not be divested except by purchase or agreement or by compensation from the sovereign. The trial court properly refused to hold that the noncompliance by the plaintiffs with the recording provisions of section 812 divested them of their rights in these vacated streets and the section is not applicable to them under the circumstances here shown.

The appeal from the judgment of April 20, 1955, is dismissed. The judgment of June 10, 1955 is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

151 Cal.App.2d 514

STANDARD REALTY & DEVELOPMENT

v.

Edward C. FERRERA and Deena Ferrera, Defendants and Respondents.

Civ. 17111.

District Court of Appeal, First District, Division 2, California.

June 6, 1957.

Action for specific performance of an option for the purchase of realty or for the alternative relief of damages for breach of contract. Judgment for defendants in the Santa Clara County, Superior Court, Byrl R. Salsman, J., and plaintiff appeals. The District Court of Appeal, Stone, J. pro tem., held that where the agent negotiating the transaction was acting in a dual capacity for both parties and failed to disclose such fact to the vendors, the vendors were entitled to rescind the contract and the purchaser was not entitled to specific performance nor to the recovery of damages.

Judgment affirmed.

1. Appeal and Error ⚷1008(1)

Appellate court will not set aside the finding of fact made by trial court if it is not improbable, in light of all the evidence.

2. Appeal and Error ⚷1002, 1011(1)

Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court.

3. Principal and Agent ⚷190(3)

Evidence justified denial of specific performance of an option agreement to purchase real property on the ground that the agent negotiating the transaction was acting in dual capacity as agent for both parties.

4. Principal and Agent ⚷157

Vendors had a right to rescind an option contract for the purchase of property on ground that agent negotiating the transaction was acting in a dual capacity as agent for the purchaser and for the vendor, where the agent made no disclosure of such fact to the vendor.

5. Specific Performance ⚷128(1)

Where purchaser was not entitled to specific performance of contract for the sale of real property on ground that agent negotiating the transaction was acting for both the vendor and the purchaser and failed to disclose such dual capacity to the vendor, purchaser was not entitled to recover damages.

◆

Bean & Bergna, San Jose, for appellant.

Machado & Machado, San Jose, for respondents.

STONE, Justice pro tem.

Leroy McEvoy, a real estate broker, was employed by a Mr. Nipper, a representative of the Western Pacific Railroad Company, to purchase real property in Santa Clara County for Standard Realty & Development Company, a subsidiary of the Western Pacific Railroad Company. McEvoy approached the defendants who owned the parcel of real property which is the subject of this action. There is a conflict in the evidence as to the representations made by McEvoy to the defendants, but the record is clear that he asked their consent to sell their property, advising them that he thought he could sell it and that he would try. The defendants agreed to pay McEvoy a five per cent commission if he sold the property.

This verbal transaction occurred about the 20th of January, 1953, and on the 26th day of January, 1953, McEvoy induced defendants to sign an option agreement whereby they agreed to sell the property for $32,500 to one E. Larsen. McEvoy paid the defendants $500 as consideration for the option. The option recited that the $500 was paid by one E. Larsen, but E. Larsen, who was an employee of a title company, knew nothing about the transaction and did not provide the $500 for the payment. The option also provided that defendants would pay McEvoy a five per cent commission. At no time did McEvoy disclose to defendants that he was also acting as agent for Nipper or the plaintiff.

Shortly after executing the option, the defendants learned that the Ford Motor Company was going to build a factory near their property. There was considerable negotiating from that time on between defendants and McEvoy, but E. Larsen, the other party to the option or Standard Realty & Development Company to whom E. Larsen assigned the option after its expiration on March 26, 1953, did not enter into the negotiations. On April 1, 1953, defendants, through their attorney, notified the California Pacific Title Insurance Company, which had been designated as escrow agent, that they were rescinding the contract with E. Larsen, the title company's employee, and enclosed a check for the $500 consideration originally paid by McEvoy to defendants. Appellant as assignee of E. Larsen then brought this action for specific performance of the option agreement or for alternative relief by way of damages for breach of contract.

[1] Appellant urges the trial court erred in its finding that McEvoy was acting as agent for the defendants because the finding is not supported by the evidence. Appellant contends the finding is predicated upon an unreasonable inference drawn by the trial court from the defendants' testimony. We do not find it so, even though a reasonable person might draw a contrary inference. This court will not set aside a finding of fact made by the trial court if it is not improbable in the light of all of the evidence. In addition to the testimony of the defendants, the record provides other substantial evidence to support the finding of the trial court that McEvoy was acting as agent for the defendants. The cross-examination of McEvoy himself supports such a finding. The evidence that McEvoy induced the defendants to pay him a commission of five per cent for selling their property also bears upon this finding.

[2, 3] A review of the record discloses that there is ample evidence and substantial evidence to sustain the finding of the trial court that McEvoy was acting as agent for the defendants. Conceding that a reasonable person might draw the contrary inference which appellant has drawn from the evidence, nonetheless, it is an elemental and fundamental rule of law that where the evidence is in conflict the appellate court will not disturb the verdict of the jury or the findings of the trial court. This proposition of law with supporting citations is set forth clearly in 3 California Procedure by Witkin, page 2245, paragraph 84.

[4, 5] Appellant contends that granted arguendo the trial court was correct in its finding that McEvoy was acting in a dual capacity as agent for plaintiff and defendants, nonetheless, it is not grounds for a rescission of the contract even though he made no disclosure of this fact to the defendants. There is persuasive authority to the contrary in the recent Supreme Court case of McConnell v. Cowan, 44 Cal. 2d 805, 285 P.2d 261. In that case the court discusses a factual situation similar to the one presented in this case, where there was dual representation, the agent assuming to act in a double capacity without disclosing this fact to one principal. At page 809 of 44 Cal.2d, at page 264 of 285 P.2d, the court says:

> "* * * Such conduct is a fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered, but the contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or, if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it. * * *"

The defendants in the case before us followed the prescribed procedure exactly, and the trial court did not err in finding that the defendants had a right to rescind the contract. Thus the defendants could not be required to specifically perform the option agreement, nor is plaintiff entitled to recover damages. See Vice v. Thacker, 30 Cal.2d 84, 90, 180 P.2d 4; 9 Cal.Jur.2d 198.

This Court having found defendants justified in rescinding the contract, the other points raised by appellant on appeal become immaterial and it is unnecessary to discuss them.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Lawrence O'Neil SMITH, Defendant and Appellant.
Cr. 5834.

District Court of Appeal, Second District, Division 1, California.
June 10, 1957.
Rehearing Denied July 2, 1957.
Hearing Granted Aug. 6, 1957.

Defendant was convicted of possessing heroin with a prior conviction of narcotic addiction. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence was not sufficient to establish that defendant had been deprived of due process of law by any force used to obtain heroin which he had put in his mouth for purpose of disposal.

Judgment affirmed.

1. Criminal Law 🔑1130(4)

Where defendant's trial counsel discontinued representation of defendant, and defendant, who was unsuccessful in obtaining an attorney through appropriate committee of the bar association, was notified that he could engage counsel of his own choosing or file briefs in his own behalf, but if brief was not filed within 30 days appeal would be submitted to the court, which would make an independent examination of the record and the appeal, and defendant failed to file a brief within the 30 days, the appeal could have been dismissed. West's Ann.Rules of Appeal, rule 17(a).

2. Criminal Law 🔑266

In prosecution for possession of heroin, evidence was not sufficient to establish that defendant had been deprived of due process of law by any force used to obtain heroin which he had put in his mouth for purpose of disposal. West's Ann.Health & Safety Code, §§ 11500, 11721.

Lawrence O'Neil Smith, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment wherein the defendant was convicted of possessing heroin (section 11500, Health and Safety Code), with a prior conviction of narcotic addiction (section 11721, Health and Safety Code).

On May 1, 1956, an information was filed in Los Angeles county charging that the defendant did, on or about the 8th day of April, 1956, have in his possession a preparation of heroin, and that before the commission of the offense he was, on or about November 17, 1954, in the municipal court, Los Angeles Judicial District, convicted of the crime of violating the provisions of section 11721, Health and Safety Code, a misdemeanor (addiction to narcotics).

A fair résumé of the facts as developed by the evidence is as follows: A police officer of the Los Angeles police department, on the day before the arrest, received information from a "very reliable" informer that the defendant had just purchased about a "spoonful of heroin" and that it would be on his person at a certain residence. The officers knew the defendant as a known narcotic addict. On the day of the arrest, two officers approached the house in question, and through a window, observed the defendant and a woman sitting upon a bed. The officers went to the front door of the house and knocked on the door. An elderly lady answered the knock and the officers identified themselves and asked if they could come in. The lady opened the door and the officers walked in and started towards the room where they had observed the defendant and the woman together on the bed. As they approached the door the elderly lady shouted, "Lawrence, the police are here", and at that the officers opened the door to the bedroom. The officer who testified stated that the bedroom door was closed, but he did not know if it was locked, and further, that he did not think that it was forced. The defendant immediately stood up and placed his hand toward his mouth at about the time the officers identified themselves, and the officers immediately asked the defendant to "spit it out which he did, and emitted a cellophane package" which contained five rubber balloons, each of which contained a quantity of powder which was identified later by a chemist as being heroin. Also, the officers found two medicine droppers and two metal hypodermic needles in the coat pocket of the woman in the room with the defendant. The officer testified that the defendant was not choked to make him spit out the package. The defendant was asked "how long he had been using the stuff" and he stated, "since he was 20". The defendant also stated that he "just pushed stuff just to keep his own habit", which was about three capsules of heroin a day. A certified copy of a commitment and order in the municipal court was introduced into evidence showing that the defendant had previously been convicted of the narcotics violation alleged in the information.

The defendant testified in his own behalf, and among other things, stated that the door was "kicked in", and the lock broken; that he was pummeled and choked for about a minute before he spit out the narcotics. He stated that he was a user; that the powder in the package was heroin; that it belonged to him and that he had some heroin that day; that he had put the narcotics in his mouth to the end that he could swallow it and thereby dispose of it when he heard the officers kicking at the door.

Counsel for the defendant, at the time of the trial, stated that the only point he was raising was the "question of the lawfulness of the search and seizure and the legality of the evidence obtained". Defendant's counsel also argued that the reliable informant had given the police the information the day before and consequently the police had ample time to get a search warrant. At the conclusion of the testimony counsel for the defendant asked the judge if he would "consider striking the prior in order to give your Honor greater leeway in sentencing." The judge thereupon answered: "I discovered something this morning that I was not aware of. I have a case tomorrow where the girl is charged with selling marijuana. Normally I would send her to the penitentiary, period. She has a prior addiction conviction. And as I read the statute, the minimum is ten years.

"I talked to one of the elder statesmen on the subject and I think I have got a way of getting around it, but I am certainly not going to strike a prior addiction charge unless I know more about it than I do now. Let's determine the prior at the time of probation and sentence."

Where the matter of the prior conviction was proved positively, and where no question whatsoever was raised as to the validity of the prior conviction, and when the law specifically provides for a specified punishment under such circumstances, it is difficult to understand what the court had in mind when he stated, "I think I have got a way of getting around it * * *."

The defendant was then permitted to make an application for probation which was, upon hearing, denied and he was sentenced to the state prison.

[1] A notice of appeal was filed September 24, 1956. Apparently counsel who represented the defendant in the trial court discontinued the representation of the defendant, and on February 6, 1957, the defendant directed a letter to this court wherein he requested that we appoint an attorney to represent him in the appeal. The matter was referred to an appropriate committee of the Bar Association, which in turn referred the matter to one of its experienced and skilled members who studied the transcripts thoroughly and came to the conclusion that there was no merit to the appeal and declined to accept any appointment to represent the defendant. The defendant was notified of what had been done and the reports of counsel to this court; he was also notified that he could engage counsel of his own choosing or file briefs in his own behalf, and further, that if a brief was not filed within thirty days from the date of the letter the appeal would be submitted to the court which would make an independent examination of the record and the appeal. No brief has been filed and more than thirty days has elapsed from the date of the letter. Under Rule 17(a) of the Rules on Appeal the appeal could, and perhaps should, be dismissed. However, we prefer to dispose of it on the merits.

[2] There was a conflict in the testimony and the trial judge believed the officers and disbelieved the defendant and his witnesses. The only contention of any consequence is whether the defendant was deprived of due process of law because of any shocking and brutal force used against him to obtain the heroin which he had put in his mouth for the purpose of swallowing it and thereby disposing of it. If the testimony of the officer is believed, then there is nothing in the conduct of the officers which was brutal or which shocks the conscience. In People v. Dawson, 127 Cal.App.2d 375, 273 P.2d 938, the defendant put the heroin in his mouth and the officer put his arm around the defendant's neck and told him to spit it out. The court upheld the conviction of the defendant.

The facts in the case of Rochin v. People of State of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, are in no wise similar to the facts of this case, and the same can be said for the case of People v. Martinez, 130 Cal.App.2d 54, 278 P.2d 26.

As we view the matter, there was no error in the trial and the judgment should be affirmed.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

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151 Cal.App.2d 587

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert A. SHELTON, Defendant and Appellant.

Cr. 3335.

District Court of Appeal, First District, Division 2, California.

June 10, 1957.

Defendant was convicted of occupying a building with books, papers, and other paraphernalia for recording bets on horse races. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that where case was tried without a jury, and circumstantial evidence of defendant's guilt was very strong, improper admission of an involuntary confession was not prejudicial error.

Judgment affirmed.

1. Searches and Seizures 🔑3(9)

Where police officers went to home of defendant with a search warrant, rang bell, waited for one-half minute, and then forced entrance with a sledge hammer, and, when they entered, they found defendant burning records of bets on horse races, conduct of police officers was justified under the circumstances. West's Ann.Pen. Code, §§ 337a, subd. 2, 844.

2. Criminal Law ⊙=522(1)

Where officers told defendant's wife that if defendant did not confess, they might arrest her, and she then talked to defendant, and he made a confession, the confession was an "involuntary confession" and inadmissible.

See publication Words and Phrases, for other judicial constructions and definitions of "Involuntary Confession".

3. Criminal Law ⊙=260(11)

Where case was tried without a jury, and circumstantial evidence of defendant's guilt was very strong, improper admission of an involuntary confession was not prejudicial error.

Benjamin M. Davis, San Francisco, Don Wilson, Oakland, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by the court sitting without a jury of violating section 337a(2) Penal Code, occupying a building with books, papers and other paraphernalia for recording bets on horse races. He was sentenced to the county jail for one year, execution was suspended, and he was placed on three years probation on certain conditions.

Police officers went to the home occupied by appellant and his wife armed with a search warrant. They rang the bell, waited for one-half minute and then forced an entrance with a sledgehammer. The door was secured by a lock and had a timber braced against it on the inside.

The officers found the appellant burning papers in the kitchen. They extinguished the flames and the charred papers were later treated to bring out the writing. An officer testified that the writing on the charred papers showed them to be records of bets on horse races. Other papers commonly found in betting establishments were discovered elsewhere in the house and on appellant's person.

The officers before breaking down the door did not comply with that portion of section 844 Penal Code which reads: "after having demanded admittance and explained the purpose for which admittance is desired."

[1] The cases hold that where compliance with this provision would probably frustrate the arrest or permit the destruction of incriminating evidence compliance is not required. People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. King, 140 Cal.App.2d 1, 294 P.2d 972; People v. Sayles, 140 Cal.App.2d 657, 295 P.2d 579. In view of the ease with which guilty persons may destroy records of bets (as appellant in fact was doing when the officers forced an entry into his home) we cannot say that the officers' conduct in this case was not justified under the authorities cited.

[2] Appellant at first denied any criminal activity and said that he was not the occupant. The officers suggested that if he had no right to be on the premises they might have to arrest him for burglary. Later appellant's wife arrived and the officers told her that if her husband did not confess they might arrest her. She then talked to appellant and he made a confession which the court admitted in evidence. We agree with appellant that the confession was not voluntary. Coercion of a confession by threat to arrest a near relative unless the accused admits his guilt renders the confession involuntary. People v. Mellus, 134 Cal.App. 219, 25 P.2d 237.

[3] However in the circumstances of this case we do not believe that the admission of the confession was prejudicial. The case was tried without a jury and the circumstantial evidence of appellant's guilt was

very strong. When the police forced an entrance they found appellant busily burning papers which the evidence showed were records of bets. His conduct in destroying records of bets immediately after he heard his doorbell ringing seems to be subject to no reasonable conclusion compatible with innocence.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

151 Cal.App.2d 615

Ernest E. BELCHER and Louise E. Belcher, husband and wife, Plaintiffs and Respondents,

v.

Arthur F. WILLIAMS and Corinne E. Williams, husband and wife, Farmers and Merchants Bank of Long Beach, Defendants.

Arthur F. Williams and Corinne E. Williams, Appellants.

Civ. 21898.

District Court of Appeal, Second District, Division 1, California.
June 11, 1957.

Purchasers' action against vendors for specific performance of contract to convey realty. From judgment rendered for plaintiffs by the Superior Court of Los Angeles County, George Francis, J., defendants appealed. The District Court of Appeal, White, P. J., held that provision in contract for sale of realty and personalty that bill of sale covering equipment located in a bath house and bar was to be deposited in escrow, approved by buyers and sellers, did not make the approving of inventory an essential element of the agreement which would make promise to convey unenforceable until approval, in view of fact that goods to be transferred were not subject to later selection, but that judgment would be amended to require parties to provide each other with certificates of title insurance.

Judgment affirmed as modified.

1. Pleading 🔑427

Even though complaint is defective in a particular, if case is tried on theory that is sufficient and evidence accordingly is received without objection, defendant cannot thereafter contest sufficiency of complaint.

2. Contracts 🔑39

If essential element is reserved for future agreement of both parties, promise can give rise to no legal obligation until such future agreement.

3. Contracts 🔑147(1)

Law protects contracts and strives to carry into effect reasonable intention of parties, if it can be ascertained.

4. Contracts 🔑39

For an element reserved to future agreement to make contract unenforceable until such future agreement, such element must be important to contract as a whole.

5. Vendor and Purchaser 🔑21

Provision in contract for sale of realty and personalty that bill of sale covering equipment located in a bath house and bar was to be deposited in escrow, approved by buyers and sellers, did not make the approving of inventory an essential element of the agreement which would make promise to convey unenforceable until approval, in view of fact that goods to be transferred were not subject to later selection.

6. Appeal and Error 🔑1026

In absence of complaint of prejudice, reviewing court will not correct unimportant and unprejudicial errors.

7. Contracts 🔑91

Adequacy of consideration is fact question.

8. Specific Performance 🔑121(3)

In purchasers' suit against vendors for specific performance of contract for sale of restaurant and bath house business, evidence sustained trial court's finding that consideration of $12,500 and exchange of other realty was sufficient.

9. Evidence ⚷601(4)

Court is not bound to accept in toto testimony of any one witness as to value and may conclude that values of properties have been erroneously stated by all witnesses and are more or less than stated.

10. Payment ⚷34

Express company letters of credit presented by purchasers and accepted by vendors' escrow agent without question or notice that they would not be considered as cash were required to be deemed in compliance with agreement to pay cash.

◆

E. O. Leake and J. J. Leake, San Gabriel, for appellants.

Reidman, Dalessi & Shelton, W. T. Dalessi, Thomas C. Beyer, Long Beach, for respondents.

WHITE, Presiding Justice.

Defendants Arthur F. Williams and Corinne E. Williams appeal from a judgment that the plaintiffs Ernest E. Belcher and Louise E. Belcher are entitled to delivery of the deed executed by defendants granting to plaintiffs property known as 355 East Seaside, Long Beach, and held in escrow by the Farmers and Merchants Bank of Long Beach; that plaintiffs "are the owners" and on August 1, 1955, were entitled to possession of the property described in said deed and are entitled to be paid the rents, issues and profits of said property from August 1, 1955, to the date of trial amounting to $1,590.24 "with interest at the legal rate plus such amounts as may accrue from time of trial herein until plaintiffs are put into possession by defendants"; that defendants "are the owners" of property known as 1027 Cedar Avenue, Long Beach, and entitled to delivery of the deed therefor, together with the $12,500 and assignment of a certain oil lease deposited in the same escrow by plaintiffs; and that plaintiffs "are ordered to execute any and all necessary documents to fully effectuate this judgment * * *".

Appellants rely upon nine grounds for reversal stated in their opening brief as follows:

"1. The complaint does not state facts sufficient to constitute a cause of action.

"2. The alleged agreement evidenced by said escrow instructions was and is indefinite and uncertain. That said escrow instructions were insufficient to constitute an agreement, were void and incapable of specific performance.

"3. The alleged contract as evidence by the said escrow instructions lacked mutuality of obligation and remedy, and was not specifically enforceable.

"4. The evidence was wholly insufficient to establish that the alleged contract was fair, just and equitable, or the consideration to the defendants adequate.

"5. The evidence was wholly insufficient to establish that plaintiffs performed the terms and conditions of said escrow on their part to be kept and performed.

"6. The findings of fact are wholly unsupported by the evidence.

"7. The conclusions of law are wholly unsupported by any findings of fact.

"8. The judgment is contrary to, and is wholly unsupported by the findings of fact and conclusions of law, and by the evidence.

"9. The court entirely ignored the agreement between the parties and entered a decree purporting to establish an entirely different contract than that entered into between the parties."

The First Amended Complaint alleges three causes of action: for specific performance of a contract to exchange properties, for declaratory relief, and for appointment of a receiver. The alleged first cause of action is in part as follows:

"IV. That on or about the 13th day of July, 1955, in the City of Long Beach, County of Los Angeles, State of California, defendants Arthur F. Williams and Corinne E. Williams entered into an oral agreement with the plaintiffs herein, whereby the said defendants agreed to sell and the plaintiffs agreed to buy the 355 E. Seaside property aforesaid, together with a restaurant business and bathhouse business then owned and operated by the said defendants on the 355 E. Seaside property, including all equipment used in or in connection with the said businesses; that in consideration thereof, and in full payment therefor, the plaintiffs and said defendants did further agree that plaintiffs pay to said defendants the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) and that plaintiff convey to said defendants the 1027 Cedar property, it being further agreed by plaintiff and said defendants that possession be afforded by the grantors to the grantees of the respective properties forthwith; and that in order to carry out the intention of the said parties, an escrow agreement was prepared by the defendant, Farmers and Merchants Bank of Long Beach, and subsequently on the date therein set forth signed by the defendants, Arthur F. Williams and Corrine E. Williams and by the plaintiffs herein; that a copy of said escrow agreement is attached hereto marked Exhibit A and incorporated herein as though set forth in full and made a part hereof; that the last named defendants and the plaintiffs did further agree to perform all things required of them at the times and in the manner in said escrow agreement set forth; that the said defendants did further promise and agree with plaintiffs to instruct the son of the plaintiffs and the plaintiffs in the operation of the restaurant business and the bathhouse business aforesaid, and for the purpose of affording such instruction to render themselves available on the 355 E. Seaside premises during the period commencing at the time of the agreement herein, and continuing until September 1st, 1955;

"V. That the consideration named in said agreement is the fair and reasonable value of the said 355 E. Seaside property.

"VI. That on or about the said 14th day of July, 1955, the plaintiffs herein did deliver to the defendant, Farmers and Merchants Bank of Long Beach all pursuant to the agreement between the parties thereto, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00), a grant deed in favor of defendants, Arthur F. Williams and Corinne E. Williams of the 1027 Cedar property, Continental Northern Community Oil Lease No. 3, of record, Assignment of existing oil lease in favor of the said Arthur F. Williams and Corinne E. Williams, and did perform all things required of them by the provisions of the said agreement, and did demand, in writing on the 29th day of July, 1955, and again orally on the 29th day of July, 1955 and on the 1st day of August, 1955, of defendants, Arthur F. Williams and Corinne E. Williams, that the said defendants give possession to plaintiff of the 355 E. Seaside property; that on the 14th day of July, 1955, plaintiffs did cause to be delivered to defendants last named, the keys to the 1027 Cedar property and did then and there give possession of said property to said defendants, and that said defendants did then and there go into possession of same;

"VII. That the plaintiffs and each of them have performed all things required of them by the terms of the said agreement, and are not in default in any particular or at all."

A copy of the escrow instructions, admittedly signed by appellants as well as respondents, is attached to the complaint and by reference made a part of it. Those instructions read in part as follows:

"For the purpose of effecting an exchange of properties hereinafter described, we (plaintiffs) hereby instruct the Farmers and Merchants Bank of Long Beach as follows:

"I will hand you $12,500.00 and the following

"1. Grant Deed * * * (1027 Cedar Avenue)

"2. Policy of Title Insurance with liability of $15,500.00 * * *.

"3. Assignment of existing oil lease * * * Which You Are Authorized To Use In Connection With This Escrow and deliver same to Arthur F. Williams and

Corinne E. Williams on receipt of the following instruments:

"1a Grant Deed * * * (355 E. Seaside)

"Excepting Therefrom all oil, gas, minerals and hydrocarbon substances as deeded to Richfield Oil Corporation.

"2a Policy of Title Insurance with liability of $28,000.00

"3a Bill of Sale covering equipment located in bath house and bar located on premises known as 355 E. Seaside, Long Beach, California, as per inventory to be deposited in escrow approved by buyers and sellers."

In the record on the instant appeal, no demurrer to the first amended complaint is mentioned, nor does it appear that defendants' contention that the amended complaint fails to state a cause of action was presented to the trial court by their answer, by objection to the introduction of evidence, or in any other manner before or during the trial or upon the motion for new trial.

[1] Points 1, 2 and 3 above set forth concern the insufficiency of the complaint. "It is the settled rule that even though a complaint is defective in some particular, if the case is tried on the theory that it is sufficient and evidence accordingly is received without objection, the unsuccessful party cannot later effectively contest the sufficiency of the pleading. [Citing cases.]" McClure v. Donovan, 33 Cal.2d 717, 731, 205 P.2d 17, 26.

Upon the instant appeal, however, appellants' points 6, 7 and 8, the insufficiency of the findings, conclusions and evidence (in addition to their points 1, 2 and 3, the insufficiency of the complaint) are in effect that, since the escrow instructions provided for a "Bill of Sale covering equipment located in bath house and bar located on premises known as 355 E. Seaside, Long Beach, California, as per inventory to be deposited in escrow, approved by buyers and sellers" and since no such inventory was deposited or approved by either buyers or sellers, there was no valid agreement between the parties.

[2–4] Their argument is that "where any term of an executory contract is left for the future agreement of the parties, it is wholly unenforceable and is void so far as being sufficient to constitute an agreement". In support of that argument, many decisions are cited in appellants' briefs stating the oft repeated rule that "neither law nor equity provides a remedy for a breach of an agreement to agree in the future". As restated in Ablett v. Clauson, 43 Cal.2d 280, 284, 272 P.2d 753, 756, the rule is that "'* * * if an *essential element* is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement.'" The law protects contracts and strives to carry into effect the reasonable intention of the parties if it can be ascertained. Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706. The element left for future agreement, to justify the application of the rule relied upon by appellants, must be important to the contract as a whole. The transfer of the furniture and equipment in the building on real estate which is the subject of an agreement has been held not to be essential to the enforceability of the contract in Gittelson v. McKnight, 75 Cal.App. 698, 703, 243 P. 889, and Keelan v. Belmont Co., 73 Cal.App. 2d 6, 12, 165 P.2d 930.

[5] In the instant action, as stated by appellants in their opening brief, they deposited in the escrow "form bill of sale covering equipment located in the bath house and bar as per inventory attached, there being no inventory attached thereto * * * and no inventory ever deposited in the escrow or approved by the buyers and sellers or either of them, and no inventory was ever taken or prepared, or submitted for approval of either of the parties to said escrow." The agreement was not that the goods to be so transferred should be subject to later selection or approval by the parties, but merely that an inventory of the goods already shown by appellants to respondents should be made and approved. The making and approving of an inventory is a routine matter and does not involve the exercise of

independent judgment or choice. It is not an item which, if left to the future, will necessarily invalidate a contract for uncertainty, and we find no substantial evidence in the record to indicate that the taking or approving of the inventory was an essential element of the agreement now engaging our attention.

[6] The judgment in the instant action does not award any personal property to respondents. Since they have not appealed from that portion of the judgment, whether it was error to deprive them of such equipment need not be determined. Certainly appellants were not prejudiced by the failure of the trial court to award the personal property to respondents, and it is not the province of this court in the absence of complaint of prejudice to correct unimportant and unprejudicial errors in procedure in the court below.

What we have said regarding the claimed uncertainty of the agreement applies likewise to appellants' claim that the contract lacked mutuality. At any time after the opening of the escrow, appellants were at liberty to perform their obligations under their agreement and to demand that respondents also perform. If the respondents had then made the same arguments concerning uncertainty and lack of mutuality as are now being heard from appellants, the item of furniture inventory would have been likewise relatively unimportant.

[7–9] Appellants also urge that the consideration for their property agreed by them to be exchanged was not adequate and therefore the agreement cannot be specifically enforced. The adequacy of consideration is a question of fact. There is ample evidence in the record to support the finding of the court in that respect. The court is not bound to accept in toto the testimony of any one witness, but may find that one witness has correctly evaluated one property and that another's appraisal of the other property is correct; or, the court may find the actual values of both properties have been erroneously stated by all witnesses, and that they are more or less than stated. Where, as in the instant action, testimony of several experts is before the court, and the values of both properties stated by them cover a wide and overlapping range, it cannot be said that the court erred in determining that one parcel of real property and the additional cash payment is adequate consideration for the other parcel of real property.

Appellants further urge that the evidence was wholly insufficient to establish that respondents performed the terms and conditions of said escrow on their part to be kept and performed. In this regard, their argument is that plaintiffs did not deposit $12,500 cash in the escrow, but that instead they placed in said escrow "Letters of Credit issued by American Express Company." The evidence is that such letters of credit for $22,000 with sight draft attached were deposited in the escrow. Over the objection of appellants, an officer of the bank which held the escrow was permitted to testify that the bank "treated" American Express Company letters of credit "exactly the same as cash", and on cross-examination the same witness admitted that the actual cash was never in the escrow and that the sight draft would have to be presented to and honored by the American Express Company before there would be any cash in the escrow.

[10] American Express Company Letters of Credit with sight draft attached given in good faith and in the ordinary course of business are generally treated as cash: and where, as in the instant action, they were accepted by appellants' agent, the escrow officer, without question or notice that they would not be so considered, they must be deemed to be in compliance with the agreement to pay cash. See Kells v. Pearson, 56 Cal.App. 502, 505, 205 P. 888; Albert v. Pearson, 68 Cal.App. 657, 661, 229 P. 998.

Appellants' ninth point is that the court did not enforce the contract as made, but ignored its terms regarding the inventory of personal property and the exchange of title policies for the real properties being exchanged. The provision of the agreement regarding the inventory of personal property has heretofore been discussed.

As we view the judgment herein its provisions require the performance by all parties of such acts and the execution of such documents necessary to effectuate such judgment, except that it fails to require the parties to provide each other with certificates of title insurance.

It is therefore ordered that the judgment be amended by providing therein that each of the parties shall furnish the other certificates of title insurance covering the respective properties as provided for in the escrow instructions.

As thus modified the judgment is affirmed. Each party to pay his respective costs on appeal.

DORAN and FOURT, JJ., concur.

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151 Cal.App.2d 500

Jerome Neal SEVERANCE, an Infant, by Jerome Severance, his Guardian ad litem, Plaintiff and Appellant,

v.

Robert George ROSE et al., Defendants,

John P. Riley, Defendant and Respondent.

No. 17194.

District Court of Appeal, First District,
Division 1, California.
June 5, 1957.

Action for personal injuries sustained by ten year old plaintiff when he fell off the edge of a water-ski jump resting on the ground in a public park. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment of nonsuit in favor of defendant and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that in view of fact only risk attendant upon use of ski jump as a slide when resting upon the ground, was a perfectly obvious one, namely the hazard of falling off the upper end or over either side, no warning sign of such hazard was necessary for any adult nor for most children, even children of tender years, and therefore, owner of such jump was not negligent, and did not violate a duty owed plaintiff in respect to such ski jump by failing to equip it with guards or rails to keep children from sliding off its sides or by failing to post warning signs.

Judgment affirmed.

Theaters and Shows 🔑6(8)

In view of fact only risk attendant upon use of a water-ski jump as a slide when resting upon the ground, was a perfectly obvious one, namely the hazard of falling off the upper end or over either side, no warning sign of such hazard was necessary for any adult or for most children, even children of tender years, and therefore, owner of such jump was not negligent, and did not violate a duty owed ten year old plaintiff in respect to such water-ski jump by failing to equip it with guards or rails to keep children from sliding off its sides or by failing to post warning signs.

◆

Bergen Van Brunt, Allan L. Shapiro, San Francisco, for appellant.

Boyd & Taylor, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff, a boy of 10 at the time, was injured while playing on a water ski jump. Judgment of nonsuit was rendered in favor of defendant John P. Riley. Plaintiff presents two issues upon this appeal. Was there sufficient evidence to present these questions to the jury: (1) Did Riley own this water ski jump at the time of the accident? (2) If he did, was he negligent, did he violate a duty he owed the plaintiff in respect to this water ski jump? We will consider the latter question first.

This ski jump was typical of such devices: An inclined plane supported or buoyed up at one end by air-tight drums. This one was about 6½ feet wide by 26 feet long. One end rested upon the ground; the other was about seven feet from the ground. It had no wheels or other moving parts.

It was in a portion of a public park which was adjacent to a yacht harbor and used for the parking of automobiles, navy rafts, boat trailers and other similar objects. It was near a pile of navy rafts and about 300 to 400 feet distant from a playground area equipped with swings, slides and similar apparatus. There intervened a grove of trees with several picnic tables interspersed among them.

Several years before the accident, during Riley's absence from home, the ski jump had been taken from his yard to the park by persons unknown to him, but he had seen it at the park sometime during the year preceding plaintiff's accident. He thought it had been used each year for the Shark Derbies. He said that any of the skiers that wanted to use it could use it. He thought it had been used every year for a long time.

One morning plaintiff went to the park and played on the swings and other apparatus at the playground. He saw this large slide and went over and played on it. He would push himself up backwards and then slide down. He would make a mound of his jacket, sit on it and slide down. He played on it about 15 minutes before he fell. Just before he fell he was sitting down and pushing himself up backwards, using his hands and feet. He started from the bottom and worked himself up about three-quarters of the way from the bottom. He was getting toward the edge. So, he tried to push himself back and then fell off the edge, a distance of about five and a half feet to the ground.

Here we have an object that was constructed appropriately to serve its function. To equip it with "guards" or "rails to keep children from sliding off the sides," as plaintiff alleges defendant should do, would seriously impair if not completely destroy its usefulness as a water ski jump. The only risk attendant upon its use as a slide when thus resting upon the ground was perfectly obvious, the hazard of falling off the upper end or ever either side. No sign warning of this hazard would be necessary for any adult nor for most children, even children of tender years. And it appears as a fact that the minor plaintiff needed no such warning. He was aware of the hazard of falling over the side. He testified, "I was pushing myself up backwards, and I was getting toward the edge, so I tried to push myself back and I went off the side." There was involved no hidden risk, no element of entrapment, no moving machinery to impose upon defendant a duty toward plaintiff to install guard rails, post warning signs or take other precautions for plaintiff's protection should he choose to use this ski jump as a slide.

The applicable legal principles we find expounded and the case law reviewed in the recent case of Lopez v. Capital Co., 141 Cal.App.2d 60, 296 P.2d 63, (hearing by Supreme Court denied). There, it appeared that a seven year old boy was injured when he climbed upon and fell from a scaffold erected upon a public sidewalk for use in remodeling an office building. Demurrers were sustained to the original and three amended complaints. Plaintiff then refused to further amend, and appealed.

In affirming the judgment the court discussed the attractive nuisance doctrine, indicating various types of situations in which it has been applied, "cases where hidden dangers exist which would be outside the experience of young children, including cases involving drowning under certain conditions, access to dynamite or dynamite caps, movable machinery, high tension wires, and boards piled near where children play, in a manner that is inherently unsafe." 141 Cal.App.2d at page 65, 296 P.2d at page 65. The court then observed that thus far "the doctrine has never been applied in a case involving only an opportunity to climb upon something, the danger of falling being something that is known and realized to all children from earliest infancy, or in a case involving a mere attraction to something as an opportunity to play. In Loftus v. Dehail, 133 Cal. 214, 65 P. 379, 380, the court said:

"'But it by no means follows, * * * that anything or everything which a jury may find, or a court may determine, to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. * * * Venturesome boys, and even girls, make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible, merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight.'

"In Doyle v. Pacific Elec. Ry. Co., 6 Cal.2d 550, 59 P.2d 93, 94, the court said:

"'But it is not every contrivance or apparatus that a jury will be entitled to treat as an "attractive nuisance." Before liability may be imposed, always there must be something in the evidence tending to show that the device was something of a new or uncommon nature with which children might be supposed to be unfamiliar, or not to know of its danger. * * * There is nothing uncommon about a ladder. They are present in practically every home or house, and the danger of falling from them is familiar to children as well as to adults. The ladder was dangerous, but it was not uncommon, and in this case it was not a proximate cause of the injury.'

"Under the cases just cited, and Giddings v. Superior Oil Co., 106 Cal.App.2d 607, 235 P.2d 843, it appears that in some cases it may properly be held, as a matter of law, that the attractive nuisance doctrine is not applicable, and that the facts are not sufficient to warrant leaving the decision of that question to a jury. In general, it may be said that the cases where the doctrine has been applied have been cases where with the owner's knowledge children of tender years habitually come on his property to play, when a dangerous condition exists there which involves an *unreasonable* risk of harm to such children, or where there is an unknown concealed danger or contrivance which constitutes a trap, the existence of which the child could not be expected to suspect. The applicability of the doctrine involves the elements of lure to children, the foreseeability of their playing on property where an unreasonable risk of harm exists, and the presence of a concealed or unknown danger. It involves whether the defendant should have anticipated that an injury would be apt to result from his failure to do something which the circumstances reasonably required, as distinguished from something that resulted only from the child's own activity." 141 Cal.App.2d at pages 65–66, 296 P.2d at page 95. See also 2 Restatement of the Law of Torts, § 339; Prosser on the Law of Torts, 2d ed., pp. 438–445.

Those principles apply here.

The cases upon which plaintiff relies bear no real resemblance to this case. They are not cases in which it could be said as a matter of law that plaintiff must have been aware of the hazard or the evidence demonstrated that he was in fact aware of the hazard. We should say a word about one of them, Hines v. Milosivich, 68 Cal.App.2d 520, 157 P.2d 45. An eight-year old boy fell into a sewer ditch which was being constructed. He had been warned by his parents and by the contractor. Yet a judgment in his favor was affirmed. In holding that there the question of negligence was one of fact, the reviewing court said that the trial court well may have inferred negligence from the fact that the contractor had failed to comply with an ordinance that required the erection of a barrier at either end of the ditch and that if he had erected the barrier he might have impressed upon the plaintiff an appreciation of the danger of falling in. Also, said the reviewing court, the defendant-contractor knew that the lad had not observed his repeated warnings; hence, the trial court could have inferred that defendant knew the boy did not realize the danger and therefore defendant should have taken further precautions by placing barriers around the open portions of the ditch. Those are elements not present in our case.

In view of this conclusion other issues discussed by the parties need not be considered.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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151 Cal.App.2d 602

Theodore M. BORING and Voyce W. Boring, husband and wife, Plaintiffs and Respondents,

v.

Edgar O. FILBY and Annie M. Filby, husband and wife, Defendants and Appellants.

Civ. 9136.

District Court of Appeal, Third District, California.

June 10, 1957.

Action by grantees against grantors to quiet their title to property. The Superior Court, Glenn County, Wright L. Callender, J., rendered judgment for grantees and grantors appealed. The District Court of Appeal, Warne, J. pro tem., held that where grantors' deed excepted oil, gas and minerals as contained in deed from grantors' predecessor, and deed from predecessor excepted all oil, gas and minerals, clause in grantors' deed was no more than reference to outstanding interest and grantors did not reserve any interest in land.

Affirmed.

1. Deeds 🔑140

The rule that a grant is to be interpreted in favor of the grantee applies to an exception to grant also. West's Ann.Civ. Code, § 1069.

2. Contracts 🔑155

In case of uncertainty in a contract, it is to be interpreted most strongly against the party who causes the uncertainty to exist. West's Ann.Civ.Code, § 1654.

3. Mines and Minerals 🔑55(4)

Where grantors' deed excepted oil, gas and minerals as contained in deed from grantors' predecessor, and deed from predecessor excepted all oil, gas and minerals, clause in grantors' deed was no more than reference to outstanding interest and grantors did not reserve any interest in land.

4. Deeds 🔑117

In absence of contrary intention on part of grantor, everything essential to beneficial use and enjoyment of property conveyed is considered as passing to grantee, either as part thereof or as appurtenant thereto.

Mahan & Harland, Fortuna, for appellants.

Francis R. Crable, Chico, for respondents.

WARNE, Justice pro tem.

Plaintiffs brought this action against the defendants for the purpose of quieting their title to certain real property which they had previously purchased from the defendants. Defendants, in their answer to plaintiffs complaint, allege affirmatively that they were owners of a one-half interest in the oil, gas, hydrocarbon and other mineral rights in the subject property. The trial court found that at the time of the conveyance to plaintiffs by defendants, the defendants were the owners of a certain interest in gas, oil and mineral rights by contract with Capital Company, a corporation, and that all the rights of the defendants under said contract passed and were transferred by virtue of the deed of conveyance to plaintiffs, as incidents of ownership. Judgment was entered quieting plaintiffs' title in and to said lands and the gas, oil and mineral rights. Defendants have appealed from the judgment.

On March 17, 1944, Bank of America National Trust and Savings Association, by grant deed, conveyed the land in question to the defendants and one Hull. The defendants, as joint tenants, were granted an undivided one-half interest in the land, and Hull was granted an undivided one-half interest therein. In that deed the bank reserved and excepted all oil, gas and other hydrocarbon minerals then or any time thereafter situate therein and thereunder, together with easements and rights necessary or convenient for the production, storage and transportation thereof, and the exploration and testing of said real property.

In 1946, Hull conveyed his interest in the land to the defendants. The deed contained the following clause: "Saving, Excepting and Reserving all oil, gas, and minerals, etc., as contained in Deed from Bank of America National Trust and Savings Association, to Edgar O. Filby and Annie M. Filby, his wife, as Joint Tenants, an undivided one-half interest and Edward T. Hull * * * an undivided one-half interest dated March 17, 1945 and recorded * * *."

On the same day that the bank conveyed to the Filbys and Hull, and apparently as part of the overall transaction, the bank conveyed to the Capital Company all the oil, gas and minerals situate in and under the real property described in the Filby deed. This deed was never recorded so far as is shown by the record.

Likewise, on March 17, 1944, the Capital Company entered into an agreement in writing with the Filbys and Hull. This agreement after reciting the giving of the deed from the bank to the Filbys and Hull, with the reservation of the oil, gas and minerals and the transfer of those rights to the Capital Company, provided that if there was no commercial development of oil, gas, or mineral deposits within a radius of five miles from the exterior boundaries of the property within five years from the date of the agreement, then the Filbys and Hull were entitled to share in the proceeds from any oil, gas or mineral development thereafter. This agreement was likewise never recorded. The plaintiffs did not learn of the above agreement until sometime after they had received their deed from the Filbys, although the Filbys' rights under the Capital Company contract had matured.

The deposit receipt dated October 16, 1951, signed by plaintiffs and defendants and the realtor who handled the sale on behalf of the defendants contained the same language with regard to the oil, gas and minerals as is found in the deed from the defendants to the plaintiffs.

The manager of the Glenn County Title Company who searched the records with regard to the title and whose company handled the escrow, testified that his instructions from the defendants as sellers made no mention of any reservation or exception in favor of the defendants of the oil, gas or mineral rights; neither did the defendants mention the Capital Company agreement of March 17, 1944. He further testified that the deed was prepared in his office and that he included the language in question as notice that the property was subject to that reservation; that according to the (official) records, the Bank of America National Trust and Savings Association owned the mineral rights. Mr. Boring testified that after he received the title report he had a conversation with Mr. Nunes (the real estate agent who handled the sale for the defendants) with reference to the reservation clause, and his testimony in this regard was, "* * * it sounded to me as though Mr. Filby might be retaining the mineral rights—and I positively objected to buying it and him owning it—but Mr. Nunes told me that the Bank of America owned the mineral rights—I says O.K.—under those conditions I'll go ahead with it * * *", meaning that he would go ahead with the deal. Both Mr. Boring and his wife testified to several conversations with Mr. Filby in which they received his assurance that he was retaining nothing. The evidence further shows that it was Boring's understanding that the Bank of America owned the mineral rights.

[1, 2] Section 1069 of the Civil Code provides as follows: "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." This rule applies to an exception also. Seligman v. Carr, 8 Cal.App. 572, 97 P. 324. "In other respects grants are to be interpreted in like manner with other contracts. (Civ.Code, sec. 1066.) In cases of uncertainty in a contract, it is to be interpreted most strongly against the party who causes the uncertainty to exist." Union Oil Co. v. Stewart, 158 Cal. 149, 154, 110 P. 313; citing Civil Code, sec. 1654.

[3, 4] Applying the foregoing rules to the facts of the case, we feel that the trial court was justified in concluding that the Boring deed (being in the language used and selected by the defendants) is uncertain and ambiguous if they intended to reserve the mineral rights for themselves. The clause reads as follows: "Saving, Excepting and Reserving from Parcels 1, 2 and 3 above all oil, gas and minerals, etc., as contained in Deed from Bank of America National Trust and Savings Association to Edgar O. Filby and Annie M. Filby, his wife, as Joint Tenants, an undivided one-half interest and Edward T. Hull, a single man an undivided one-half interest, dated March 17, 1945 and recorded June 14, 1945 in Book 179 of Official Records, at page 331." The deed from the bank to the Filbys of March 17, 1944, is in evidence. That deed excepts and reserves unto the grantor (bank) its successors and assigns from all the lands in question, all oil, gas and other hydrocarbons and minerals, etc. There is no language in the deed that could possibly be construed as conveying any of the mineral rights to the Filbys. The clause in question contained in the deed from the defendants to the plaintiffs is no more than a reference to an outstanding interest. Had it been the intention of the Filbys to reserve these rights unto themselves they should have done so by appropriate language. In the absence of a contrary intention on the part of the grantor, everything essential to the beneficial use and enjoyment of the property conveyed is considered as passing to the grantee, either as part thereof or as appurtenant thereto. 15 Cal.Jur.2d Deeds, sec. 178.

In addition the trial court found that the defendants were estopped to assert that they had not transferred whatever rights they had in the oil, gas and minerals to the plaintiffs. No complaint is made on this appeal by the appellants that this finding, which by itself supports the judgment, is improper or not supported by the evidence. We assume that the appellants have not done so because of the substantial evidence to support said finding.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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151 Cal.App.2d 669

Bennie Franklin BARNES, Plaintiff and Appellant,
v.
WESTERN PIONEER INSURANCE COMPANY, a corporation, Defendant and Respondent.

Willis Lee RILEY, also known as Willis E. Riley, Plaintiff and Appellant,
v.
WESTERN PIONEER INSURANCE COMPANY, a corporation, Defendant and Respondent.

Civ. 9052.

District Court of Appeal, Third District, California.

June 11, 1957.

Rehearing Denied July 3, 1957.
Hearing Denied Aug. 6, 1957.

Actions seeking declaratory relief as to insurer's liability on automobile liability policy issued to one of plaintiffs, whose automobile was involved in collision. The two causes were combined for trial and from adverse judgment of the Superior Court, Placer County, Lowell L. Sparks, J., the plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that where insurance agent refused to grant insured's request for transfer of coverage from DeSoto to Ford automobile and policy, which specifically covered DeSoto, gave insured no right to demand that coverage be transferred to another automobile, there was no transfer of coverage, even though insurer had erroneously cancelled policy, which was subsequently reinstated, and retained premiums, and insurer was not liable under policy for collision involving Ford automobile during time that policy was temporarily cancelled.

Judgment affirmed.

1. Insurance ⟹144(1)

Where insurance agent refused to grant insured's request for transfer of coverage from DeSoto to Ford automobile, and liability policy which specifically covered DeSoto, gave insured no right to demand that coverage be transferred to another automobile, there was no transfer of coverage even though insurer had erroneously canceled policy, which was subsequently reinstated, and retained premiums, and insurer was not liable under policy for collision involving Ford automobile during time that policy was temporarily canceled.

2. Contracts ⟹247

Modification of contract can often be inferred from conduct of parties thereto.

3. Insurance ⟹237

Where insurance agent refused insured's request for transfer of coverage under liability policy from DeSoto to Ford automobile, driving of Ford automobile, which was involved in collision, without coverage was sole proximate cause of loss occurring through lack of coverage not negligence of insurer in sending insured erroneous notice of cancellation of his policy, and insurer was not estopped from asserting that defense when insured knew that Ford was not covered by insurance when he operated it on highway.

4. Insurance ⟹144(1)

An insurer is not required to issue automobile liability policies in such form as to cast upon insurer an affirmative obligation to transfer coverage from one automobile to another at request of insured.

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C. Ray Robinson by Ronald G. Cameron, Merced, for appellants.

Ericksen & Ericksen and Robert H. Kroninger, Oakland, for respondents.

VAN DYKE, Presiding Justice.

[1] Appellants, as plaintiffs, brought separate actions against respondent, seeking declaratory relief as to the liability of the respondent on a contract of automobile liability insurance issued to one Andy Virgil Gordon, whose automobile was involved in a collision that resulted in injury to the plaintiffs. The two causes were combined for trial, and the appeals are presented on a single reporter's transcript.

The court, upon substantial evidence, made the following findings of fact: On January 8, 1952, respondent issued to Gordon a policy of automobile liability insurance which, by its terms, covered the operation of a 1946 DeSoto automobile. The term of the policy was for one year, and the premium was paid in full. At the time the policy was issued and for two years previous thereto Gordon owned a 1934 Ford. Franklin P. Andrews was the local agent of the company who sold the policy to Gordon. He was a general agent, with authority to bind respondent. On April 1, 1952, respondent advised Andrews and Gordon by letter that, effective 12:01 a.m. April 7, 1952, the policy would be cancelled. After receiving the notice, Gordon drove his Ford to the office of Andrews and requested that the insurance coverage be transferred from the DeSoto to the Ford. Andrews told him that, due to the cancellation, the reason for which was unknown to Andrews, he could not make the requested transfer of coverage. Andrews told Gordon that until the matter was straightened out, or until Gordon had acquired insurance with some other company, he Andrews, could do nothing, and, finally, that he would write the company to inquire as to the cause of the cancellation. The cancellation had, in fact, been erroneously made by the respondent. On April 8, 1952, at 10:30 a.m., while driving the Ford, with knowledge that the coverage on the DeSoto had not been transferred to the Ford, Gordon was involved in an accident out of which this controversy arose. The respondent, having discovered its error, mailed notice, under date of April 8, 1952, to Gordon and to Andrews of reinstatement of the policy upon the DeSoto. The respondent at no time returned or offered to return any of the premium payments, but retained the whole thereof. Thereafter, Gordon bought a third car, a Buick, and on or about May 17th at his request, the coverage upon the policy was transferred from the DeSoto to the Buick. Based on the foregoing findings, the trial court concluded that the policy was in full force and effect on April 8, 1952, at the time of the accident, but the protection afforded thereby did not extend to the Ford; that neither respondent nor its agent owed a legal duty to transfer the coverage. Judgment for respondent followed.

[2] Appellants contend that when the company reinstated the contract of insurance and retained the premiums with knowledge, through the knowledge of its agent, that the insured desired coverage on the Ford automobile because he was disposing of the DeSoto, respondent consented to modification of the contract to cover the operation of the Ford. In support of this position, they argue that notice to and knowledge of the agent gained in the course of his agency is notice to and knowledge of the principal; that, under principles of contract law, the modification of a contract of insurance is governed by the rules which are applicable to contracts generally; that the essential elements necessary for the existence of contractual obligations are parties capable of contracting, their consent, a lawful object, and a sufficient cause or consideration. They argue that the retention of the year's premium, with knowledge that the insured desired to modify the contract, was a factor, which, with the others, required the trial court to find that the contract had, in fact, been modified. We do not agree. Modification of the contract required the consent of both parties, and, while such modification can often be inferred from conduct, such was not the situation here in view of the court's findings of fact as to what occurred between the insured and respondent's agent when the insured requested that the coverage be transferred to the Ford. The answer of the agent to the request was an emphatic no, and it made no difference that he based it upon his belief that the contract had been cancelled by unilateral action by respondent. It was not shown that the contract itself required modification upon request of the insured by transferring the coverage to any other car than the one specifically described in the policy. The policy was not an open policy but, on the contrary, covered a specifically described automobile without any right in the insured to demand that the coverage be transferred to another car. Under such circumstances, the agent's refusal to grant the insured's request for transfer of coverage could have been arbitrary, notwithstanding the company had, without right, purported to cancel the policy. This lack of consent was known to the insured when he left the office of the agent. The court so found, and the evidence amply supports the finding. The insured, therefore, knew, when he elected to drive the Ford on the highway, that the coverage had not been extended to it, and that as to the operation of that car he was uninsured. The vital element of consent to modification was lacking.

Appellants next argue that the reformation of the policy would have been authorized on the facts of the case so as to make the written contract so reformed reflect the intent of the parties. What we have said heretofore disposes of this contention, for the court has found impliedly that there was never any intention on the part of respondent to modify the written contract so as to afford coverage on the Ford car. This lack of intent did not depend upon fraud or mutual mistake or mistake of one party known by the other. It was simply a flat refusal to modify the contract as written. We have carefully examined the authorities cited by appellants in support of their contentions, and we find none which afford authority for a reversal of the judgment appealed from.

[3] Appellants further contend that the negligence of respondent company in sending the insured an erroneous notice of cancellation of his policy was the sole proximate cause of the failure of the company's agent to take the procedural steps necessary to a transfer of coverage when first requested, and consequently respondent company is liable for damages flowing directly from such negligence. But the cause of non-coverage was the actual refusal of respondent, through its agent, to insure. And Gordon's driving the Ford without coverage was the sole proximate cause of loss occurring through lack of coverage. Unless there was a contract of insurance, there could be no cause of action in appellants. Nor is the respondent estopped to make the defense here asserted. Estoppel could not exist in view of the facts found by the court, which, as we have said, are amply supported by the evidence, that the insured knew when he operated the Ford on the highways that it was not covered by insurance. He operated the Ford without reliance upon or belief in the existence of insurance coverage.

[4] Finally, appellants contend that the respondent company, as a state-franchised insurer, was obligated to provide coverage required by the applicable state statutes when it issued and reinstated the contract of insurance in question. The argument here is that the business of insurance is affected with a public interest; that this justifies holding insurers to a broader legal responsibility than parties to purely private contracts or transactions; that such a company has an affirmative legal obligation to provide coverage consistent with the policy of the state, which policy has led to the granting of a franchise permitting it to engage in the insurance business; that policies of insurance must be read in the light of applicable statutory provisions. Appellants argue that by the nature of its contract the public interest affecting it, and the various statutory requirements to be read into its policy, the respondent should not be permitted to evade its obligation to provide that coverage which it knew the insured desired and for which the insured paid premiums. But there is no statute requiring automobile liability policies be written in such form as to cast upon the insurer an affirmative obligation at the request of the insured to transfer coverage from one car to another. The findings of the trial court, supported as they are by the evidence, compel the conclusions of law which the court drew and the judgment which it entered.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

151 Cal.App.2d 537

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Garry Lee PARKS, Defendant and Appellant.

Cr. 2707.

District Court of Appeal, Third District, California.

June 6, 1957.

Hearing Denied July 31, 1957.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of armed robbery, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that since defendant had stated at pre-trial interview that he did not want to talk about anything until he talked to an attorney, evidence as to his failure to answer question during such interview should not have been admitted, even if question could be considered in nature of accusatory statement which it ordinarily would have been incumbent upon him to deny.

Reversed.

1. Criminal Law ⚷407(2)

Defendant's failure to deny that he knew that someone had identified him was not indicative of consciousness of guilt, and evidence of failure to make such denial, during pre-trial interview, was inadmissible in prosecution for armed robbery.

2. Criminal Law ⚷407(2)

Any accusatory statement, and response thereto made by defendant while under restraint, should be considered with great caution; and if police questioning was insistent, so that defendant was induced or persuaded against his better or more considered judgment to make a response or to adopt policy of silence, accusatory statement should be held inadmissible in ensuing criminal prosecution.

3. Criminal Law ⚷393(1)

No violation of privilege against self-incrimination can be sanctioned.

4. Criminal Law ⚷407(2)

Where defendant stated, at pre-trial interview, that he did not want to talk about anything until he talked to an attorney, evidence, as to his failure to answer question during such interview, should not have been admitted, in subsequent criminal prosecution, even if question could be considered in nature of accusatory statement which it would ordinarily have been incumbent upon him to deny.

5. Criminal Law ⚷407(2)

Defendant had right to refuse, on grounds of possible self-incrimination, to answer questions propounded by district attorney at pre-trial interview, and no unfavorable inference could be drawn, in subsequent criminal prosecution, from his failure to respond.

* * *

Douglas C. Busath, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a jury verdict which found appellant guilty of three armed robberies, and from the order denying a new trial.

It is unnecessary to narrate the evidence, as appellant does not challenge the sufficiency thereof to support the verdict. However, he was positively identified by the victims of the robberies.

It appears from the record that upon appellant's arrest he was questioned by four officers, and at that time he denied his guilt. On the following day, he was further interrogated and again insisted that he was innocent. He was held in custody and four days later was taken to the office of a deputy district attorney. Appellant there declined to answer any questions addressed to him, stating that he did not want to talk "about anything" until he "talked to an attorney". This was brought out by the deputy district attorney on cross-examination of appellant and furnishes the basis for one of two assignments of error on appeal. The other assignment is based on alleged prejudicial misconduct of the trial judge in respect to the same matter.

Without objection, the deputy district attorney asked appellant if at the time of the aforementioned interview he had not asked him various questions as to his whereabouts at the times of the robberies, as to whom he was with and as to what he had been doing and if he had not refused to answer. Appellant admitted that this was so. The deputy district attorney continued this line of questioning, asking: "Q. You made no response at all? A. Yes, sir, I did. I said I did not want to talk to you about anything until I talked to an attorney. Q. And do you remember my asking a question, 'Do you know where Grady's Bottle Shop is,' and do you remember you didn't say anything? You didn't answer that? A. I don't remember your asking that specific question."

At that point, appellant's counsel interposed an objection on the ground that the deputy district attorney was going beyond the scope of proper cross-examination. The objection was overruled, and the deputy district attorney continued. His next question was: "Q. Do you remember my asking you this question: 'Do you know you were identified by Mr. and Mrs. Smith who own the Grady's Bottle Shop as the person who robbed the bottle shop twice?' Do you remember you made no response to that?"

[1–5] Whether or not appellant had answered the question was immaterial. His failure to deny that he knew that someone had identified him was not indicative of a consciousness of guilt. But even if we were to assume that the question could be considered in the nature of an accusatory statement, which it was incumbent upon appellant to deny, People v. McKay, 107 Cal.App.2d 519, 522, 237 P.2d 345, it was error to admit evidence of his failure to deny in the instant case for reasons hereinafter set forth. The deputy district attorney continued: "Q. The question was: 'Do you know you were identified by Mr. and Mrs. Smith who own Grady's Bottle Shop as the person who robbed the bottle shop twice? Do you know that?' And he made no response to that question." Then the trial court interposed: "If you did not do it, why didn't you say you didn't do it? Mr. Olson [counsel for appellant]: Your Honor —The Court: Let the understanding be you are objecting to them all. I am still going to ask it: If you didn't rob it why didn't you say you didn't rob it? A. Because, sir, I am entitled to my constitutional rights. The Court: Which one are you talking about? Maybe you are talking about one I never heard of. A. Well, sir, I don't have to say anything to anything when I am under arrest until—I am entitled to counsel. The Court: Why didn't you say you didn't rob it? A. I don't remember him asking me that."

The facts in the instant case bring it within the rule enunciated in People v. Simmons, 28 Cal.2d 699, 718–721, 172 P.2d 18, 29. Therein the Supreme Court declared that:

> "* * * any accusatory statement and a response thereto made by a defendant under restraint, should be considered with great caution, and if the police questioning has been insistent, so that the defendant has been induced or persuaded against his better or more considered judgment to make a response or has adopted the policy of silence, the accusatory statement should be held inadmissible by the trial judge in the first instance. * * * No violation of the privilege against self-incrimination can be sanctioned.
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> "* * * Defendant was under restraint by the police officers. He was, or should have been advised by them, but at any rate knew from his past criminal experience, that anything that he might say would be used against him and that he did not have to make any statements. * * * it is obvious that defendant was attempting to exercise his constitutional privilege against self-incrimination, despite the insistence of the officers upon carrying on a conversation about the contents of the statements, and that his responses were not such as could give rise to an inference of acquiescence or of guilty consciousness. In this situation it was an abuse of discretion on the part of the trial court to admit the evidence in the first instance; the circumstances were such as to foreclose it." Accord: People v. Spencer, 78 Cal.App.2d 652, 178 P.2d 520.

The error in admitting the evidence was prejudicially compounded. The deputy district attorney continued the objectionable line of questioning until the trial court interrupted:

"I think I had better straighten something out. The jury might have misunderstood my questions. It is true that no person is required to testify against himself under the law of this State. No person is required to give testimony in any court or in any proceeding, or at any time against himself, but in this—what Mr. Wells is referring to is a conversation had in the District Attorney's office and at that time, according to this statement—these questions he has been asked here, he asked this defendant certain questions and you have a right to determine from his failure to reply, failure to deny it, you have the right to, in your own mind, to determine whether or not it indicates guilty knowledge or consciousness of guilt.

"Now, you have a right to take into consideration an ordinary thing that a person would do, and an innocent person, when asked, 'Do you know that you have been identified as the person who robbed Grady's Bottle Shop,' you have the right to take into consideration what the natural inclination of a person ordinarily would be. Go ahead. I think I have straightened that out, counsel. Mr. Wells: I understand, your Honor. The Court: I don't want this jury to think that he has got the right to refuse to answer. Mr. Wells: That is correct, your Honor. The Court: The fact that he doesn't answer can be taken into consideration by this jury."

The trial court was clearly in error, and its remarks were highly prejudicial. Moreover, the error was further enhanced. There was read into the record at length each of the questions asked by the deputy district attorney and the "no responses" thereto by appellant noted. Thereafter, the court further emphasized the matter by making the following statement just prior to commencing the formal charge to the jury:

"* * * Now ladies and gentlemen, I want to clear up one thing here: You recall that on yesterday the District Attorney asked the defendant while the defendant was on the witness stand this question,—Mr. Wells asked the question: 'Do you remember'—that is referring to a conversation that he had with the defendant in the District Attorney's office about the day of his arrest. 'Mr. Wells: Do you remember me asking you this question: "Q. Do you know you were identified by Mr. and Mrs. Smith, who own the Grady's Bottle Shop, as the person who robbed the bottle shop twice?" Do you remember you made no response to that? A. No, sir, I don't believe you asked me that.' Now then it further developed during the hearing that the record, court reporter's record of that conversation, showed that the defendant made no response to that question when asked by Mr. Wells—when it was asked by Mr. Wells in the District Attorney's office, and you recall the Court informed you that the defendant has the right to refuse to answer, had the right to refuse to answer the question and I inform you of that again. But although he had the right to refuse to answer, as to the jury I then told you and I tell you again, the jury could take into consideration, if it so desired, the fact that he did refuse to answer.

"Now then, later in the trial the defendant offered testimony to show that when he was first arrested he was brought into the Sheriff's office—rather the defendant testified to this, that when he was first arrested he was taken into the Sheriff's office and told by the Sheriff that he was accused of these two robberies,—of two robberies, two 'jobs' as he said it. Well, there he said that he at that time denied having committed the robberies. Well now, he is not required to continually deny it. However, you may take into consideration the fact that he didn't deny it when asked about it by Mr. Wells, but you also must take into consideration the fact that he did deny it at the time he was questioned in the District Attorney's office prior to being questioned by Mr. Wells."

Apparently, the trial court was attempting to cure the errors committed during the course of cross-examination of appellant. However, we hold that it failed to do so, and that the error was so prejudicial as to necessitate a reversal.

The judgment and the order are reversed.

PEEK and SCHOTTKY, JJ., concur.

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Appellant,
v.
W. H. HUNT ESTATE COMPANY, a Corporation, Defendant and Respondent. *

Civ. 8950.

District Court of Appeal, Third District, California.
June 3, 1957.

Hearing Granted July 31, 1957.

Proceeding brought by electric company to condemn easement for construction, operation, and maintenance of two electric transmission lines. The Superior Court, Shasta County, Richard B. Eaton, J., awarded condemnee $5500 as value of easements and $32,000 as severance damages to land of condemnee not taken, and electric company appealed. The District Court of Appeal, Van Dyke, P. J., held that admission of testimony as to potential danger of electrocution, fire and lightning bolts, was improper where hazards described were not shown to have been probable but were remote and fanciful speculation.

Part of judgment fixing damages for property taken affirmed, and part of judgment awarding severance damages reversed and cause remanded.

1. Eminent Domain 🔑221

In action by electric company to condemn easements over land, sole issue for consideration by jury is amount to be awarded condemnee for easements and rights sought to be condemned.

2. Eminent Domain 🔑126(1)

Market value is measure for compensation to be awarded for easements and rights condemned.

3. Eminent Domain 🔑96

Severance damage to land not taken in condemnation proceeding can be obtained only to extent that it flows directly and proximately from the severance and cannot be proved by testimony of mere fears of remote or contingent possibilities or damages.

4. Eminent Domain 🔑203(2)

In action to condemn easements, testimony concerning damage must be confined to diminution in value resulting from lawful elements of damage.

5. Evidence 🔑501(7)

In action to condemn easements, opinions as to severance damages based upon speculative, remote, imaginary, contingent or merely possible elements of damage are inadmissible.

6. Evidence 🔑553(4)

In action to condemn easements, it is improper to address to valuation witness hypothetical questions which are not based on facts shown by evidence.

7. Eminent Domain 🔑203(1)

In proceeding by electric company to condemn easement over lands for construction and alteration of two electric transmission lines, admission of testimony as to potential danger of electrocution, fire and lightning bolts, was improper where hazards described were not shown to have been probable but on contrary were remote and fanciful speculation.

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* Opinion vacated 319 P.2d 1044.

8. Trial ⟹96

Where cross-examination establishes that opinion of valuation witness, in proceeding to condemn land, as to diminution in value of property, is based partially on non-compensable items of damage which he is unable to segregate from lawful elements of damage, a motion to strike his testimony, accurately pointing out the defects, ought to be granted.

◆

Robert H. Gerdes, F. H. Pearson, Charles T. Van Deusen, San Francisco, Malcolm A. MacKillop, San Francisco, and Carr & Kennedy, Redding, of counsel, for appellant.

L. C. Smith, Redding, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment based upon a jury verdict which awarded respondent corporation, hereinafter called Hunt, $5,500 as representing the market value of easements over the land of Hunt condemned by plaintiff-appellant, hereinafter called Pacific, and $32,000 as severance damages to the land of Hunt not taken.

By its complaint Pacific sought to condemn an easement for the construction, operation and maintenance of two electric transmission lines. The Hunt property contains approximately 7,600 acres of land. It has two operating transmission lines on it that were built in 1920–1921. The right of way for the lines to be built extends 17,382 lineal feet across the property and the easement strip approximates 52.6 acres. Auxiliary road easements extend 8,892 feet upon the property and occupy 4.01 acres. The spoil deposits occupy .87 acres. The lines will be carried on steel towers. For 9,335 lineal feet they will be carried on parallel sets of squat snow towers about 20 feet square at the base. For the rest of the way the lines will be carried on a single tower line, the towers averaging 28 feet square at the base. There will be 26 of the smaller towers and 10 of the larger. The ground clearance normally varies from 47 to 57 feet and the maximum sag at 125° Fahrenheit brings the wires in places to within 30 feet of the ground. 15 new gates in existing fences were to be constructed and Pacific sought the right to use 3 gates maintained by Hunt and the further right, should Hunt construct fences across the access roads or under the lines, to place gates therein. Grounding wires are carried on the transmission towers for the purpose of diffusing lightning so that the full force of a lightning bolt will not spend itself down one tower, but will be spread along the line and come to ground along several towers.

No contention is made that the award for the easements taken is excessive. In fact, the amount so awarded approximates the upper limits of Pacific's own valuation testimony. But Pacific contends that the part of the judgment based upon the award for the severance damages must be reversed for a retrial of that issue because the award is excessive, and because of alleged errors in the admission of testimony on the part of Hunt, coupled with the use of that testimony by Hunt's valuation witnesses in testifying as to the extent of severance damages.

[1–6] A brief statement of pertinent rules of law will suffice. In such a case as this the sole issue for consideration by the jury is the amount to be awarded to the condemnee for the easements and rights sought to be condemned. People v. Ricciardi, 23 Cal.2d 390, 402, 144 P.2d 799. Market value is the yardstick in this state for measuring such compensation. People v. Ricciardi, supra; People v. Al. G. Smith Co., 86 Cal.App.2d 308, 194 P.2d 750. Severance damages can be obtained only to the extent that they flow directly and proximately from the severance and cannot be proved by testimony of mere fears of remote or contingent possibilities or damages. (17 Cal.Jur.2d pp. 673–674.) Opinion evidence as to severance damages based upon incompetent and inadmissible matters must be rejected and cannot be submitted to the jury. San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A.

604; People ex rel Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 268 P.2d 117; City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228. Testimony of witnesses concerning damage to property must be confined to the diminution in value resulting from lawful elements of damage. Rose v. State of California, 19 Cal.2d 713, 739, 123 P.2d 505. Opinion evidence as to market values must be based upon property uses which are reasonably probable and cannot be based upon elements which, though affecting values, are mere possibilities and no more. People v. Ocean Shore Railroad, 32 Cal.2d 406, 425–426, 196 P.2d 570, 6 A.L.R.2d 1179. Opinions as to severance damages based upon speculative, remote, imaginary, contingent or merely possible elements of damage are inadmissible. Arnerich v. Almaden Vineyards Corp., 52 Cal.App.2d 265, 272, 126 P.2d 121. Hypothetical questions addressed to valuation witnesses which are not based on facts shown by the evidence are improper. People v. Wilson, 25 Cal.2d 341, 349, 153 P.2d 720. With reference to experiment testimony admitted over objection, Pacific relies on the rule that evidence of such experiments which are not shown to have been performed under conditions finding factual support in the evidence or which only tend to confuse the jury with collateral matters are improper. People v. Ely, 203 Cal. 628, 632–633, 265 P. 818. We may note an illustrative application of some of the foregoing rules made in the case of Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N.E. 486, 490, a decision frequently cited by our own courts, from which we quote the following on the subject of severance damages:

> "The burden of proof was on the appellee to show damage to the part of the land not described in the petition and not included within the three-rod strip, and the ultimate fact which he was required to prove was a depreciation of the market value of the land because of conditions which would furnish the basis for a common-law action. He must prove the same facts which he would be required to prove in a common-law action. If any supposed element of damage is not a proper subject of proof or of consideration in the common-law action, it is not a proper subject of proof in the eminent domain proceeding or of consideration as an element affecting the market value. The cases cited established beyond doubt that depreciation in market value will not, alone, sustain a claim for damages. The depreciation must be from a cause which the law regards as a basis for damages. 'Testifying to amounts of damage, where there is no basis of damage, is of no value as evidence.' * * * The appellee, to recover damages to his land outside the three-rod strip, was required to prove a physical disturbance of a right which he enjoyed in connection with that land. His witnesses who testified to damages ranging in amount in their respective opinions from about $1,000 to about $4,000 did not state on their direct examination in what the damages consisted. They were cross-examined as to the basis of their opinions. * * The elements of damage which they took into consideration were danger of injury from electricity by reason of broken wires, danger from fire, danger from lightning, danger to crops by the towers being blown over, danger of trespass by the appellant's employees and others, and inconvenience in farming. All these elements were not mentioned by all the witnesses, but every witness mentioned some of them. Damages being recoverable only where there is a physical disturbance of a right of property, the mere fear of a remote and contingent injury which may possibly occur, but whose happening is altogether speculative and uncertain, is not regarded by the law as an element entering into the damages which may be allowed to the owner. The damages must be direct and prox-

imate and not such as are merely possible or may be conceived by the imagination. * * *

"Whether the line would expose persons and stock to danger was a question of fact * * * and no evidence that it would do so was offered. Evidence was introduced by the petitioner to show that there was no danger except in case a wire should break and fall upon a person or animal before striking the ground. This evidence was uncontradicted and the contingency so remote as to furnish no basis for the allowance of present damages. The danger from fire, which was referred to, arose from the possibility that the employees of the appellant in inspecting the line might throw away lighted cigarettes and cause fire, which might extend into the land outside the strip. There was a remote possibility that this might occur. If it did, it would be the result of a tortious act of the employee, for which the appellee would have his remedy against the person doing the wrong or perhaps against the appellant. The danger from lightning suggested was that the lightning might be conducted down one of the towers and might jump and injure any one who was standing near. Danger was anticipated to crops if the towers should be blown over on the field while the crops were on the ground. Danger was also anticipated by trespasses of the appellant's employees or others on the land of the plaintiff outside of the three-rod strip and also by the employees throwing down the fences at the ends of the strip and leaving it open. All these imagined sources of danger were so remote, speculative, and uncertain as to afford no basis for the allowance of damage which their anticipated occurrence might occasion."

It is Pacific's contention that testimony as to wholly speculative risks from the presence of the lines was admitted over its objection, the rulings on the objections being reserved subject to motion to strike; that precise motions to strike were at the close of such testimony directed to these very defects and were denied; that a great part of the total evidence addressed to the lowering of market value was made up of such erroneously admitted testimony; that the effect of the errors alleged to have been committed was magnified by permitting all of the objectionable testimony to come in over constantly repeated objections and constantly reserved rulings; that 25% of the total testimony taken was thus erroneously admitted, and that the final ruling of the court admitting it resulted in its being magnified in the minds of the jury.

A brief résumé of the type of testimony here under attack follows: Bill Bogue was a 16-year old boy who worked with a sprinkler system beneath a power line on his property. Once he had lifted a pipe straight up in the air so that it touched or came near the line and he received a shock. Jesse Hufford, Jr., testified that once while irrigating land with a pump he placed his hand at one end of a pipe to stop a water leak, that the water sprayed over the pump and that he received a shock which knocked him down. Wilson Pritchett, a teacher of electrical engineering at the University of California, testified that the purpose of an overhead wire carried on the towers was to diffuse lightning along the line to other towers so that the whole shock would not go down a particular tower near which the lightning might strike, but would be diffused a mile along the line; that he thought there might be an appreciable hazard should lightning strike the line within half a mile of a person near a tower, saying there would be a likelihood of "gradients as far as ten feet away if you were standing with your feet separated so that a dangerous current could flow up one leg and down the other." He had nothing to say as to the probability of lightning striking the line as against the probability that it was equally apt to strike anyone on the ranch. Having so testified generally, this witness then gave testimony concerning some assumed hazards. He testified that aluminum pipe and solid jets of water containing the usual amount of mineral salts were good conductors of electricity and that if in irrigating by a sprinkling system under the lines a solid jet of water as thick as the width of a thumbnail should strike one of the lines electricity would be conducted down the jet and along the aluminum pipes used in such system and that anyone contacting the jet or the pipe at that moment of time might well be electrocuted. Charles A. Hufford testified that he had a power line on his ranch; that he experienced no difficulty in feeding cattle under it; that he felt the damage to the Hunt land would be occasioned by the potential hazard of handling cattle in the corrals through which the lines would run and in hindrance to sprinkler irrigation of land under the lines; that he felt most of the severance damages would be caused by hazards created by the power line. Aubrey Gross, who runs a general merchandising business in Millville, in the course of which he sells installed sprinkler systems, testified to an experiment he had conducted to determine the distance that water will go into the air from such systems under certain conditions. He said he made a test to determine how high in the air water would go if a sprinkler head came off of a riser and that, using 35 pounds of pressure against water coming out through a single riser, he had seen the water go 34 feet in the air. He was not sure the column of water had been solid at that elevation, but said it looked to be solid. It was further testified that no sprinkler system would be designed so as to send a solid jet of water 34 feet in the air and such occurrence could only happen by misadventure and not by design. On this subject Pritchett was asked to assume that 5 of 6 risers with their topping sprinkler heads would become clogged by moss or dirt or such like material and that the sprinkler head on the remaining riser would come off, thus permitting a solid jet of water to be projected straight up toward the overhead lines. He said a person properly placed to receive a shock might be electrocuted if the solid jet hit a wire. There was testimony that sprinkler systems are often operated under overhead lines; there was no testimony that anyone had ever been injured by such operations. All of these defects were pointed out to the trial court during the argument on the motions to strike. Hunt put on two valuation witnesses, both of whom, on cross-examination as to their testimony of diminution of market value of the land not taken, said that they considered among other things that the presence of the line would prevent or make hazardous irrigation by sprinkling the land under the lines and both considered hazards from lightning striking the lines and injuring or killing men and animals. Throughout the trial the matter of hazard from the overhead lines as an element reducing the market value of the land not taken was stressed and much was made of it in the argument to the jury. It was not confined to proof of the value of the easements taken as increasing the burden of those easements. It was principally directed at, and generally used with regard to, the issue of severance damages. Both valuation witnesses stated they could not segregate from their general estimate of severance damages the part based upon the hazards referred to. Pacific points out that, although the only issue before the jury was the market value of the easements and the amount of severance damages, which latter would be determined by the reduction in market value of that portion of the Hunt ranch outside the easements, yet counsel for Hunt in argument continuously stressed the potential danger of electrocution, fires, lightning bolts and the like. An example of this follows: "The fact of the matter is * * * if it were not for Mr. Pritchett I would not have been informed * * * I think you will have a different outlook upon these high-tension electric towers for the rest of your life and the reason why that other people don't, members of the jury, is because that the public utilities have been successful in keeping the people in the dark." Pacific further points out that the severance damages total about 9% of the highest market valuations placed on the entire Hunt property.

[7, 8] The testimony adverted to herein comes squarely within the ban declared by the cases we have cited. The hazards described were not shown to have been probable and on the contrary fit squarely into the classification of remote and fanciful speculation. The testimony should have been stricken and the jury instructed to disregard it. In Rose v. State of California, supra, a divided court, treating of the situation here presented where valuation witnesses consider improper items of damage, and either cannot or will not eliminate them from their estimates of severance damages, held that admission of the valuation testimony, notwithstanding such defects and the refusal to strike the same, did not constitute prejudicial error requiring reversal where the motion to strike was not accurately directed at the improper evidence alone. Throughout the opinion, however, it is recognized that valuation testimony ought not to be based in part upon non-compensable items of damage. The situation we have here, taking the whole record into consideration, is one where the probable effect of the errors pointed out was to greatly enhance the severance damages allowed and to leave the record in a condition wherein we cannot say that grave injustice has not been done to the appellant. We think that where cross-examination establishes that the opinion of a valuation witness as to the diminution in the value of property is based partially upon non-compensable items of damage which he is unable to segregate from lawful elements of damage, a motion to strike his testimony, accurately pointing out the defects, ought to be granted. If that had been done in this case there would have been no proof of severance damage. We think the trial as to severance damage was unfair and that in itself constitutes a miscarriage of justice.

That part of the judgment appealed from fixing damages for the property taken is affirmed. That part of the judgment awarding severance damages is reversed and the cause is remanded for a further trial upon that issue alone.

PEEK and SCHOTTKY, JJ., concur.

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151 Cal.App.2d 611

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Tom SHEELEY, Defendant and Appellant.
Cr. 3238.

District Court of Appeal, First District, Division 1, California.
June 11, 1957.

Defendant was convicted of forgery. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that testimony sufficiently proved the corpus delicti at the preliminary examination without use of any of defendant's extrajudicial statements.

Judgment and order denying new trial affirmed.

1. Criminal Law 🔑414

In prosecution for forgery, testimony of owners of company against which check was drawn, of beer salesman, and of police inspector that check was not that of the company against whose account it was drawn, that no one having name of payee of check was employed by company, that there was no bank at address stated for bank named on check, that there was no such "ABA" number as that set forth on check, and that salesman had received the check in payment for a beer delivery sufficiently proved the corpus delicti at the preliminary examination without use of any of defendant's extrajudicial statements. West's Ann.Pen.Code, § 470.

2. Criminal Law ⚷563

Corpus delicti may be established by circumstantial evidence and inferences therefrom.

3. Criminal Law ⚷26

Identity of offender is not part of the corpus delicti.

4. Criminal Law ⚷412(1)

Where corpus delicti is established by independent evidence, defendant's extrajudicial statements may be used to show the surrounding circumstances and to establish degree of the crime committed and to identify defendant as the culprit.

5. Criminal Law ⚷374

In forgery prosecution police inspector's statement that certain checks, which defendant asserted were not related to the offense charged, were fictitious and similarities which such checks bore to one on which prosecution was based, coupled with defendant's admissions, furnished basis for inferences concerning defendant's knowledge of the fictitious character of the check in suit and, thus, a foundation for admission of such other checks in evidence. West's Ann.Pen.Code, § 470.

6. Criminal Law ⚷1169(11)

In forgery prosecution, admission in evidence of fictitious checks other than check in suit could not have been prejudicial in view of fact that formal introduction of such other checks added very little to the testimony which had gone in without objection. West's Ann.Pen.Code, § 470.

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S. Bruce Scidmore, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of forgery, a violation of section 470 of the Penal Code, defendant does not question the sufficiency of the evidence at the trial. He claims (1) insufficiency of evidence at the preliminary examination because, he asserts, without the use of his extrajudicial statements there was no proof of the corpus delicti, and (2) prejudicial error in the admission of certain checks assertedly not related to the offense charged.

As To The Preliminary Examination.

[1] The state claims (1) that by not applying for a writ of prohibition within the time limited by section 999a, Penal Code, defendant lost his right to review the trial court's order denying his motion to set the information aside for lack of competent evidence of reasonable or probable cause; (2) that defendant can not now urge it upon appeal because he does not and can not show that he was prejudiced by the denial of that motion; and (3) at the preliminary hearing sufficient evidence of the corpus delicti was adduced without the use of defendant's extrajudicial statements. We are convinced that the state's third point is good. Therefore, we need not consider its other two points.

At the preliminary hearing the corpus delicti was sufficiently shown by the following evidence: A check was in circulation purportedly signed by "K. R. Lomison" as maker against the account of "Atlas Box Co., 879 Bryant Street, San Francisco, Calif." with the "Bank of America, Twenty Second and Mission Street, San Francisco, California" (identified as No. "11-57") in favor of "Thomas M. Dowson" as payee. It was not the check of the Atlas Box Company of San Francisco. No one by the name of Lomison was employed by that company or authorized to sign its checks and no one named Thomas M. Dowson was employed by it. There was no Bank of America at 22nd and Mission Streets and no such ABA number as 11-57. A beer salesman testified that he received this check in payment for a beer delivery. This evidence went in by testimony of one of the owners of the Atlas Box Company, the beer salesman, and an inspector in the Oakland Police Department. That evidence, together with the inferences that reasonably could be drawn from it, sufficiently proved the corpus delicti without use of any of defendant's extrajudicial statements.

[2-4] The corpus delicti may be established by circumstantial evidence and inferences that may be drawn therefrom. People v. Stuart, 116 Cal.App.2d 820, 823, 254 P.2d 583. The identity of the offender is not a part of the corpus delicti. People v. Harmon, 117 Cal.App.2d 511, 514, 256 P.2d 340. Where the corpus delicti is established by independent evidence, defendant's extrajudicial statements may be used to show the surrounding circumstances and to establish the degree of the crime committed (People v. Miller, 37 Cal.2d 801, 806, 236 P.2d 137) and to identify the defendant as the culprit (People v. Harmon, supra, 117 Cal.App.2d at pages 513–514 and 514–515, 256 P.2d at pages 342, 343). (Additional authorities upon each of these points are cited in 8 Cal.Jur., Crim.Law, §§ 247, 248, 303, and supplements thereto.)

As To The Other Checks Admitted In Evidence At The Trial.

Two checks bearing a certain similarity to the check in suit were introduced in evidence over defendant's objection that a proper foundation had not been laid. He claimed there was no showing that defendant had anything to do with them. The prosecution said the purpose of the offer was to show a common scheme, design or device in the modus operandi.

These checks were in format and style of printing quite like the check in suit. Each also bore the ABA No. 11–57 though drawn on different banks. There was some similarity in the typed portion of each and "K. R. Lomison" was the purported maker of one of them.

In addition, the police inspector testified that he showed the defendant "some fictitious printed-up checks," including the two in question, and asked defendant if he recognized these two and he said, "Yes, they were made on the same press that we had up in Oregon." He said the press was taken from him and his partners in Portland; he did not deny having passed the check in suit; asked if he did or not, he said "Well, what is the difference, you have got me sewed up anyway." Later defendant said that he knew lots of people in the business, check business, and if he could make some kind of a deal with the District Attorney's office and someone high, he would be able to give names and addresses, or names of people involved in the business; he knew a lot of them and he had been involved in it since about 1945 himself; that is what he said. But defendant denied having printed the checks, saying "they were printed before we got the press." In none of these conversations did defendant deny having passed the check in suit.

[5, 6] This testimony of the inspector went in without objection. His unchallenged statement that these two checks were fictitious, the similarities which they bore to the check in suit, coupled with defendant's admissions, furnished a basis for inferences concerning defendant's knowledge of the fictitious character of the check in suit, and thus a foundation for their admission in evidence. See People v. Torres, 140 Cal.App.2d 751, 755, 295 P.2d 904; People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769. Moreover, the formal introduction of these two checks in evidence added very little to the testimony that went in without objection, and therefore could not have been prejudicial.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J. concur.

151 Cal.App.2d 442

Harvey R. MONTIETH, by his Guardian ad litem, Artia Markham; Artia Markham, Plaintiffs and Appellants,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, William T. Scott, Leonard Lathem, Orville D. Brumfield, Frank E. Cross, Defendants and Respondents.

Civ. 8952.

District Court of Appeal, Third District, California.

June 3, 1957.

Hearing Denied July 31, 1957.

Action arising out of railroad crossing collision. The Superior Court, Stanislaus County, H. L. Chamberlain, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that the trial court had given a number of formula instructions which should not have been given but that plaintiffs had not been prejudiced thereby.

Affirmed.

1. Appeal and Error ⚷1064(1)

Prejudicial error does not necessarily result from giving of instruction which, subjected to meticulous analysis, might be given a "possible construction" making it subject to "criticism".

2. Trial ⚷295(1)

Charge to jury must be read in its entirety, with each instruction considered in connection with others, and if they harmonize as a whole and fairly and accurately state the law, reversal may not be had merely because of verbal inaccuracies, or because separate instruction does not contain all of elements which are to be gathered from instructions as a whole.

3. Appeal and Error ⚷1064(1)
Railroads ⚷351(1, 12, 21)

In action arising out of railroad crossing collision between train and school bus on foggy morning, jury was fully, fairly and correctly instructed as to law relating to negligence, contributory negligence and proximate cause; and giving of instruction, claimed by plaintiffs to have, in effect, told jury that plaintiffs were precluded from recovering if bus driver had failed to use great care and had been guilty of slightest amount or degree of negligence, did not constitute prejudicial error.

4. Railroads ⚷351(2)
Trial ⚷240

In action arising out of railroad crossing collision between train and school bus on foggy morning, instructions with regard to duty of driver approaching railroad crossing were not subject to claimed infirmity of not being based upon evidence in case; but they were properly subject to criticism of being, in the main, argumentative and the type of formula instructions that should not be given.

5. Trial ⚷240

Trial court should instruct jury in clear, concise language as to law applicable to case, and should leave matter of argument to counsel for respective parties.

6. Appeal and Error ⚷1064(4)

Giving of instructions that were argumentative and the type of formula instructions that should not be given would not require reversal of judgment for defendants, in railroad crossing collision case, in view of evidence in case.

7. Trial ⚷194(16)

In action arising out of railroad crossing collision between train and school bus on foggy morning, trial court's instructions left question of bus driver's negligence to jury and did not imply that driver had been negligent if he failed to anticipate that trainmen would not sound signals required by law and by their own rules.

8. Trial ⚷194(16)

In action arising out of railroad crossing collision between train and school bus on foggy morning, trial court's instruction was not subject to claimed infirmity of telling jury that bus driver's failure to hear train whistle was not evidence that one had not been sounded.

9. Evidence ⚿590

Trial ⚿236(3)

In action arising out of railroad crossing collision between train and school bus on foggy morning, testimony of railroad's employees was to be scrutinized and evaluated by identical tests that would be applied to any other witness sworn in case, and railroad was not to be prejudiced by fact that it had to rely almost entirely on testimony of its own employees; and giving of instruction to that effect was not error, even though it might well have been omitted.

C. Ray Robinson, Merced, and William B. Boone, San Francisco, for appellants.

Rutherford, Jacobs, Cavalero & Dietrich, Stockton, Robert W. Walker, William F. Brooks, Los Angeles, for respondents.

SCHOTTKY, Justice.

This is an appeal from a judgment for defendants in a main line railroad crossing accident case, after verdict by the jury in favor of respondents, and following the denial of plaintiffs' motion for a new trial.

The appellants are Harvey R. Montieth, the bus driver involved in the collision, who sued for alleged personal injuries, and Artia Markham, his mother, who sued to recover medical expenses. For convenience, they will hereafter collectively be referred to as appellants, and Harvey Montieth will generally be referred to as appellant bus driver. The respondents are The Atchison, Topeka and Santa Fe Railway Company and four members of its train crew, i. e., William T. Scott (engineer), Leonard Lathem (fireman), Orville D. Brumfield (brakeman), and Frank E. Cross (conductor). For convenience they will hereafter collectively be referred to as respondents, and the railroad company will generally be referred to as respondent railroad company.

The action was brought by appellants to recover damages from the respondents for the alleged negligence of respondent railroad company and its train crew in the operation of a freight train which collided with a school bus driven by appellant bus driver at the Hatch Road main line crossing in Stanislaus County. No negligence was pleaded as to the maintenance of the crossing. Respondents denied the charge of negligence and pleaded contributory negligence as an affirmative defense.

Appellants do not question the sufficiency of the evidence to support the judgment but contend most earnestly that the court committed prejudicial error in its instructions to the jury. Before discussing these contentions we shall give a brief summary of the evidence as disclosed by the record.

The accident occurred at about 7:00 or 7:05 a. m. on February 23, 1954, at the point where Hatch Road crosses the Santa Fe railroad tracks between Empire and Hughson in Stanislaus County. The crossing is about two miles south of Empire and about one mile north of Hughson

The collision was between a freight train owned and operated by Santa Fe and a school bus owned by the Modesto Union Academy and operated by the plaintiff Harvey Montieth, an able-bodied young man of 19 years. The bus was a 1949 International, it was painted orange-yellow with black letters, and was about 35 feet long. It had a door on the right side at the front and none on the left side.

The Santa Fe locomotive was a double unit Diesel-electric. It was pulling 56 cars and a caboose; 47 cars were loaded. The locomotive was orange and black. It was equipped with a pneumatic bell and whistle.

There is a single set of railroad tracks running generally north and south, while Hatch Road runs generally east and west. There is a railroad bridge over the Tuolumne River to the north of Hatch Road. The tracks make a slight bend to the southeast after crossing the bridge at a point about a mile north of the Hatch Road crossing. Thereafter, the tracks run substantially straight and substantially level to Hatch Road. There is a very slight upgrade at that point, consisting of about 15.8

feet to the mile, or about one-third of one per cent. A whistle board and station sign are located at the side of the tracks about 2,000 feet or 2,306.5 feet north of Hatch Road. The tracks come into the Hatch Road crossing at a slight southeasterly angle.

Hatch Road is a two-lane highway with a white line down the middle. There is also a white line across the road parallel to the tracks and about 10 to 12 feet west of the nearest track. There is no stop sign at the crossing on the west side; there is such a sign at the intersection of Santa Fe Road and Hatch Road just east of the Hatch Road crossing. Santa Fe Road runs parallel to the tracks for some distance. There were no automatic wigwag signals, crossing gates or flagmen at the crossing. There is an irrigation canal about 75 feet wide running along Hatch Road just to the south of it. A railroad bridge carries the tracks across the canal just south of the crossing.

At the time of the accident there was a fog which covered the crossing and a considerable area surrounding it. The fog was variously described as heavy, thick or dense. There were five Santa Fe employees riding on the train. This crew consisted of Scott, the engineer, who was riding on the right side of the locomotive cab, Lathem, the fireman, riding on the left side of the cab, Brumfield, the head brakeman, riding in the cab between the engineer and fireman, Cross, the conductor, riding in the caboose on the right side, and Diehl, the rear brakeman, riding in the caboose on the left side. All except Diehl were made defendants in the action.

The train started from Richmond but the five-man crew listed above took over the train at Riverbank the morning of the accident. Riverbank was about 11 miles or 8 miles or 9 miles north of the scene of the accident. The train left Riverbank at 6:50 a. m. and was on its way south to Calwa, which is the terminal yard just south of Fresno. It was an unscheduled or extra freight and there were no orders for any stops anywhere along the way.

Plaintiff Harvey Montieth testified that he drove to the school (Modesto Union Academy) and picked up the bus. The school is on Hatch Road about four miles west of the scene of the accident. He drove away from the school with the bus at about 6:45 a. m. He was alone in the bus and was on his way to pick up students. It was very foggy and visibility was limited to about 50 to 75 feet. The plaintiff turned on his headlights before starting and they were left on at all times. He drove east on Hatch Road and stopped at the railroad crossing; he stopped the bus about 20 feet west of the tracks; the right wheels of the bus were about two feet off on the shoulder of the road. It was then about 6:55 a. m. After stopping, Harvey got out of the bus and walked about three or four feet in front of it and looked up and down the tracks. He also listened. He did not see or hear anything; there was no train whistle or bell or noise of a train and he did not see any train light.

After looking and listening, the plaintiff walked back to get into the bus; just as he reached the right fender of the bus a car passed going east. He had previously noticed the car stopped behind him. There were two men in the car; the passenger looked out the window as they went by. Then the plaintiff went back around to the front of the bus and wiped off a little piece of the windshield which the wiper did not reach. Thereupon, he went back up and listened for a train again and looked; there was no train bell, whistle, light or sound. He got back in the bus, threw his rag in the glove box or on the floor, saw another car stopped behind the bus, and then sat down. The car was stopped about 5 or 8 feet behind the bus, in the middle of the right lane.

The plaintiff sat down in the driver's seat, leaned forward and looked to his left down the tracks, then looked to the right; there was neither sight nor sound of a train. About the time he looked to his right (south) he started out in low gear and proceeded across the tracks. As he drove forward there was no train whistle, bell or noise and he saw no train light. The bus remained in low gear and was going about 5 to 8 miles per hour at the time of the accident.

The door on the right side of the bus was open and the vent window on the left side was open.

Just before the train struck the bus the plaintiff saw a black shadow to his left. It was just for a split second.

The bus was stopped at the crossing for a period of about two or two and a half minutes altogether. It was a few seconds later that the bus started to move over the tracks.

Four witnesses, Streng, Darnaby, Porter and Smith, testified that plaintiff stopped at the crossing. Two of the witnesses, Streng and Darnaby, corroborated the fact that plaintiff got out of the bus and looked and listened. There were no other eyewitnesses to the accident or to plaintiff's conduct immediately before it happened. These four witnesses and two others testified that they did not hear any train whistles prior to the accident.

The five members of the train crew and four other witnesses testified to hearing the blowing of the train whistles prior to the accident. Scott, the engineer, was not present at the trial, but his deposition was admitted and read in evidence. He testified that there was a whistle board and station sign along the tracks approximately 2,000 feet north of Hatch Road and that that was the place where he last sounded the whistle before the collision. He gave a station whistle and then a regular crossing signal. The signals were continuous, one right after the other. He completed the crossing signal about ten seconds before reaching the Hatch Road crossing. Scott also testified that the bell was ringing continuously from Riverbank to the scene of the accident. After the accident Scott sounded a flag signal on the whistle—a signal to put out a flag to protect the rear of the train. That was after the train came to a stop.

The fireman, Lathem, testified that he could not hear the bell ringing from inside the locomotive cab, but he could hear the sound of the whistle; it was very loud. He also testified that the engineer sounded a station signal and then a crossing whistle before the accident. He estimated that the whistle was blown about 2,000 feet north of the crossing. He determined that distance on the basis that there was a whistle post about 2,000 feet north of the crossing. The whistle post was on the engineer's side of the track and the fireman, Lathem, could not see it. Lathem further testified that the whistle was completed "just a second or so" before the collision; that it could not have been as long as 10 seconds, as the engineer testified, although the engineer was the one who blew the whistle. In his deposition, Lathem testified that the whistle was completed about three or four seconds before the train reached Hatch Road. Immediately after the train came to a stop following the collision another whistle was blown.

The testimony of the head brakeman, Brumfield, was practically identical with that of the fireman, Lathem.

The witness Porter testified that he was right in back of the bus and saw the accident. He was driving east on Hatch Road; when he reached the crossing he saw the bus stopped there; Porter stopped his car about two to four feet behind the bus. The bus was over to the right a little. He saw the bus driver standing in the bus, in front of it, about in the middle. The bus driver sat down, was there for a few seconds, and then started the bus forward. When the bus started up, Porter also drove forward and was following right in back of the bus, about two to four feet behind it. The train then hit the bus. There was another car behind Porter.

Porter also testified that when the bus started up it was about 7:00 o'clock. The bus was stopped there about two to four minutes. There was no train whistle or bell before the accident. After the train hit the bus and was going down the track there was a loud train whistle. It was a

Diesel engine and did not make much noise. It was very foggy that morning and visibility was between 50 and 75 feet.

Porter also testified that he saw the headlight of the train when the train was about 15 or 20 feet from the bus. He also stated that he saw the train's light for about four seconds before the collision, but he later said that the four seconds also included the time he watched the train go down the tracks after the impact. The bus was on the tracks when Porter first saw the train.

The plaintiff Harvey Montieth testified that he saw a black shadow to his left a split second before the impact.

The engineer, Scott, stated that he saw the bus when the train was about 100 feet away. At that time the bus was "dead center in the track."

The fireman, Lathem, first saw the bus in the middle of the track, straddling it when the train was about 75 to 100 feet from it. The center of the bus was between the rails.

The bus was about 35 feet long.

All the witnesses agreed that the train hit the bus near the rear of it. Smith testified that the bus was "pretty near across the track when the train hit it." The plaintiff stated that the train hit the left side of the bus around the rear wheels. Scott's testimony was that the train hit the left rear wheel of the bus. Brumfield testified that the bus was struck just in front of the rear wheels. Lathem ducked down and did not see the actual impact.

Porter estimated the speed of the train at 80 miles per hour when he saw it. However, the defendants Scott, Cross and Lathem estimated the train's speed at 45 to 50 miles per hour. The rear brakeman, Diehl, stated that the speed of the train was about 45 miles an hour. Defendants also produced a copy of a speed tape which showed a speed of 47.5 miles per hour when the train went into emergency.

Appellants first contend that the court committed prejudicial error in giving defendants' instruction No. 14 which reads as follows:

> "There is no doctrine of comparative negligence in this State. It is the law that if the plaintiffs were guilty of the slightest amount of negligence proximately contributing to the accident, there can be no recovery and this is true regardless of how slight such negligence on his part may have been and it is also true regardless of whether the defendant railway company or its employees were negligent or how negligent they may have been. The law does not permit you to weigh the amount of negligence as between the plaintiffs and the defendants; that is to say, the law is not concerned with how negligent either party may have been, if both parties were negligent, and such negligence proximately contributed to the accident. Or stated another way, any negligence of the plaintiffs cannot be excused on the ground that the defendants were also negligent or on the ground that the defendants may have been more negligent than the plaintiff.
>
> "If you find from the evidence that the plaintiffs were guilty of the slightest amount or degree of negligence which proximately contributed to the accident in question they are not entitled to recover any damages, and your verdict must be for the defendants, Santa Fe Railway Company, William T. Scott, L. R. Lathem, Orville D. Brumfield, and Frank E. Cross."

Appellants argue that: "Thus, with unnecessary and argumentative repetition and emphasis, the instruction erroneously told the jury, in effect, that the plaintiffs were precluded from recovering and the verdict must be for defendants if the plaintiffs failed to use great care and were guilty of the slightest amount or decree of negligence." In support of this contention appellants quote the following from the early case of Robinson v. Western Pacific R. Co., 48 Cal. 409, at page 422:

"* * * It is no defense to an action of this kind that the plaintiff by his own act has contributed to his injury; it must appear that by his own fault he has so contributed. And the law regards the plaintiff as innocent, unless he has been guilty of what has been called (somewhat awkwardly) 'ordinary negligence;' that is, unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense. (Shearman and Redfield, Sec. 29.) The *formula* is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover. A very timid or cautious person would not perhaps have gone on the track as the plaintiff did, and—as the absence of great care is slight negligence—it may be claimed that, to that extent, the plaintiff was negligent."

They also quote from Strong v. Sacramento and Placerville Railroad Company, 61 Cal. 326, at page 328, as follows:

"* * * Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing. In the legal sense, he was innocent of negligence, unless there was a want of ordinary care and prudence on his part. The rule is, not that any degree of negligence, however slight, which, directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover. [Citing the Robinson case.]

"A very timid or cautious person would not, perhaps, have driven in the direction of the railroad, knowing that a train *might* pass along the track, and that the warning bell might not be sounded. But the question is: Did the plaintiff exercise ordinary care and prudence in doing what he did?"

Appellants also cite Clark v. State of California, 99 Cal.App.2d 616, 222 P.2d 300. It was there said at page 623, of 99 Cal. App.2d, at page 304 of 222 P.2d:

"* * * But appellant more justly complains of a group of instructions given by the court at defendants' request which as to the point now under consideration may be summarized as follows: The court told the jury that if the decedent was guilty of contributory negligence, no matter how slight, which proximately contributed to the accident their verdict must be for the defendants. Again the court said that in determining whether or not decedent was guilty of contributory negligence 'if you believe from the evidence that she was guilty of the slightest degree of negligence * * * and that such negligence proximately contributed to the accident and her death' the verdict must be for the defendants. As said by the Supreme Court of California in Strong v. Sacramento & P. R. R. Co., 61 Cal. 326, 328:

"'The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover.'

"Ordinarily we would not be disposed to attach great importance to this defect in the instructions, but there is * * * matter * * * indicating that the defect may have wrongfully damaged plaintiff's case. We refer to what has been hereinbefore said concerning the situtation presented when the jury returned to the court for further instructions, particularly on the matter of contributory negligence.

> What the foreman said to the court at that time amounted in substance to a statement that the jury were discussing the question of decedent's negligence exactly in the light of the court's erroneous statement."

And further, 99 Cal.App.2d at page 624, 222 P.2d at page 305:

> "While the lawyer and also the layman recognize that there are differing degrees of negligence, here ordinary negligence was the only degree of negligence involved, and to permit the jury to continue in their mistaken belief that they were concerned with the degree of negligence as distinguished from the degree of proximate contribution of that negligence to the happening of the accident and the infliction of the injury, was detrimental to plaintiff's interests, to say the least."

Appellants then argue that the giving of said instruction was particularly harmful to appellants' case because throughout the voir dire examination of jurors counsel for defendants, in their questioning of jurors, repeatedly argued the legal theory stated in said instruction.

Respondents in reply argue (1) that the giving of such an instruction is not in and of itself any error whatsoever, and (2) that although such instruction might be subject to some technical criticism in not being nicely worded, nevertheless, the giving of the same or similar instructions is never considered to be prejudicial error, unless, in addition thereto, the giving or refusal of instructions on other issues has been prejudicially erroneous and it affirmatively appears that the jury was in fact misled.

[1–3] Notwithstanding the earnest and able argument of appellants we cannot agree that the giving of said instruction constituted prejudicial error. For as stated in Popejoy v. Hannon, 37 Cal.2d 159, at page 168, 231 P.2d 484, at page 490:

> "Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a 'possible construction' making it subject to 'criticism.' It is extremely doubtful that the jurors analyzed the instruction with such exactitude as counsel for the Hannons."

And as stated in Westover v. City of Los Angeles, 20 Cal.2d 635, at page 637, 128 P.2d 350, at page 351:

> "* * * In this connection it should be remembered that the charge to the jury must be read in its entirety, each instruction being considered in connection with the others. If they harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all of the elements which are to be gathered from the instructions as a whole. [Citing cases.]"

Preceding the instruction complained of the court defined negligence as the failure to use ordinary care in the management of one's person or property and also defined ordinary care. Immediately preceding the instruction complained of the court defined contributory negligence as follows:

> "One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation."

Immediately following the instruction No. 14 complained of the court gave the following instructions:

> "You are instructed that if you find that the plaintiff, Harvey R. Montieth, was negligent and if you further find that his negligence was the sole proximate cause of the accident, plaintiffs are not entitled to recover against the defendants and your verdict should be for the defendants.

"To establish the defense of contributory negligence, the burden is upon the defendant, Santa Fe Railway Company, to prove by a preponderance of the evidence that the plaintiff, Harvey Monteith, was negligent and that such negligence contributed as a proximate cause of the injury. If you find that such facts have not been proved by a preponderance of the evidence, then your decision on the issue of contributory negligence must be in favor of the plaintiff, Harvey Monteith. If you find that it is just as probable that the plaintiff, Harvey Monteith, was free from negligence, or even if negligent, that it is just as probable that his negligence did not contribute as a proximate cause of the injury, as it is that negligence on the part of the plaintiff, Harvey Monteith, did contribute as a proximate cause, then the defense of contributory negligence has not been established.

"The defense of contributory negligence requires proof of two things: First, that the plaintiff was negligent at the time and place of the accident, and, secondly, that any such negligence was a proximate cause of the accident. Negligence on the part of a plaintiff is of no significance and does not bar a recovery by the plaintiff unless the negligence, if any, was so connected with the accident as to constitute a proximate cause thereof. If you should find that the plaintiff, Harvey Monteith, was negligent, still such negligence, if any, does not bar his recovery and is of no significance unless you should also find from a preponderance of the evidence that any such negligence was so connected with the accident as to constitute a proximate cause of the accident."

The evidence in the instant case was highly conflicting but the chief question of fact that confronted the jury was whether or not the train whistle was blown prior to the accident. The record shows that the jury deliberated about an hour before returning a unanimous verdict in favor of respondents. We are convinced that the jury reached the conclusion that the proper warnings were given by the train crew and that appellant Montieth failed to take the proper precautions. We are convinced also that the jury was fully, fairly and correctly instructed as to law relating to negligence, contributory negligence and proximate cause and that even if, in a strict, technical sense, the instruction complained of by appellant is subject to the criticism made of it by appellants, we would not be justified in holding that the giving of said instruction constituted prejudicial error. If said instruction were the only instruction given on the subject of contributory negligence there would be more merit in appellants' contention, but as stated in Westover v. City of Los Angeles, supra, "the charge to the jury must be read in its entirety, each instruction being considered in connection with the others."

[4] Appellants next complain that the court erred in giving instructions "which were not based upon or supported by any evidence in this case." Appellants group these instructions as follows:

> "A duty rested upon the driver of the school bus to use ordinary care to look and to avoid colliding with visible objects in front of him, and a special duty of care rested upon him in approaching and crossing this railroad track, which was in itself a warning of danger, and with the presence and location of which he was familiar. (Defendants' No. 51.)
>
> "If you believe from the evidence that upon approaching the tracks before the collision with the train, the driver of the school bus could by the exercise of ordinary care have known of the presence of the train upon the crossing and the danger to be apprehended therefrom, but that he carelessly and negligently disregarded such danger and proceeded upon the

tracks, such conduct on the part of the driver of the school bus would constitute negligence and if such negligence was the sole proximate cause of the accident, or proximately contributed thereto, then there can be no recovery by the plaintiffs and your verdict should be for the defendants. (Defendants' No. 59.)

"If, from the physical facts in this case, you believe that Harvey R. Montieth, the driver of the school bus, would have had a clear and unobstructed view of the approaching train while he was in a place of safety, you are at liberty to find either that he did not look for a train before driving into a zone of danger or that he looked in a careless manner or that he looked and saw the train and failed to heed the obvious danger. (Defendants' No. 52.)

"* * * The duty of a person about to cross a railroad track is not satisfied by merely listening, but requires him to use ordinary care to look 'and listen before' passing from a place of safety to a place of danger, in order to become aware of 'a train's' approach, and his failure in this respect, if any, would be negligence on his part, and if such negligence contributed proximately to cause the accident, there can be no recovery for his injury, and your verdict should be for the defendants. (Defendants' No. 41.)

"* * * Absentmindedness or forgetfulness will not suffice as an excuse for the negligence of a person about to cross a railroad track like the one in this case, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation and if you find that the driver of the automobile was negligent in these respects and this negligence was (a contributing) or (the sole proximate) cause of the accident and alleged injuries, then the plaintiff is not entitled to recover against the defendant. (Defendants' No. 28.)

"It is the duty of the driver of an automobile to approach railroad tracks at a crossing in such a manner and at such a speed as to be able to control the movements of his automobile and stop the same in the event it should appear to be dangerous to attempt to cross the tracks; in other words, there is a duty on the driver approaching a railroad track to keep his vehicle so under control that if, upon exercising his duty of looking and listening, due care for his safety would require him to stop under the circumstances, he will be able to stop." (Defendants' No. 55.)

[5, 6] So far as the contents of these instructions are concerned we do not believe that it can be held that they are inapplicable or are without any support in the record. We do believe, however, that they are properly subject to the criticism that they are in the main argumentative and are the type of formula instructions that should not be given. We believe that a court should instruct the jury in clear, concise language as to the law applicable to the case, and should leave the matter of argument to counsel for the respective parties. The giving of formula instructions has been condemned many times by our appellate courts but has seldom been made a ground for reversal.

In the case of Taha v. Finegold, 81 Cal.App.2d 536 at page 543, 184 P.2d 533, at page 536, the court said:

> "Formula instructions should not be given. As said in Tice v. Pacific Elec. Ry. Co., 36 Cal.App.2d 66, 71, 96 P.2d 1022, 1024, 97 P.2d 844, formula instructions 'are not calculated best to serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials.' While the giving of formula instructions is not in itself prejudicial error, the giving of them here added to the other circumstances of

the case, combined to deny the plaintiff a fair trial."

However, in view of the evidence in the instant case, we do not believe that appellants were prejudiced by the giving of said instructions. The crossing was an open main line crossing with which appellant Montieth was familiar and he knew that he was approaching and crossing said main line railroad in a heavy fog. As hereinbefore stated, the chief issue of fact was whether or not the train whistle was blown prior to the accident. The jury undoubtedly reached the conclusion that proper warnings were given by the train or they would not have rendered a verdict adverse to appellants. We therefore conclude that while said formula instructions should not have been given, it was not reversible error to give them.

The next error complained of by appellants is that the court "gave three separate, emphatic and specific instructions to the effect that the plaintiff had no right to rely upon the absence of train signals, implying that plaintiff would be negligent if he failed to anticipate that the defendants would not sound the signals required by law and by their own rules." These instructions were:

> "Even if you believe that no whistle was blown and no bell was rung or no other warning was given of the approach of the train, I charge you that the driver of the school bus had no right to rely upon the absence of warning of the approach of the train, and in such reliance, omit the exercise of the care which the law requires of one about to cross a railroad track. * *
>
> "* * * (No failure of duty or of the customary practice on the part of those in charge of a train or of anyone handling or supervising any phase of its operation, such as a failure to sound the bell, siren or whistle as required by law absolves a person going upon a track area, such as that involved in this case, from the duty to use ordinary care for his own protection.)
>
> "You are instructed that when a person driving a school bus approaches a railroad track, he is presumed to know that he goes to a place where he may be injured or killed. * * * If he relies upon not seeing or hearing the train or any signal and takes no further precautions he does so at his own risk. * * *"

Appellants argue that these instructions must have conveyed the impression to the jury that the court believed that the plaintiff did rely upon the absence of signals and, in such reliance, took no further precautions and did not stop, look and listen, as he and the other witnesses testified; and that the plaintiff was required to anticipate the negligence of defendants in failing to sound any warning of the approach of the train.

[7] We do not agree with appellants' criticism of these instructions. We believe that they left the question of appellant bus driver's negligence to the jury and must be considered along with the many other instructions given by the court defining burden of proof, proximate cause, negligence and contributory negligence, many of which specifically related to the duties of respondents in giving proper bell and whistle signals, others which specifically related to the duties of respondents in operating the train and maintaining the crossing, and three instructions specifically related to excusing any negligence of appellant bus driver, "unless such negligence was so connected with the accident as to constitute a proximate cause of the accident."

[8] Appellants next contend that it was prejudicial error to instruct that failure to hear a whistle was not evidence that one was not sounded. The specific instruction (Defendants' No. 44) complained of by appellants reads as follows:

> "Under the statute which deals with sounding of whistle or bell by a steam

locomotive 'it is the sounding or giving of the' warning and not the hearing of it which determines the question of statutory violation. On 'the question of violation of the statute' the only issue is whether a signal, as required by the statute, was sounded. If you find that a signal was sounded as required by the statute, the fact that it may not have been heard by some person, is not ground for finding that the statute was violated, or that the railroad or its employees were negligent 'for that reason alone.'"

Said instruction is not fairly subject to appellants' criticism of it because it does not state or imply that any negative evidence was not evidence on the issue of whether the whistle was blown, but specifically states that if the jury found that a signal was in fact sounded, the fact that it may not have been heard by some person was not ground for finding that the statute had been violated.

Appellants state that a similar instruction was held to be improper in Jones v. Southern Pacific Co., 74 Cal.App. 10, 42, 239 P. 429, 441. However, in that case the instruction which this court held had been properly refused stated that "the affirmative evidence of the fact that the whistle was blown and that the bell was rung should overcome the negative evidence that the whistle was not blown and that the bell was not rung."

[9] Appellants contend also that the court committed prejudicial error in giving "special emphasis to the testimony of defendants and other Santa Fe employees." They complain of the following instruction:

> "You should apply the same tests to testimony given by employees of the Railroad Company as you would to any other witness sworn in the case. It sometimes becomes necessary for a litigant to rely almost entirely on the testimony of its own employees, and it should not be prejudiced by this fact. The employees of a party litigant are entitled to have testimony given by them scrutinized and evaluated by the identical tests that would be applied to any other witness sworn in the case."

While the instruction was perhaps unnecessary and could well have been omitted, we do not believe that it was an incorrect statement of the law or that giving it constituted error.

The final contention of appellants is that the court erred in over-emphasizing the duties of the plaintiff. It is true that the court gave a number of formula instructions which we believe should not have been given. We have hereinbefore referred to some of these instructions and have stated our belief that argumentative and formula instructions should not be given, but that the court should instruct the jury in clear, concise language as to the law applicable to the case and leave the matter of argument to counsel for the respective parties. We have read all of the instructions carefully and do not believe that appellants were prejudiced thereby.

No other points raised require discussion.

Because of the numerous contentions of error we have made a careful study of entire record in the instant case. No question is raised as to the sufficiency of the evidence to support the judgment, and we are convinced that the case was one that was decided by the jury upon the evidence presented before them and that there were no errors that would justify a reversal of the judgment. We believe that the following quotation from our opinion in Risley v. Lenwell, 129 Cal.App.2d 608, at page 660, 277 P.2d 897, at page 930, is quite applicable to the instant case:

> "Section 4½ of Article VI of our state constitution reads as follows:
>
> "'No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error

as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'

"The instant case was tried by able and experienced counsel and was presided over by an able trial judge who after full hearing denied appellants' motions for a new trial. Taking the record as a whole, and bearing in mind the plain and meaningful words of the constitution hereinbefore quoted, we are satisfied that even if appellants are correct in some of their contentions of error, no miscarriage of justice has resulted."

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

151 Cal.App.2d 460

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William A. LEVY, Defendant and Appellant.

Cr. 3260.

District Court of Appeal, First District, Division 1, California.

June 4, 1957.

Hearing Denied July 31, 1957.

Proceeding wherein the Superior Court, City and County of Santa Clara, William F. James, J., determined that defendant was a sexual psychopath and ordered him committed accordingly, and he appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that the sexual psychopath act is civil in nature, and fact that one is, after conviction for misdemeanor, committed under the act, for an indeterminate period, does not constitute double jeopardy.

Affirmed.

1. Criminal Law 🔑163
Mental Health 🔑444

The sexual psychopath act is civil in nature, and fact that one is, after conviction for misdemeanor, committed under the act, for an indeterminate period, does not constitute "double jeopardy". West's Ann. Welfare & Inst.Code, §§ 5500–5521, 5501, 5512, 5517(c), 5518, West's Ann.Pen.Code, § 647a(1); West's Ann.Const. art. 1, § 13.

See publication Words and Phrases, for other judicial constructions and definitions of "Double Jeopardy".

2. Mental Health 🔑444

Even though the sexual psychopath act is civil in nature, since it involves deprivation of personal liberty, person proceeded against is entitled to constitutional safeguards, and fact that, thereunder, he is granted bail, presence at hearing, and counsel does not mean that proceedings under the act have developed into criminal proceedings. West's Ann.Welfare & Inst. Code, §§ 5500–5521, 5501; West's Ann. Const. art. 1, § 13.

3. Constitutional Law 🔑212, 258
Mental Health 🔑433

The sexual psychopath act defining sexual psychopaths as persons affected, in form predisposing to commission of sexual offenses, and in degree constituting menace to health and safety of others, with mental disease, psychopathic personality, or marked departures from normal mentality is sufficiently definite and is not violative of the constitutional guarantees of equal protection of laws or due process of laws. West's Ann.Welfare & Inst.Code, §§ 5500–5521, 5501, 5512; U.S.C.A.Const. Amend. 14.

4. Statutes 🔑181(1)

Before statute may be properly interpreted, its intent must be ascertained.

5. Mental Health 🔑444

Main purpose of the sexual psychopath act is to protect society against the activities of sexual psychopaths and the secondary purpose is to rehabilitate the sexual psychopath. West's Ann.Welfare & Inst. Code, §§ 5500–5521, 5501.

6. Mental Health ⚷448

The procedure under the sexual psychopath act by which a person may be transferred from court to court or from hospital to hospital, even when it permits one originally convicted of misdemeanor to be incarcerated at San Quentin is not arbitrary or unreasonable, in view of prime purpose of act of protecting society against sexual psychopaths. West's Ann.Welfare & Inst.Code, §§ 5500–5521, 5501–5517(c), 5518.

◆

Peter M. Nakahara, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The superior court, pursuant to the terms of the Sexual Psychopath Act (§§ 5500–5521 of the Welf. & Inst.Code) found Levy to be a sexual psychopath who would not benefit from further hospitalization and was a menace to the health and safety of others, and committed him for an indeterminate period to the Department of Mental Hygiene for placement for treatment as a sexpal psychopath at San Quentin. Levy appeals, admitting that the lower courts complied precisely with the provisions of the relevant statutes, but contends that the act is substantially criminal in nature and is unconstitutional as applied to him. What appellant really seeks is a reappraisal by this court of the essential nature of the Sexual Psychopath Act and a reversal of a line of Supreme and Appellate court decisions holding that the act is essentially civil in nature.

The background of this controversy is somewhat complex. In July of 1954 appellant was charged with the misdemeanor of annoying and molesting a child under the age of 18 in violation of section 647a(1) of the Penal Code. He pleaded guilty in the Municipal Court. He had at least one prior misdemeanor sex conviction. After a probation hearing, the Municipal Court adjourned the criminal proceeding and certified appellant to the Superior Court, as provided in section 5501 of the Welfare and Institutions Code. As provided in the act, the Superior Court appointed two psychiatrists to examine appellant. They reported that he was an alleged sexual psychopath. Pursuant to section 5512 of the Welfare and Institutions Code the court found appellant to be an alleged sexual psychopath and committed him to the Mendocino State Hospital for a 90-day observation period. Within the time limited the medical director at Mendocino reported to the court that after appellant had been given physical and psychiatric examinations, and kept under observation, his condition was diagnosed as a case of "Sociopathic Personality Disturbance, Sexual Deviation (Homo-sexuality and Pedophilia)." The medical director at Mendocino also opined that appellant was a sexual psychopath as defined in the statute, was a menace to the health and safety of others, and would not benefit by treatment in a state hospital. The report observed that appellant had a long record of antisocial behavior and was a confirmed homosexual with a predisposition toward child molestation. Appellant was returned to the Superior Court, and that court on October 29, 1954, after a hearing, found appellant to be a sexual psychopath who would not benefit from care or treatment and remanded him to the Municipal Court for further proceedings.

In November of 1954 the Municipal Court, by stipulation of all concerned, again certified appellant to the Superior Court for a hearing to determine whether he was a sexual psychopath. On November 19, 1954, the Superior Court, on the basis of the previous report of the medical director of Mendocino, again found that appellant was a sexual psychopath, and this time ordered him committed for an indeterminate period to the Department of Mental Hygiene for placement in the Atascadero State Hospital. Sec. 5518 of the Welf. & Inst.Code.

Some 17 months later, in April of 1956, the medical director at Atascadero diagnosed appellant's condition as being the same as the diagnosis at Mendocino. He certified that appellant had not recovered from his psychopathy and opined that appellant was still a menace to the health and safety of others. Pursuant to section 5517 (c) of the Welfare and Institutions Code he recommended that appellant "be recommitted to the Department of Mental Hygiene for placement in an institutional unit for the treatment of sexual psychopaths in a facility (California State Prison at San Quentin) of the Department of Corrections." The Superior Court referred the case to its probation department, another hearing was had, and on May 11, 1956, appellant was again found to be a sexual psychopath and a menace to others, and the case was again remanded to the Municipal Court for further proceedings as provided in section 5518 of the Welfare and Institutions Code. The Municipal Court, after considering a supplementary probation report, promptly (May 16, 1956) recertified appellant to the Superior Court. Shortly thereafter that court, for the fourth time, determined that appellant was a sexual psychopath, concluded that he would not be benefited by further hospitalization, found that he was still a menace to the health and safety of others and that he was predisposed to the commission of sexual offenses, and committed him "for an indeterminate period to the Department of Mental Hygiene, for placement in an Institutional Unit for the treatment of Sexual Psychopaths in a facility of the Department of Corrections, namely: The California State Prison at San Quentin." It is from this order that this appeal is taken. It should be mentioned that appellant was represented by counsel during most of these proceedings.

[1] The first major contention of appellant is that the Act, as applied to a person first convicted of a misdemeanor and certified to the Superior Court as a probable sexual psychopath, and then committed by that court to San Quentin for an indeterminate period, is unconstitutional for the reason that it subjects the accused to double jeopardy in violation of section 13, Article I of the California Constitution. This argument is unsound if the proceeding under the Act is essentially civil in nature, because the double jeopardy clause, of course, is applicable only to two successive criminal proceedings for the same offense.

This is no longer an open question in this state. The courts, whenever presented with this problem, have held the act to be civil in nature. In Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025, the Supreme Court held that section 963 of the Code of Civil Procedure which deals with appeals in special proceedings which are, of course, civil in nature, was applicable to appeals under the Act. The Supreme Court stated (42 Cal.2d at page 820, 270 P.2d at page 1027): "Sexual psychopathy proceedings are special proceedings of a civil nature which are collateral to the criminal case." In People v. Gross, 44 Cal.2d 859, 860, 285 P.2d 630, 631, it was stated: "Sexual psychopathy proceedings are not crimal actions but special proceedings of a civil nature." In People v. Howerton, 40 Cal.2d 217, 219, 253 P.2d 8, 10, the court pointed out: "The proceedings under section 5512 of the Welfare and Institutions Code are of a civil nature. [Citations.] Sexual psychopath proceedings need not be heard before the same judge that heard the criminal charge. [Citation.] The guilt of defendant is finally determined when the judgment of conviction is pronounced in the criminal proceeding, and nothing done in the sexual psychopath proceeding could modify or nullify that determination." In People v. McCracken, 39 Cal.2d 336, 346, 246 P.2d 913, 918, it was pointed out that "It is obvious therefore that the primary purpose of the Legislature was to protect society against the activities of sexual psychopaths * * *, and that it was not intended to make sexual psychopathy a mitigating circumstance. On the contrary, the sexual psychopath may be removed from society under the Sexual Psychopath Law until he is cured or until he is no longer considered a menace to the safety of others. The court may thereafter resume the criminal proceeding and impose the punishment allowed by law since the confinement as a sexual psychopath is not a substitute for punishment, the entire statutory procedure being civil in nature rather than penal." In People v. Gross, 139 Cal.App.2d 607, 613, 294 P.2d 88, 92, (appeal dismissed and certiorari denied 351 U.S. 977, 76 S.Ct. 1057, 100 L.Ed. 878), it is stated that section 1200 of the Penal Code does "not apply to a sexual psychopathy hearing which is a civil proceeding, collateral to the criminal case under which appellant was first arraigned." In People v. Bachman, 130 Cal. App.2d 445, 448, 279 P.2d 77, 79, the District Court of Appeal came to the same conclusion as had the Supreme Court in Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025, using the following language: "It having been decided that sexual psychopathy proceedings are special proceedings of a civil nature * * * it follows that the rules on appeal in civil cases govern the time within which such appeals may be taken and that the rules on appeal in criminal cases have no application thereto so far as is concerned the time within which such appeals must be noticed." And in In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159, 161 the appellate court stated: "A proceeding provided for by section 5501 of the Welfare and Institutions Code is a proceeding civil in nature, not criminal, and a person committed pursuant to the provisions thereof is not being confined for the commission of a criminal offense but because it has been determined that he is a 'sexual psychopath.'" See also People v. Olds, 140 Cal.App.2d 156, 294 P. 2d 1034; People v. Martinez, 130 Cal.App. 2d 239, 278 P.2d 727, 24 A.L.R.2d 350; 44 C.J.S. Insane Persons § 130, and Pocket Part.

[2] In the face of these authorities appellant nevertheless argues that although the act may have originally been conceived by the Legislature as a civil proceeding it has gradually developed into a criminal proceeding. This argument is predicated upon the fact that some procedural safeguards commonly existing in criminal cases also exist in cases under the sexual psychopath act. Thus, the person involved is entitled to bail pending determination of his status; he is entitled to be present at the hearing; if he has no counsel the court may appoint one for him or order the public defender to serve; his liberty is, of course, at stake; and he is entitled to a state paid transcript on appeal. See Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025. In many of the cases cited, supra, these points were considered, but, nevertheless, the proceeding was held to be civil and not criminal. Certainly, if, as appellant admits, the act was originally civil in substance, the addition of procedural safeguards which are ordinarily incidental to criminal proceedings could not ordinarily convert the proceeding from a civil one to a criminal one. It is the substantive effect of the act and not its procedural aspects that controls its character. The above cases all hold that the act is not punitive in character, but civil in nature. That is the decisive point so far as the contention that jeopardy attaches is concerned.

Of course, even though the act is civil in nature it does involve a deprivation of personal liberty, and so is necessarily subject to constitutional safeguards. Based on this premise appellant argues that the definition of "sexual psychopath" in section 5500 of the Welfare and Institutions Code as applied to a person originally convicted of a misdemeanor is so vague, uncertain, arbitrary and unreasonable that it violates the due process clauses of the state and federal constitutions. That section provides:

> "As used in this chapter 'sexual psychopath' means any person who is affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or

safety of others, with any of the following conditions:

"(a) Mental disease or disorder.

"(b) Psychopathic personality.

"(c) Marked departures from normal mentality."

[3] The difficulty with this argument is that the courts have already directly or indirectly held that the act does not violate the equal protection and due process clauses. See In re Keddy, 105 Cal.App.2d 215, 233 P.2d 159; People v. Gross, 139 Cal.App.2d 607, 294 P.2d 88; People v. Albin, 111 Cal.App.2d 800, 245 P.2d 660; People v. Hector, 104 Cal.App.2d 392, 231 P.2d 916; People v. Barnett, 27 Cal.2d 649, 166 P.2d 4.

[4] Before the statute can be properly interpreted its purpose and intent must be ascertained. In People v. McCracken, 39 Cal.2d 336, 345, 246 P.2d 913, 918, the Supreme Court stated: "The sexual psychopath law was passed by the Legislature because experience had shown that persons who came within the classification of sexual psychopaths were unable to benefit from ordinary penal confinement and were in need of medical treatment. * * * The Legislature therefore gave the courts power to commit a person determined to be a sexual psychopath to a medical facility for an indeterminate period of time until the person had been cured or was unable to benefit from further treatment. * * *.

"* * * It is obvious therefore that the primary purpose of the Legislature was to protect society against the activities of sexual psychopaths."

The United States Supreme Court in State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744, has already passed on the constitutional questions here involved. There the Minnesota statute defined (309 U.S. at page 272, 60 S.Ct. at page 525) "psychopathic personality" as "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

The state court construed this provision as including (309 U.S. at page 273, 60 S.Ct. at page 525) "those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not make only the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined."

The Supreme Court of the United States, taking the statute precisely as it had been interpreted by the state court, held it immune from attack. The court held that the three criteria set forth in the statute were sufficiently certain. The court stated (309 U.S. at page 274, 60 S.Ct. at page 526): "These underlying conditions, calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime."

In reference to the claim that such a statute violated the equal protection of the laws clause the court stated (309 U.S. at page 274, 60 S.Ct. at page 526): "The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'"

The definition in section 5500 of our act is obviously within the broad definition approved in the last quoted case. The three criteria used by the Supreme Court in upholding the Minnesota statute can also be used in construing the California statute.

The Legislature does not have detailed knowledge of psychiatry. In this field the best that it can do is adopt general broad definitions and leave it to the common sense and fairness of the courts to see to it that individual rights are not illegally affected. There are many similar statutes that are as "vague" as on the one under consideration. Thus, the definition of "mentally ill persons" in section 5040 of the Welfare and Institutions Code is quite general. Equally general and vague is the definition of persons of sound mind in section 21 of the Penal Code. Section 5250 of the Welfare and Institutions Code purports to define "feeble-minded persons" and such definition is not fundamentally different from the one under consideration. Reference should also be mentioned to the broad definitions contained in the compulsory sterilization act—section 6624 of the Welfare and Institutions Code—upheld in Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000.

The California statute has been vigorously criticized. (See Hacker and Frym, 43 Cal.L.Rev. 766.) The arguments there contained should more appropriately be addressed to the Legislature than to the courts. While the definition of "sexual psychopath" contained in the statute is somewhat general, considering our present knowledge in the field of mental sciences, any specific definition would unduly fetter expansion and experimentation in the field. Certainly we know that all psychiatrists do not agree as to the nature of the type of mental illness here involved, so that, by necessity, any legal definition must be a broad one. (See 39 Columbia Law Rev. 534; 1 Stanford Law Rev. 486.)

[5, 6] The last contention of appellant is closely connected with the points already discussed. It is that the statutory procedure which permits a person convicted of a misdemeanor to be transferred from court to court, and from hospital to court to hospital to court as was appellant, is arbitrary and unreasonable, particularly when such procedure culminates in an indeterminate commitment to San Quentin. This argument is based on a misconception of the purposes of the statute. The main purpose of the Act is to protect society against the activities of sexual psychopaths. The secondary purpose is to rehabilitate the sexual psychopath. See People v. McCracken, 39 Cal.2d 336, 246 P.2d 913; People v. Hector, 104 Cal.App.2d 392, 231 P.2d 916. In People v. McCracken, 39 Cal.2d at page 346, 246 P.2d at page 918, the Supreme Court properly pointed out that "the sexual psychopath may be removed from society under the sexual psychopath law until he is cured or until he is no longer considered a menace to the safety of others." Thus, the place of commitment and the possibility of criminal punishment on the misdemeanor charge does not affect the validity of the objectives of the Act, which are admittedly proper.

The emphasis that appellant places on the fact that he was originally convicted of a misdemeanor, and now finds himself in San Quentin, possibly for life, is misplaced. This argument would be sound only were his confinement punishment. As we have already seen, the purpose of the confinement is to protect society and to try and cure the accused.

The arguments of appellant are without merit. The order appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.

151 Cal.App.2d 469

John C. AGUIRRE et al., Plaintiffs and Appellants,

v.

FISH AND GAME COMMISSION of the State of California et al., Defendants and Respondents.

Civ. 21943.

District Court of Appeal, Second District, Division 1, California.

June 4, 1957.

Rehearing Denied July 2, 1957.

Hearing Denied July 31, 1957.

Suit to quiet title to water rights. From judgment for defendants in Superior Court, Ventura County, Charles F. Blackstock, J., plaintiffs appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence was sufficient to support trial court's findings that underflow of water was not retarded in area of defendants' wells and that separate underground basin area alleged to exist by plaintiffs did not, in fact, exist.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

A trial court's finding which is supported by any substantial evidence will not be set aside on appeal.

2. Appeal and Error 🔑989

It is not the duty or the function of the court of review to pass upon the weight, value, or effect of conflicting evidence upon which a trial judge's declaration is based.

3. Trial 🔑397(2)

When matters covered by the findings defeat a plaintiff's right of recovery, trial court is not required to make additional findings upon other issues.

4. Waters and Water Courses 🔑107(3), 152(8)

In suit to quiet title to water rights and to enjoin defendants from pumping water out of alleged separate basin area in which underflow of water was allegedly retarded below defendants' wells, evidence was sufficient to support trial court's findings that underflow of water was not retarded and that separate basin area did not exist.

5. Waters and Water Courses 🔑107(3), 152(10)

In suit to quiet title to water rights and to enjoin defendants from pumping water out of alleged separate underground basin area in which underflow of water was allegedly retarded below defendants' wells, findings that alleged basin did not exist and that underflow of water was not retarded supported judgment for defendants.

6. Trial 🔑404(1)

Uncertainties in the findings of a trial court should be resolved in such manner as to uphold rather than to defeat a judgment.

7. Appeal and Error 🔑1071(1)

Even where findings of a trial court are to some extent inconsistent, a judgment may not be set aside unless the conflict is clear and material, and the findings are incapable of being harmoniously construed.

8. Trial 🔑404(1)

A trial court's findings should be construed liberally to support the judgment.

9. Waters and Water Courses 🔑152(10)

Where suit to quiet title to water rights was tried on theory that only issues were plaintiffs' rights to water under their lands as affected by defendants' pumping of water from wells downstream, trial court was not required to determine the measure of water used for a fish hatchery operated by one of the defendants.

10. Waters and Water Courses 🔑107(3)

Where only issues involved in suit to quiet title were plaintiffs' rights to water under their lands as affected by defendants' pumping of water from wells down-stream, language of judgment that rights of all parties were mutual, reciprocal and correlated and that plaintiffs were not entitled to a judgment enjoining defendants from asserting any claim whatever in and to said underground waters meant only that plaintiffs were not entitled to injunctive relief under the facts presented, and judgment did not determine plaintiffs' riparian rights.

◆

William T. Selby, Glenn C. Garman, Ventura, for appellants.

Edmund G. Brown, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., for respondent Fish and Game Commission.

James C. Hollingsworth, Edward Henderson, Ventura, for respondent Southside Improvement Co. and Cienega Water Co.

DRAPEAU, Justice pro tem.

The Santa Clara River in southern California flows westwardly from its sources in the Sierra Madre Mountains to the sea. It is about a hundred miles long. It rises in Los Angeles County, runs through Ventura County to the ocean at a point midway between the cities of Ventura and Oxnard in the latter county. It is fed by tributary streams, mostly from the north.

The Santa Clara is a typical southern California river, dry on the surface for most of the year, but with water percolating and flowing under the ground all the time. Someone has said that this type of California river is "upside down".

Those who lived along the river in the early days of California depended solely upon its surface flow of water. Three or four times in a century there came years of great rainfall, and the river carried enormous quantities of water. In spate it overflowed its banks for miles, and washed away most man-made things along its course.

Then the river would run more sedately for a time.

Then, as cyclic changes from wet to dry years came, and the surface flow lessened, parts of the river channel would be dry, and other parts of it would have some running water.

And then occasionally would come the dry year or years—the dreaded *ano seco* of Spanish-Mexican and early American times—when no water flowed at all on the surface of the river, and the parched and barren land within its valley gasped for moisture.

But be the years wet or dry, the deep alluvial lands in the Valley of the Santa Clara Del Sur, served by this river are as rich and productive as any lands anywhere in the world. All that is needed is water, and work, and vision to make the ground immensely productive.

As American farmers took over the agricultural land in the Santa Clara Valley they found they had to have more dependable sources of water than the surface flow of the river. So they put down wells and pumped water from them, to irrigate their farms and orchards. And as time went on, they emancipated a good part of the land in the valley from the uncertainty of surface water flow.

As wells were put down it was learned that the flow of underground water fluctuated as did the surface flow, sometimes more and sometimes less; that that flow could be measured to a certain extent by the rise and fall of water levels in the wells; and that the water levels went down in dry years and with pumping use, and came up in wet years. And then came the lurking fear that perhaps the underground, like the surface flow of the river, might some day fail, and these rich lands might again become parched and barren, or there might not be enough water to irrigate all the lands depending upon wells in the valley.

With this preliminary survey of the river, its water, the land, its people, and their fears, we come to the pending action.

It is to quiet title, and for an injunction. The complaint is brought by a number of plaintiffs, land owners, in what they call the Piru Basin of the Santa Clara River. They own highly productive farming land, largely devoted to citrus orchards, in the vicinity of the Town of Piru, in Ventura County, and in a relatively narrow area in the Santa Clara Valley about thirteen miles long.

Defendants are a large number of land owners and water users down river.

In their opening brief plaintiffs state their theory of the case as follows:

"* * * In substance we state that plaintiffs are overlying owners irrigating their lands from a ground water body beneath their lands; that the maintenance of the water levels beneath their lands is of prime importance to them; that there is an area of retardation of underflow at or immediately below the defendants' wells which causes accumulation of water in the area above and serves to retard the dropping of the water levels in plaintiffs' wells. Defendants have taken the retarded or accumulated water first as diversion of rising water and then by pumping from the accumulated ground water and have transported it to remote areas downstream which do not overly the area of accumulation, thus lowering the levels in the area of accumulation. The area of retardation is not impervious but does hold back as much as 80% of the water creating a rising water situation. We call the area of retardation a 'barrier' and the area of accumulation a 'basin.'

"The rights of the parties under the condition of such a 'barrier' and such a 'basin' are here involved."

In plaintiffs' reply brief we find a statement of their theory of the case as set forth in their complaint:

"After alleging ownership in paragraph VI the complaint proceeds in paragraph VII to describe the Santa Clara River and the ground-water basins involved. The pertinent part of that statement is:

"'There are, and from time immemorial have been, a number of ground-water basins in the Santa Clara River Valley including the Piru Basin and the Fillmore Basin, both in Ventura County. These ground-water basins are alluvial filled channels and are bounded on the north and south by relatively impervious beds of shales, conglomerates and sands. The voids in the alluvium contain water which has percolated into them from various sources. Change in precipitation produces changes in re-charge of said underground basins and the water table rises or lowers in accordance therewith.'

"Then after stating figures as to the effect of change in re-charge it is alleged:

"'The Piru Basin embraces an area about the City of Piru and the Fillmore Basin lies immediately to the west of Piru Basin. The boundary between the Piru Basin and the Fillmore Basin, based on ground-water contours, is approximately one and one-half miles east of the City of Fillmore. The underground flow of water is retarded at the western end of Piru Basin. The water plane to the east of the basin boundary is relatively flat, but it drops off rapidly to the west into Fillmore Basin.'"

After taking evidence for several weeks the trial judge found that there is no Piru Basin, and that the underground flow of water is not retarded west of plaintiffs' properties. (ff. 1 and 4.)

To illustrate what the trial judge meant by this finding, part of his memorandum of opinion is as follows:

"This court is convinced that there is no plug or barrier as contended by the plaintiffs separating what they call the Piru Basin from the Fillmore Basin or separating the Piru Basin from any other part of the Santa Clara River system. I am satisfied that the plaintiffs and the defendants are all in the same boat in the same body of water and that is the waters of the Santa Clara river. The plaintiffs and the defendants, in my opinion, all have correlative and reciprocal rights in the underground waters involved in this case."

Plaintiffs appeal from the judgment that followed.

Grounds of appeal are:

That there is no evidence to support the finding that there is no Piru Basin and that the sub-surface flow of the river is not retarded west of plaintiffs' lands.

That in any event the findings do not support the judgment.

That the judgment can be construed only to mean that defendants, regardless of the effect on plaintiffs, have the right to use unlimited quantities of water.

[1, 2] So far as plaintiffs' first contention is concerned, it is elementary law that if there is any substantial evidence to support the finding that there is no basin and no barrier, that is all there is to this phase of the case. For it is the duty of the trial judge under our law to declare the truth as he finds it, and it is not the duty or the function of a court of review to pass upon the weight, value, or effect of conflicting evidence upon which a trial judge's declaration is based. No citation of authority is necessary to support this fundamental rule in the law of appeals.

[3] And when matters covered by the findings defeat a plaintiff's right of recovery the trial court is not required to make additional findings upon other issues. Vidler v. De Bell, 125 Cal.App.2d 326, 333, 270 P.2d 120, and cases therein cited.

[4] This court has gone through the trial record, and finds evidence that substantially supports the finding.

No good reason appears why the evidence upon this issue, pro and con, should be set forth at any length in this opinion. Suffice it to say that expert witnesses testified for plaintiffs, with the opinion that there was a barrier below plaintiffs' property, holding back underground water; and that other expert witnesses testified for defendants, with the contrary opinion that there was no barrier and no basin, and that the underground percolating and flowing water passes by these Piru lands of plaintiffs just as sub-surface water passes by all the land along the river.

In view of plaintiffs' insistence as to the weight of the expert testimony, this court has examined with particularity the facts upon which the expert witnesses for defendants based their opinions. We cannot agree with plaintiffs' assertion that the trial judge blindly followed these opinions alone.

Now, with reference to plaintiffs' contention that the findings do not support the judgment.

[5] Read as a whole, the findings do support the judgment.

Plaintiffs say that the finding that there is no Piru Basin standing alone is meaningless. This court has no difficulty in applying the words "Piru Basin" to the area described in plaintiffs' complaint as belonging to them, and from which they seek to stop pumping of water by defendants.

[6, 7] In any event if there be uncertainties in findings they should be resolved in such manner as to uphold, rather than to defeat a judgment. Even where findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and material and the findings are incapable of being harmoniously construed. Richter v. Walker, 36 Cal. 2d 634, 639, 226 P.2d 593.

[8] And findings should be construed liberally to support the judgment. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.2d 5.

[9] Plaintiffs assert that in particular the findings fail to determine the measure of water use for a fish hatchery operated by one of the defendants, Fish and Game Commission of the State of California. Plaintiffs say that the water taken for this purpose is approximately equal to the entire use of all of the plaintiffs in the Piru Basin.

Assuming that that amount of water is used by the Fish and Game Commission, it is also to be said that after it goes through the fish hatchery the water is taken down stream and put to beneficial use upon other riparian agricultural lands. And it is stated in the briefs for defendants that none of the plaintiffs testified that he had ever been without water sufficient for his needs.

Plaintiffs argue that the rule in Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, followed in many California cases, that underground water may be put to use only upon the land from which it is taken forbids the taking by the Fish and Game Commission of water that they do not put to beneficial use upon the property where its wells are located.

However, the case at bar was not tried with the idea that the rights *inter se* of the parties to it were to be adjudicated. This is made evidence in a colloquy between court and counsel for plaintiffs near the end of the trial.

> "The Court: Well, in any event, this is purely a suit to quiet title, isn't it?
>
> "Mr. Selby: (Counsel for plaintiffs.) Yes.
>
> "The Court: No more and no less.
>
> "Mr. Selby: To quiet title and to enjoin interference.
>
> "The Court: What about your prayer for general relief? What did you have in mind? Anything in particular, other than just a matter of course, you put that in?
>
> "In other words, all the Court can do in this case is to find that you have paramount right, and quiet title to those rights and issue an injunction; that is all the Court could do.
>
> "Mr. Selby: That is all the Court could do.
>
> * * * * * *
>
> "The Court: It isn't one of those cases where the Court would be called upon to enjoin all of the parties from taking as much water as they are taking and adjusting that matter. That is not in this case.
>
> "Mr. Selby: No."

Therefore this court will not now go beyond the determination of the trial judge that the only issues involved were plaintiffs' rights to water under their lands as affected by defendants' pumping of water from wells downstream, and that beyond that no rights *inter se* of the parties were to be adjudicated in this action. City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17.

[10] Plaintiffs' last ground of appeal may also be stated from their brief: "That the language in the judgment 'that the rights of all parties are "mutual, reciprocal and correlative"' and that plaintiffs were 'not entitled to a judgment against said defendants or any of them *enjoining them from asserting any claim whatever in and to said underground waters adverse to said plaintiffs or any of them*' can be construed only to mean that the defendants, regardless of the effect on plaintiffs, have the right to use unlimited quantities of water."

Again, keeping in mind the narrow issues here involved, the judgment must be construed to mean that in the facts and circumstances in this case, and this case alone, plaintiffs are not entitled to injunctive relief against the defendants, or any of them. It does not determine plaintiffs' riparian rights, which are mutual, reciprocal, and correlative with all other such rights along the Santa Clara River. City of Pasadena v. City of Alhambra, supra, 33 Cal.2d 908, 207 P.2d 17; City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Hudson v. Dailey, 156 Cal. 617, 105 P. 748.

The judgment is affirmed.

WHITE, P. J., and DORAN, J. concur.

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151 Cal.App.2d 387

HERCULES POWDER COMPANY, a corporation, Estella V. Ackelbein, et al., Plaintiffs and Appellants,

v.

AUTOMATIC SPRINKLER CORPORATION OF AMERICA, a corporation, and J. W. Mott, Defendants and Respondents.

Civ. 17133.

District Court of Appeal, First District, Division 2, California.

May 29, 1957.

Rehearing Denied June 28, 1957.

Hearing Denied July 26, 1957.

Action, against automatic sprinkler system company, by powder company and its employees, for damage resulting from dope-house explosion allegedly due to malfunctioning of sprinkler system which had been installed and intermittently checked by defendant company.

From judgment rendered for defendant by the Superior Court, City and County of San Francisco, H. A. Van der Zee, J., plaintiffs appealed. The District Court of Appeal, Kaufman, P. J., held, inter alia, that evidence warranted instructions under res ipsa loquitur doctrine.

Reversed.

1. Negligence ⊂⇒121(2)

Requirements for application of res ipsa loquitur doctrine are that accident be of kind which ordinarily does not occur in abesnce of someone's negligence, that it be caused by agency or instrumentality within exclusive control of defendant, and that it not have been due to any voluntary action or contribution on part of plaintiff.

2. Explosives ⊂⇒8

In action, against automatic sprinkler system company, by powder company and its employees, for damage resulting from dope-house explosion allegedly due to malfunctioning of sprinkler system which had been installed and intermittently checked by defendant company, evidence warranted instructions under res ipsa loquitur doctrine.

3. Negligence ⊂⇒121(2)

Inference of negligence is permissible where it appears that accident would not have occurred but for negligence.

4. Explosives ⊂⇒8

Automatic sprinkler system company which had installed and intermittently checked a system in dope-house of powder manufacturer could not escape liability, under res ipsa loquitur doctrine, to powder manufacturer and its injured employees for explosion damage due to malfunctioning of system, even if choice of system was entirely that of powder manufacturer.

5. Explosives ⊂⇒8

In action, against automatic sprinkler system company, by powder company and its employees for damage resulting from dope-house explosion allegedly due to malfunctioning of sprinkler system which had been installed and intermittently checked by defendant company, evidence on issue of whether failure of sprinkler system proximately caused damage was for jury.

6. Negligence ⊂⇒121(2)

Fact that defendant was not in immediate control does not preclude application for res ipsa loquitur doctrine, if there is evidence of no improper handling in meantime.

7. Explosives ⊂⇒8

For powder manufacturer and its employees to recover for damage resulting from dope-house explosion, assertedly due to malfunctioning of sprinkler system, from the automatic sprinkler company which had installed and intermittenly, checked system though it had no contract for maintenance, under the res ipsa loquitur doctrine, they were not required to eliminate every other possibility of control than that of the sprinkler company.

8. Negligence ⊂⇒121(2)

Plaintiff may rely upon res ipsa loquitur doctrine even though he has participated in events leading to accident, if evidence excludes his conduct as a responsible cause.

9. Explosives ⊂⇒8

Where, pursuant to statute, injured employees joined as plaintiffs in suit brought by their employer, a powder manufacturer, to recover for damage in dope-house explosion, from automatic sprinkler system company which had installed system, the malfunctioning of which allegedly caused the explosion, since, as to employees, the system was either in control of employer or sprinkler system company, fact sprinkler company blamed employer for accident did not preclude application of res ipsa loquitur doctrine to employees' cause.

10. Appeal and Error ⊂⇒1067

Where plaintiffs had not urged at trial that they had not assumed risk of accident, no prejudicial error resulted from trial court's refusal to instruct that they had not assumed the risk.

11. Negligence ⚷131

Evidence of subsequent precautions is not admissible on issue of negligence.

12. Evidence ⚷560

In action, against automatic sprinkler system company, by powder company and its employees, for damage resulting from dope-house explosion allegedly due to malfunctioning of sprinkler system which had been installed and intermittently checked by defendant company, wherein powder company's witnesses had testified, inter alia, that dope-house was not an explosive building and that substance therein was not explosive, it was proper to permit evidence of subsequent precautions under cautionary instruction limiting such to impeachment.

13. Evidence ⚷560

In action, against automatic sprinkler system company, by powder company and its employees, for damage resulting from dope-house explosion allegedly due to malfunctioning of sprinkler system which had been installed and intermittently checked by defendant company, it was proper to permit cross-examination of parties' expert witnesses by use of army ordinance safety manual, to test their credibility rather than for impeachment purposes, though they had not relied upon it.

14. Evidence ⚷139

In order for evidence to be relevant, on issue of customs in industry, conditions must be same or similar.

15. Customs and Usages ⚷19(3)

Evidence of conduct in a particular situation or in a few instances is not sufficient to establish custom.

16. Appeal and Error ⚷1058(1)

No prejudicial error could be shown from refusal to admit testimony where testimony was subsequently admitted upon proper foundations being laid.

17. Appeal and Error ⚷264

Trial court's statement to jurors, when they returned to court room for information regarding forms of verdict, that defendants were to be regarded as one was not an "instruction" for purposes of statute providing that instructions are deemed to have been excepted to, and where plaintiffs had not excepted to the form of verdict, either before submission or then, they were not entitled to assign it as error on appeal. West's Ann.Code Civ.Proc., § 647.

See publication Words and Phrases, for other judicial constructions and definitions of "Instruction".

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Pillsbury, Madison & Sutro, San Francisco, Eugene M. Prince, Francis N. Marshall, Noel Dyer, San Francisco, of counsel, for appellant Hercules Powder Co.

Appel, Liebermann & Leonard, San Francisco, for appellants Estella v. Ackelbein, et al.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

This is an appeal from a jury verdict in favor of all defendants and against all plaintiffs, in an action for damages due to an explosion which occurred on February 12, 1953, at the Hercules Powder Company's explosive manufacturing plant near Pinole, California. The appellants are Hercules Powder Company, joined pursuant to Labor Code Section 3853, by 34 individual appellants who are 22 injured Hercules employees and the heirs of 12 deceased Hercules employees. All of the appellants alleged negligence in the design, manufacture, installation, inspection and repair of an automatic sprinkler system, against the respondent, Automatic Sprinkler Corporation and two of its employees, J. W. Mott and F. E. Zaiser. Hercules alone also alleged breach of warranty. The lower court granted a non-suit to Zaiser as to all causes of action, and a non-suit to Mott on the causes of action for breach of warranty. Respondents asserted the defense of contributory negligence against appellant Hercules and the defense of assumption of risk against the individual appellants. The facts are as follows:

In 1951 Hercules built a new "Pulp Dry & Dope House" as the previous one had been destroyed by a fire in June 1950. In this building certain materials known as "dope" were processed. In another part of the Hercules plant, known as the "mix house" these dopes were combined with nitroglycerin to make various kinds of commercial dynamites.

In June 1951, after some correspondence and in accordance with Hercules specifications, the respondents installed a new type of "low pressure dry pipe" valve and automatic sprinkler system in the new dope house. The system worked as follows: Inside the enclosed valve, water under pressure at 90 lbs. per square inch was held down by a cover or clapper; throughout the sprinkler piping and behind the sprinkler heads, air was held at a pressure of 6 to 7 lbs. per square inch. When the air pressure above the clapper was reduced to 3 lbs. per square inch or less, a weight mechanism in the valve released a latch which opened up the clapper, and permitted the water to pour through the verticle riser pipe at the top of the valve to the sprinkler piping and sprinkler heads onto the fire. The air pressure above the clapper was reduced by the melting of a fusible link in the sprinkler head. The fusion point of the link was 165° F. which is several hundred degrees below the burning temperature of the dopes processed. The design of the valve rendered the system inoperative if the valve was water-logged by water leaking into the dry piping above the clapper and exerting water pressure equal to or above 3 lbs. per square inch. At some time before the accident, Hercules installed a drip leg on the air pipe furnishing the air supply to the valve, to drain off any water which accumulated in the air pipe. One hundred and forty-seven sprinkler heads spaced 4 to 5 feet apart were installed near the ceiling of the building.

The respondent Automatic Sprinkler Corporation was informed that the sprinkler system and valve were to be installed in the dope house which was a place of "extra-hazardous occupancy", but it does not appear that the respondent was consulted as to what type of sprinkler system and valve would be best for the particular building. On other occasions, Automatic had been consulted by Hercules about high speed fire prevention and extinguishing systems, and had installed many different types of devices in various Hercules plants. Hercules had been informed of the development of the dry pipe valve for a number of years and had been informed by Automatic that the system was reliable and would work within 15 to 20 seconds after the fusion of the sprinkler heads. The system installed by respondent was the first of its kind in California, and the only system of its kind on the market at that time. Respondent Mott, the district superintendent of Automatic Sprinkler Corporation, who was charged with the installation of the system had never seen or been instructed about the "low pressure dry pipe valve" which was to set the sprinkler system in motion.

Although the respondent had no contract for the maintenance of the sprinkler system with Hercules, respondent regularly inspected and tested the dry pipe valve, at intervals of about six months, after the initial installation which was completed in June 1951. There is conflicting evidence as to the amount and type of instruction given to Hercules employees by the respondents in the course of the installation and subsequent inspection of the system, or about the possibility of the water-logging of the valve.

In January 1953, a month before the accident, Mott again tested the valve in the presence of several Hercules employees. The apparatus failed due to the presence of several gallons of water that had collected above the clapper of the valve. In accordance with instructions he had received from the home office of Automatic, Mott installed a new latch in the clapper of the valve. There was some difficulty in the installation of the new latch. In another test the system worked in seven seconds. Mott then reset the system and checked to see that it was free of water. This was the last contact anyone had with the valve prior to the accident. Various Hercules employees, however, drained the drip leg pipe and checked the gauges of the valve. One Hercules employee was charged with checking the system. In several tests of the system conducted by Hercules, it worked normally.

In September 1952, there was a minor fire in the dope house caused by a welding spark during repair work. At this time the automatic sprinkler system did not function; several sprinkler heads were manually broken by Hercules employees, and worked but were not near enough to the fire. Thereafter, unknown to the respondent, Hercules had installed a "wet pipe" sprinkler system in the screen used to remove impurities from the "dope" because this screen was covered and could not be reached by the dry pipe sprinkler system. This sprinkler system apparently operated on February 12, 1953, as there was little evidence of fire in the screen. After the screening operation, the dope fell into canvas covered boxes on wheels measuring 34½ by 37 by 26 inches known as "hods".

Three types of dope were in the dope house on February 12, 1953: Vibrogel, which consists of 74.75 per cent sodium nitrate, 15.15 per cent wood pulp, 2.03 per cent starch, 5.05 per cent corn cob meal and 2.02 per cent ground limestone; three hods of Hercomite which consists of 85.20 per cent ammonium nitrate, 5.78 per cent sodium nitrate, 3.70 per cent wood pulp, 4.74 per cent apricot meal and .58 per cent ground limestone; and one hod of Herculite which consists of 34.24 per cent ammonium nitrate, 6.52 per cent sulphur, 6.52 per cent sawdust, 8.70 apricot meal, 43.48 per cent sodium nitrate, and .54 per cent ground limestone. The hods of dope when filled remained in the dope house until they were transported to the "mix house". However, there is controverted evidence as to whether it was normal Hercules practice to let three or four hods of dope accumulate in the dope house. The nearest mix house was about 1,000 feet from the dope house. Vibrogel was being run through the screen to remove impurities when the fire broke out on February 12, 1953. About 50 employees responded to the siren which indicated that there was a fire in the dope house. The dope house exploded, killing 12 employees and wounding 22 others. Only the part of the building containing the dry pipe valve remained intact. The explosion crater was located at approximately the same spot on the other side of the room from the screen, where the filled hods of dope had been standing.

There is much conflicting evidence as to the possible causes of the explosion and fire; the condition of the dry pipe valve after the accident; the existence and duration of the fire before the explosion; whether the fire was a high flaming one sufficient to reach and fuse the sprinkler heads, or a burrowing penetrating fire within the oxygen supplying dope compounds; or a flash surface fire which would not open the sprinkler heads; or whether the sixty-eight sprinkler heads collected by Hercules after the accident had fused. The evidence also indicated that: there was no way of predicting what mass of the compounds would be critical enough to explode, or how soon a fused sprinkler head would open; that streams of water from the hoses may have a cooling effect on sprinkler heads.

Hercules had no special fire-fighting employees. According to its customary practices the dope house area was a "non-explosive" area which meant that in case of fire, all employees who could leave their work in other areas of the 2,800 acre plant were to come in response to the siren and help fight the fire. There is some evidence that the fire fighting activities of Hercules employees were voluntary. The general rules and regulations of Hercules, however, besides warning all employees that the occupation was hazardous, stated: "Fire hose and other fire protection apparatus are for use only in case of fire; they must not be used for any other purpose without a written order from the office. Every employee should learn where the fire fighting apparatus is and how to use it." The general rules for the dope house stated: "Fire protection: Use of fire equipment should be learned by each employee." There is controverted evidence as to whether such fire fighting is proper and accepted industry practice. Hercules had several prior dope house fires, two of which began in the processing screen. There had been other known dope house fires in the industry but only one previously known dope house explosion. The respondents contend that the fire before the explosion was not hot enough to fuse the sprinkler heads; that the explosion occurred through the sympathetic detonation of the accumulated hods of dope; that the explosion caused the fire; that the sprinkler system was not called upon to operate; that the system was not designed to cope with explosions, only fires; that the appellant Hercules was contributorily negligent in treating the dope house as a safety area, and fighting the fire there, and in not letting respondents choose the best type of sprinkler system; that the individual appellants assumed all risks in voluntarily coming to fight the fire in the dope house. The appellant's theory of the case is as follows: that the explosion was caused by the fire which would have been extinguished if respondents' system had worked as it should have, and in accordance with respondents' description of the system as the best and latest method of fire precaution; that respondents knew for what purposes the appellant required the system; that the flames were high enough to fuse the sprinkler system, and that the system had not worked as the dry pipe valve was waterlogged; that the respondents should have warned Hercules of the danger of waterlogging in the valve and provided some device to draw off the water or at least cautioned Hercules to manually draw off the water. As indicated above, the record contains controverted evidence on all of these matters, including voluminous expert testimony.

The appellant's chief grounds of appeal, which will be taken up in order, are:

[1, 2] (1) The prejudicial error of the lower court in refusing to submit the issue of res ipsa loquitur to the jury. The requirements for the application of res ipsa loquitur in this state were set forth in Ybarra v. Spangard, 25 Cal.2d 486, at page 489, 154 P.2d 687, at page 689, 162 A.L.R. 1258, as follows: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." We have concluded from the evidence that these requirements were met here and therefor the trial court should have given res ipsa loquitur instructions as the jury could have found from the evidence the facts necessary to apply the doctrine.

[3] As to the first requirement, it was said by our Supreme Court in Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, at page 442, 247 P.2d 344, at page 347: "* * * it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." The fire and explosion in the instant case under the evidence could well have been due to some fault in the mechanism of the valve and sprinkler system, or it could have occurred because of the explosive quality of the dope itself. Olson v. Whitthorne & Swan, 203 Cal. 206, at page 208, 263 P. 518, 58 A.L.R. 129. An inference of negligence is permissible where it appears that the accident would not have occurred had negligence not been present. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344.

[4, 5] In La Porte v. Houston, 33 Cal. 2d 167, 199 P.2d 665, it was held that there was no error in not instructing the jury on res ipsa loquitur, since it was equally prob-

able that the lurch of the automobile was due to some mechanism of the car for which the defendants were not responsible as that it resulted from any negligent act on the part of the defendants' mechanic. At page 169 of 33 Cal.2d, at page 666 of 199 P.2d the court said: "Assuming that defendants were in control of the car while the carburetor was being rechecked, the applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their negligence. [Cases cited] 'Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply.' Prosser on Torts, (1941) p. 297.". It cannot be said here that no such probabilities in favor of negligence can be found. The sprinkler system installed by defendants did not work. Thus, even if the choice of the system was entirely at the whim of Hercules, the respondents could not escape liability on that account. There is evidence of a sufficiently hot fire to make the sprinkler system work and that the fire burned for twenty minutes and charred beams in the ceiling directly above the sprinkler system. The jury could conclude that but for some negligence in its design, construction or in its installation the sprinkler system would have worked. The further question of whether if the sprinkler system had worked it would have prevented the explosion is one of proximate cause and not of negligence. Whether the failure of the sprinkler system proximately caused the damage is a question for the jury. Better Food Mkts. v. American Dist. Teleg. Co., 1953, 40 Cal.2d 179, 253 P.2d 10, 42 A.L.R.2d 580.

[6, 7] A somewhat difficult question arises here as to the presence of the second requirement. The defendant must be shown to have control of the instrumentality. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522. The evidence here indicates that the sprinkler system and fire-fighting activities were under the control of the Hercules Powder Company. However, among the few items of uncontroverted evidence in the record are: (1) that the respondent manufactured and installed the system and voluntarily undertook its inspection; (2) that respondent's supervisor Mott installed a new latch 30 days before the fire; (3) that the valve was not touched or tampered with thereafter. The fact that defendant has not immediate control is not required if there is evidence of no improper handling in the meantime. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344. The appellants are not required to eliminate every other possibility of control under the circumstances here presented. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436.

[8] As to the third requirement, the rule is that a plaintiff may rely on the doctrine of res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as a responsible cause. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 293 P.2d 26; Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 252 P.2d 24; Jesionowski v. Boston & Maine R. Co., 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416. As indicated above, there is some evidence here, which, if believed by the jury, would exclude the conduct of Hercules as a responsible cause. The issue of Hercules' contributory negligence is separate from the issue of the respondent's responsibility.

[9] The position of the individual appellants, is even more compelling than that of appellant Hercules. Their awards under the Workmen's Compensation Act precluded any action against Hercules; they joined in this suit, pursuant to statute. They properly rely on Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63; Stanford v. Richmond Chase Co., 43 Cal.2d 287, 272 P.2d 764; Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574; Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91, to argue that as to them the instrumentality which caused the accident was in the control of, either Hercules or Automatic

or both, and the accident could have been caused by the negligence of either or both, and that the facts that respondents blame Hercules for the accident does not preclude the application of res ipsa loquitur to the individual appellants, as they are entitled to their own theory of causation and can recover.

In the very recent case of Seneris v. Haas, 45 Cal.2d 811, at pages 826, 827, 291 P.2d 915, at page 924, in holding that there was sufficient evidence of the elements of res ipsa to permit the jury to conclude that the doctrine was applicable, the court clearly stated: "In Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 229, 252 P.2d 24, 29, it was said: 'Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present. Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P.2d 129.' [Citations] The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities. [Citation] The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it [Citation]. The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved." We think it is particularly important in this case, where there is so much confusing and conflicting evidence that the jury determine which of the many possible probabilities or any combination of them, was the most reasonable.

We conclude, therefore that under the above rules recently expressed on the subject of res ipsa by our Supreme Court, the evidence of the appellants in this case is sufficient to submit to the jury, the applicability of the rule of res ipsa loquitur, and the refusal of the trial court to so instruct, constituted prejudicial error as to all the appellants.

(2) The instructions to the jury that under the facts of the case it could not infer negligence and that specific acts of negligence had to be proved. These instructions were erroneous if the jury found facts which would bring the doctrine of res ipsa loquitur into play. The effect of the doctrine is that when conditions as indicated in a proper res ipsa loquitur instruction are shown to exist, an inference of negligence upon the part of the defendant arises.

[10] (3) The failure of the trial court to instruct that the individual plaintiffs did not assume the risk of the occurrence. As assumption of risk was not urged by the defendants at the trial, there was no prejudicial error in the refusal of this instruction. Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 265 P.2d 904 and Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69 were proper cases for the application of the defense and the instructions to the jury were erroneous in not properly pointing out the element of knowledge which is a prerequisite of the defense. In Hawk v. City of Newport Beach, 46 Cal.2d 213, at page 218, 293 P.2d 48, it was held that the defense was not applicable, unless there was voluntary acceptance of a risk and an appreciation of the magnitude of that risk.

[11, 12] (4) The admission of evidence concerning Hercules' precautions after the accident in order to impeach the plaintiffs' witnesses. The appellants are correct in their contentions that evidence of subsequent precautions is not admissible on the issue of negligence. However, in the instant case, the evidence was not admitted for such purpose but only for the limited purpose of impeaching the testimony of Hercules employees and under the record

before us was properly admitted. Witness Butler, Hercules' Work Manager, testified on cross-examination: "I know of nothing, in all my experience in the manufacture of explosives up to the present moment, that would cause me to classify a dope house * * * to be properly classified as an explosive building", and in answering a further question as to the safety of the dope house, "I not only consider it satisfactory and safe but it was the best thing I had seen. It had more sprinkler coverage than any other dope house I had seen." Witness Jones, Hercules Safety Engineer, testified that Hercules believed that the sprinkler system ordered from Automatic would provide adequate protection. Witness Hedrick, Hercules Dynamite Department Supervisor, called by the defendants, under Code of Civil Procedure Section 2055, testified that he did not consider Hercomite an explosive mixture. Witness Conrady, Hercules Assistant Master Mechanic in the maintenance department, in answering whether he had received any instructions to alter the classification of the dope house after the accident, stated, "Not that I recall." The jury was properly cautioned and instructed as to the limited nature of the evidence of subsequent precautions. Appellants attempt to distinguish Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, on the ground that there the evidence which was impeached was elicited from the witness on direct examination, and not on cross-examination as in the instant case. They rely on Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 P. 210 and Daggett v. Atchison, T. & S. F. Ry. Co., Cal.App., 301 P.2d 923. In the Parkin case, the questions were held not to be within the scope of proper cross-examination as they dealt with the different subject of driving the horses, while the issue was whether the horses had been properly hitched. In the Daggett case, the first two witnesses called by the plaintiff were two employees of the defendant, called under Code of Civil Procedure Section 2055. The court held the questions improper as the defense had not yet presented any evidence subject to impeachment.

[13] (5) The use of the U. S. Army Ordnance Safety Manual to ask questions of plaintiffs' expert witness, Lewis, and of Cook, defendants' expert witness. Appellants rely chiefly on Lilley v. Parkinson, 91 Cal. 655, 27 P. 1091, for the rule that it was improper to question a witness about a work which the witness had not relied upon, as the only effect of such questions was to place before the jury the opinion of the author of the book. Respondents correctly point out that this reason is missing in the instant case, as the manual had been introduced into evidence and brought to the attention of the jury, when Dr. Cook was questioned. As to the use of the manual on the cross-examination of Lewis, while there are some early cases which indicate that medical texts could be used on cross-examination to impeach a witness who had not relied upon them, (Fisher v. Southern Pacific R. Co., 89 Cal. 399, 26 P. 894; People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131) we agree with the appellants that the more recent cases (Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 and Gluckstein v. Lipsett, 93 Cal.App.2d 391, 209 P.2d 98) indicate that the text could not be so used. It is a question, of course, whether the rules of the above cases which dealt with medical treatises should also be applied to such documents as the government manual in the instant case. The medical treatise cases would seem to be an exception to Code of Civil Procedure Section 1936. We are not saying, however, that Code of Civil Procedure Section 1936 is applicable to the government manual in the instant case. In the instant case, the record indicates that the trial court carefully considered the matter, and there was no error in the ruling. The questions from the government manual can be said to have been used only to test the credibility of the witness, rather than for impeachment purposes. In Parker v. James Granger, Inc., 4 Cal.2d 668, 52 P.2d 226, the document was not admitted as evidence as in the instant

case. Furthermore, Dr. Cook testified that he knew of the government manual.

[14, 15] (6) The striking of witness Frome's testimony on defendant's motion. Appellants argue that the striking of Frome's testimony was prejudicial error as it excluded evidence of industry custom and practice, which is relevant to the negligence of Hercules. However, the issue here was not whether such evidence of industry practice is admissible if relevant —on this point, we agree with the authorities cited by the appellants. The issue here was whether the witness' experience and knowledge was sufficient to establish industry practice. The trial court said the evidence was too remote and lacking in relevancy. In order to be relevant, the conditions must be the same or similar (65 C.J.S. Negligence, § 232, p. 1048; Am.Jur. 1015, 1017). Evidence of conduct in a particular situation or in a few instances is not sufficient to establish custom. Longuy v. La Societe Francaise, 52 Cal.App. 370, 198 P. 1011; McStay v. Citizens Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 43 P.2d 560; Olsen v. Realty Hotel Corp., 2 Cir., 210 F.2d 785. Appellants rely particularly on Burke v. John E. Marshall, Inc., 42 Cal. App.2d 195, 108 P.2d 738, for their argument that witness Frome's experience was sufficient to establish industry custom. However, the stevedore, whose testimony was admitted in that case, was the plaintiff. As the appellants indicate, this case involved many close questions of fact. We cannot say that the trial court erred in striking the testimony of the witness Frome.

[16] (7) The exclusion of the testimony of witness Krogfoss. The record indicates that the court first sustained objections to the questioning of this witness on the ground that the witness who was a mechanical engineer dealing with valves was not shown to be experienced in the particular type of dry pipe valve involved in the instant case. Moreover, when a proper foundation had been laid, the testimony was admitted. There was, therefore, no error prejudicial to the appellants here.

[17] (8) The individual appellants contend that although the trial court told the jury that the forms of verdict presented to them constituted "every possible verdict", the forms did not include a verdict against the defendant Automatic alone. When the forms of the verdict were submitted to the jury, the individual appellants made no objection. The jury returned to the courtroom after some deliberation as apparently they did not understand that if they should decide in favor of the individual appellants and against the appellant Hercules, they would have to sign two forms of verdict that had been submitted to them. During this discussion, the trial court said: "There is no problem as to the defendants because they are regarded as one." The individual appellants made no objection at this time, nor when the verdict was rendered. As the record indicates that the forms of verdict did not include a verdict against Automatic only, the next question is whether the statement of the court regarding the forms of verdict is an instruction within Code of Civil Procedure Section 647, which enumerates matters which are considered excepted to. We think that it is not, and that this matter falls under the well established rule that the appellant's failure to object to the form of the verdict is a waiver of any defect of form. Brand v. Norris, 121 Cal.App.2d 367, 263 P.2d 456; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063. In Hager v. Gordon, 9 Cir., 171 F.2d 90, cited by the individual appellants, the forms of verdict contained erroneous valuations of the property the plaintiff sought to recover; such instruction interfered with the free exercise of the judgment of the jury. Such was not the case here.

(9) There was no error in the denial of the individual appellants' motion for a directed verdict.

In view of the prejudicial error in failing to give the instructions covering the doctrine of res ipsa loquitur and the giving of the erroneous instructions that the jury could not infer negligence and that specific acts of negligence had to be proved, the judgment must be reversed.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

PETERS and WOOD, JJ., pro tem., sitting in place of TRAYNOR and SCHAUER, JJ.

Gertrude LEWIS, Plaintiff-Appellant,
v.
Ulysses LEWIS, Defendant-Respondent.*
Civ. 22064.

District Court of Appeal, Second District, Division 2, California.

May 23, 1957.

Hearing Granted July 16, 1957.

Action by wife seeking to enforce an Illinois decree for arrearages for separate maintenance which was rendered subsequent to a Nevada divorce obtained by her husband but which was made in an action commenced prior to the Nevada proceeding. From judgment of the Superior Court of Los Angeles County and from an order denying a motion to vacate the judgment J. F. Moroney, J., the wife appealed. The District Court of Appeal, Ashburn, J., held that the Nevada decree effected a termination of the marital status but had no effect upon the wife's right to support from the husband; that the later Illinois separate maintenance decree was entitled to full faith and credit; that the question of amount of arrears under the Illinois judgment order was an open one in the California Superior Court; and that the reversal of the judgment rendered moot the appeal from the order denying the motion to set aside the judgment.

Judgment reversed and cause remanded for further proceeding.

Appeal from order dismissed.

1. Divorce 🔑393(2)

A foreign divorce based on publication or substituted service not followed by appearance, cannot affect the right of wife to recover maintenance payments due from husband under a previously entered maintenance decree rendered after personal service in the jurisdiction of the then domicile of both parties.

2. Divorce 🔑243

Husband and Wife 🔑299(1)

A judgment awarding alimony or maintenance merely effectuates a previously existing right of the wife to support from the husband, either a common law or statutory duty.

3. Divorce 🔑390(1)

Each state may determine for itself whether a divorce shall end right of wife to support from husband when the decree did not speak on the subject.

4. Divorce 🔑381

Absence of a res other than the marital status in Nevada jurisdiction precludes Nevada from affecting a right existing in a nonresident wife by husband's action for divorce whether that right be evidenced by judgment or merely rests upon a marital obligation which may ripen into a judgment.

5. Divorce 🔑393(2)

Judgment 🔑815

Where husband procured a default divorce in Nevada based on substituted service of process in Illinois and subsequently the wife was granted by Illinois Court separate maintenance, while the Nevada decree effected a valid termination of the marital status, it had no effect upon the wife's right to support from the husband, and under Illinois law, such rights survived the divorce, and the later separate maintenance decree was a valid adjudication to which California must give full faith and credit. U.S.C.A.Const. art. 4, § 1; S.H.A.Ill. ch. 40, § 19.

6. Divorce 🔑393(2)

Where husband procured a default divorce in Nevada based on substituted service of process on wife in Illinois, and subsequently the wife sought separate maintenance in Illinois but the husband ignored the Illinois Court and did not enter a supplemental plea of res judicata, Illinois court was not obligated to take cognizance of the Nevada decree.

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* Opinion vacated 317 P.2d 987.

7. **Evidence ⚿43(4)**

The decree of a court of another state is not a matter of judicial notice.

8. **Judgment ⚿948(1)**

A judgment of one state does not automatically assert or prove itself in another, and if he who is entitled to its benefit, does not pursue established remedy, he cannot thereafter attack in a third jurisdiction, a decree of a second which he could have prevented had he properly asserted and proved a first judgment under the defense of res judicata. U.S.C.A.Const. art. 4, § 1.

9. **Courts ⚿514**

A court in which a first action is commenced, cannot be ousted of jurisdiction by reason of subsequent commencement of another action between the same parties for the same cause of action in another state.

10. **Courts ⚿30**

Jurisdiction once acquired, is not defeated by subsequent defense which might have prevented jurisdiction had it occurred before personal service of the action was made.

11. **Evidence ⚿35**

A district court of appeal will take judicial notice of Illinois law. West's Ann. Code Civ.Proc., § 1875, subd. 3.

12. **Constitutional Law ⚿309(1)**
Husband and Wife ⚿299(4)

Where Illinois judgment order determined arrearage under a maintenance decree and reduced it to judgment, notice of an application to determine the amount of arrearage should have been given to the attorney or the husband, and such notice was also requisite to due process of law.

13. **Husband and Wife ⚿299(4)**
Judgment ⚿823

Where there was a lapse of three years between an Illinois decree for maintenance and judgment order fixing the amount of arrearages and process was not served upon the husband nor his attorney, judgment order was not a binding judgment or order, and question of amount of arrearages was an open one when the judgment order was sought to be enforced in the Superior Court of California.

14. **Attorney and Client ⚿76(4)**
Husband and Wife ⚿299(4)

Where there was a lapse of three years between an Illinois decree for maintenance and judgment order fixing the amount of arrearages, authority of the attorney of record for the husband terminated with the entry of the judgment, and hence notice to the husband himself was necessary in order to render a valid judgment order.

15. **Husband and Wife ⚿299(4)**

In suit to enforce a decree for arrearages for separate maintenance where notice served upon the attorney for the husband would have been ineffective, failure to find thereon was immaterial.

16. **Interest ⚿44**

Past due items bear interest under California law.

17. **Limitation of Actions ⚿2(1)**

In action to enforce an Illinois decree for arrearages for separate maintenance, the five year statute of limitations of California controlled. West's Ann.Code Civ. Proc., § 681.

18. **Appeal and Error ⚿781(4)**

Where plaintiff appealed from judgment and order denying her motion to set aside the judgment and to enter a different judgment and reversal of judgment was necessary, ruling rendered moot, the appeal from the order denying the motion and the appeal was dismissed upon that ground. West's Ann.Code Civ.Proc., § 663.

Brock, Easton, Fleishman & Rykoff, Hollywood, for appellant.

Louis Miller, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal by Gertrude Lewis, the wife, from a judgment refusing to recognize the validity of an Illinois decree for separate maintenance which was rendered subsequent to a Nevada divorce obtained by the husband, Ulysses Lewis, but made in an action which was commenced prior to the Nevada proceeding.

After some eight years of marriage the husband sued the wife for divorce in the state of Illinois, the place of their domicile. She answered and filed a cross-complaint for separate maintenance; issue was drawn thereon. Before trial was had the husband went to Nevada where he established a bona fide domicile and obtained a default divorce based upon substituted service of process in Illinois. The answer to the Illinois cross-complaint was filed in May of 1944; the Nevada action was commenced on August 27, 1947 and the decree rendered on September 30, 1947. On September 23, 1947, the Illinois court, upon application of the wife, issued an injunction against the husband's further prosecuting the Nevada divorce action until further order of court; the husband being outside the jurisdiction the said order was never served upon him.

Two months later the Illinois action came on for trial and resulted in a decree of December 30, 1947. The husband did not appear, nor did he in any manner present to that court the claim that his Nevada judgment had adjudicated any of the issues raised in the separate maintenance action. The wife was granted maintenance of $18 a week and it was also ordered that the injunction against prosecuting the Nevada action be made permanent. By "Judgment Order" of December 4, 1950, entered in the Illinois action, it was found that defaults in payment of amounts ordered by the judgment of December 30, 1947, had occurred in an aggregate sum of $3,078. The Nevada complaint alleged and the court found the fact of pendency of the Illinois action and the making of a temporary support order therein; that the husband had paid all sums required thereby and previously payable, "and has persistently attempted to bring said action now pending in said Superior Court of Cook County, Illinois, on for trial and disposition on the merits thereof, but has been frustrated in all such attempts by the refusal of said defendant, Gertrude Lewis, to cooperate in having said action brought on for trial and final disposition. * * * That the interests of said plaintiff, Ulysses Lewis, as a bona fide resident of the State of Nevada, would be prejudiced if this action were to be abated to await the final decision of that certain action between said plaintiff and said defendant, hereinbefore mentioned, now pending in the Superior Court of Cook County, State of Illinois, and known and described as Case No. 42 S 4895 in said Court." The judgment repeats the last quoted language, makes no specific mention of alimony or maintenance of the wife, but does conclude as follows: "[A]nd that said parties be, and each of them is hereby, released from the obligations of the marriage bond and restored to the status of single persons."

The plaintiff wife never remarried; defendant and a newly acquired wife became residents of California. Gertrude Lewis brought this action in the superior court of Los Angeles County to establish the Illinois decree as a judgment in this state, to have it enforced as such, and for recovery of $6,462 which was alleged to be the amount due and unpaid under the Illinois decree. The court denied her any relief, holding that the Nevada decree terminated the husband's obligation to support the wife, and that the Illinois decree "is invalid and unenforceable as against defendant and cross-complainant Ulysses Lewis and [is] not entitled to recognition in this court or in this State."

[1] The principal question debated upon this appeal is whether the fact that the Illinois maintenance decree was rendered

after the Nevada divorce removes this case from the ambit of Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; Kreiger v. Kreiger, 334 U.S. 555, 68 S.Ct. 1221, 92 L.Ed. 1572; Armstrong v. Armstrong, 350 U.S. 568, 76 S.Ct. 629, 100 L.Ed. 705; Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19. Those cases and many which follow them establish the rule that a foreign default divorce, based on publication or substituted service not followed by any appearance, cannot affect the right of a wife to recover maintenance payments due from the husband under a previously entered maintenance decree rendered after personal service in the jurisdiction of the then domicile of both parties.

The basic theory of those rulings is that there is no res other than the marital status in the divorce forum and that the court has no jurisdiction to affect the personal rights of the absent spouse without personal service of process upon her. The concept of divisibility of marital status and its resultant obligations was announced in Estin v. Estin, supra, 334 U.S. 541, 68 S.Ct. 1213 (decided June 7, 1948). That case determined the effect of a Nevada default divorce upon an existing maintenance decree rendered in New York. At pages 548–549 of 334 U.S., at page 1218 of 68 S. Ct. the court said: "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. Cf. Curry v. McCanless, 307 U.S. 357, 366, 59 S.Ct. 900, 905, 83 L.Ed. 1339, 1347, 123 A.L.R. 162.

"Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. * * * But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. * * *

"We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. * * *

"The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

Illinois followed and applied this doctrine in Pope v. Pope, 2 Ill.2d 152, 117 N.E. 2d 65. Considering the effect of a Nevada default decree upon an existing maintenance award it said, 117 N.E.2d at page 66: "[W]e hold that the Nevada decree, although regarded as a valid determination of the parties' capacity to remarry, does does not have the effect of terminating the plaintiff's right to support."

The Estin case was followed in Worthley v. Worthley, supra, 44 Cal.2d 465, 468, 283 P.2d 19, which dealt with a factual situation essentially the same as Estin. The opinion points out, 44 Cal.2d at page 468, 283 P.2d at page 21 that "the effect of the dissolution of the marriage on defendant's pre-existing obligations under the [Illinois] maintenance decree must be determined by the law of [Illinois]."[1] If, as a matter of domestic policy, the state of domicile of both parties wherein alimony or maintenance is awarded does not recognize survival of such an allowance after rendition of a valid divorce, as is the case in Pennsylvania, the foreign divorce puts an end to an existing award. So held in Esenwein v. Com. of Pennsylvania, 325 U.S. 279, 280, 65 S.Ct. 1118, 89 L.Ed. 1608. But where the domestic policy recognizes survival of the right to support after divorce, i.e., support previously awarded, the Estin doctrine operates. Upon principle it should also govern in a situation where the application for support, be it called alimony or maintenance, is made after the rendition of a divorce decree which does not make such an allowance and *a fortiori* where the application therefor was pending and undetermined at the time of a foreign divorce decree.

[2, 3] A judgment awarding alimony or maintenance merely effectuates and implements a previously existing right of the wife to support from the husband, either a a common law or a statutory duty. The right to support precedes the decree and grows out of the existing or preexisting marriage relation rather than the judgment declaring the right. Each state may determine for itself whether divorce shall end that right when the decree does not speak on the subject. Many states recognize a survival. See cases cited at page 1396 of Annotation of 28 A.L.R.2d 1378.

Illinois has statutory basis for such a view. It was so held in Larson v. Larson, 2 Ill.2d 451, 118 N.E.2d 433, 43 A.L.R.2d 1384. In that instance the husband sued for divorce and the wife defaulted after personal service of process. Divorce was granted and the decree provided that plaintiff would take no alimony from defendant "but it said nothing about the defendant receiving alimony from the plaintiff." 118 N.E.2d at page 433. Months later the defendant wife petitioned for an order fixing alimony, and after contest same was granted in the sum of $25 a month. "The question for decision is whether or not in the absence of some finding or adjudication with respect to the claim or right to claim alimony in the divorce hearing, the appellee lost her right to present the petition filed in this cause." 118 N.E.2d at page 434. The court further said: "Prior to 1947 there was no provision in the statutes providing for a petition for alimony after entry of a decree, where the question had not been properly preserved. In 1947 and in 1949 the legislature amended section 18 of the Divorce Act[2] * * *. The discussion of cases by appellant where courts of review hold that no alimony can be awarded unless it was provided for in the decree or jurisdiction reserved, do not help the situation in the present case because they were all subject to the provisions of section 18 of the Divorce Act prior to the amendment of 1947." 18 N.E.2d at page 434. The order was affirmed.

This case dealt with a domestic divorce and expressly recognized that a decree which is silent concerning alimony does not preclude a later application and award. Logically, no greater effect should be attributed to a foreign decree, and that is shown to be the Illinois view by the case of Pope v. Pope, supra, 117 N.E.2d 65 which applies the same reasoning to a foreign judgment of divorce in its relation to a domestic decree for maintenance. It is there said, at page 67: "The statute with which we are concerned provides that 'Married men or women who, without their fault, now live or hereafter may live separate and apart from their wives or husbands may have their remedy in equity * * * against their said wives or husbands * * * for a reasonable support and maintenance while they so live or have so lived separate and apart.' [Citations.]

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[1] We have substituted Illinois for New Jersey in quoting.

[2] The amended statute is here quoted as follows: "'Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony.' Ill.Rev.Stat.1953, chap. 40, par. 19; S.H.A. ch. 40, § 19; Jones Ann.Stat. 109.186."

"This legislation recognizes the ancient common-law obligation of the husband to support his wife even when she was living away from him. It reflects dissatisfaction with the inadequate remedies afforded by the common law for the enforcement of this obligation. * * * Our divorce statute has been amended to make possible the securing of alimony in a separate action following divorce proceedings in which personal jurisdiction over the husband could not initially be obtained. * * * Nor is the question resolved simply by characterizing the right to support as an 'incident of marital status.' Marriage is an aggregate of rights and duties. A decree of divorce enables the parties to contract a new marriage; that it does not necessarily relieve them of all the obligations of the old is witnessed by the award of alimony upon, or even after divorce. * * * Occasional suggestions in our opinions that divorce terminates the right to support or kindred property rights, [citations] must be considered as referring only to those situations where the wife has participated in the proceedings, or where a contract between the parties was construed to require this result."

[4] The specific question now presented, whether the fact that the maintenance decree was made in Illinois after the divorce was granted in Nevada makes the Estin doctrine inapplicable, has not been definitely answered in Illinois, California, or by the United States Supreme Court, so far as we are advised. It seems apparent, however, that the absence of a res other than marital status in the Nevada jurisdiction precludes that state from affecting a right existing in the nonresident wife, whether that right be evidenced by a judgment or merely rests upon the marital obligation which may ripen into a judgment. It is immaterial that the claim is "inchoate, to be perfected only by time or the action of the court" (borrowing the language of Pennington v. Fourth Nat. Bank, 243 U.S. 269, 271, 37 S.Ct. 282, 283, 61 L.Ed. 713).

Professor J. H. C. Morris, discussing "Divisible Divorce" in 64 Harvard Law Review 1287, says at page 1293: "It is, however, arguable that a right to support, whether crystallized in a court order or not, is itself a property right. And if the matter be looked at broadly (and Mr. Justice Douglas' language is nothing if it is not broad) the economic problem is the same, whether the wife's rights to support have crystallized in a judgment before the divorce decree or not, and should receive the same solution." At page 1302: "[I]t would appear to be immaterial whether or not the wife's right to support has or has not crystallized in a support order, since in either case the economic problem is the same and should receive the same solution. Thus, if the wife is domiciled throughout in a state where an ex-husband can be compelled to support his ex-wife, and the wife is not personally served in the state where the divorce is granted and does not appear in the divorce proceedings, she should be able to obtain support in the state of her domicil notwithstanding a prior out-of-state divorce." This thought appears in Mr. Justice Douglas' concurrence in Esenwein v. Com. of Pennsylvania, supra, 325 U.S. 279, at page 282, 65 S.Ct. 1118, at page 1120: "The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all."

The Supreme Court of the United States has approached the problem, but five Justices deemed it unnecessary to pass upon the same. Reference is made to Armstrong v. Armstrong, supra, 350 U.S. 568, 76 S.Ct. 629, 630. It there appeared that a Florida court had granted a default divorce to the husband against a non-resident wife who was notified by a substituted service only and did not appear. The Florida judgment said "that Mrs. Armstrong 'has not come into this court in good faith or made any claim to the equitable conscience of the court and has made no showing of any need on her part for alimony. It is, therefore, specifically decreed that no award of alimony be made to the defendant * * *.'" Later, the wife sued for divorce and alimony in Ohio where she resided. The husband there appeared and contested, relying upon the Florida decree. The court denied the wife's prayer for divorce but granted alimony. The majority of the United States Supreme Court concluded that "the Florida court did not purport to adjudicate the absent wife's right to alimony. The Ohio courts, therefore, in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree. Accordingly, we do not reach the constitutional question sought to be presented. But even if there is doubt as to the meaning of the Florida decree, we should construe its action as a refusal to pass on the question of alimony and thus avoid the constitutional question as to its power to do so." 350 U.S. at page 569, 76 S.Ct. at page 630. Chief Justice Warren and Justices Black, Douglas and Clark, speaking through Mr. Justice Black, held that the language of the Florida judgment was a denial of any alimony. "This was plainly a denial of alimony, not on the ground that the court was leaving the matter open but because the judge thought the wife should not have alimony.

"We agree with the majority that the Ohio decree was an alimony judgment and not a division of property. Thus in our view there is a direct conflict between that decree and the decree of the Florida court denying alimony to the wife. We therefore reach the constitutional question whether the Ohio court was justified in denying full faith and credit to the Florida decree.

"We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party. It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, decided in 1878, that nonresidents cannot be subjected to personal judgments without such service or appearance." 350 U.S. at pages 575–576, 76 S.Ct. at page 633. Discussing the Estin case they further said, 350 U.S. at pages 576–577, 76 S.Ct. at page 634: "The consideration supporting that holding are applicable here. The fact that Mrs. Estin's claim to support had been reduced to judgment prior to divorce while Mrs. Armstrong's had not is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal service." At page 578 of 350 U.S., at page 635 of 76 S.Ct.: "There was nothing novel in our holding in Estin v. Estin that a State where one of the parties to a marriage is domiciled can dissolve the marriage without personal service but that it cannot render a personal decree granting or denying alimony. The distinction between a decree which grants a divorce and one which grants a personal money judgment was recognized and the reasons for the distinction were stated by this Court in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. The state courts have long recognized the rule that a court lacking personal jurisdiction over a husband cannot render a valid alimony judgment against him. We see no reason why a court lacking personal jurisdiction over a wife should be allowed to render a valid judgment denying alimony to her. Personal jurisdiction is as necessary to protect a wife's interests as it is to protect a husband's. It is an essential to this kind of determination."

New Jersey has held that there is no survival where the right to support has not been reduced to judgment before the granting of the foreign divorce. Peff v. Peff, 2 N.J. 513, 67 A.2d 161, 166. Kentucky, New York, Ohio and Florida have held the contrary. See Taylor v. Taylor, Ky., 242 S.W.2d 747, 749; Lavigne v. Lavigne, 113 N.Y.S.2d 521; Slapp v. Slapp, 143 Ohio St. 105, 54 N.E.2d 153, 156; Pawley v. Pawley, Fla., 46 So.2d 464, 472–473.

Cases upon which respondent relies[3] are not persuasive for they were decided prior to Estin v. Estin, supra, 334 U.S. 541, 68 S.Ct. 1213.

[5] The lower court construed portions of the Nevada decree, above quoted, to constitute an attempt to deny Mrs. Lewis any future support. We think that the proper interpretation, but we conclude that the Nevada court had no jurisdiction so to do. We hold that the Nevada decree effected a valid termination of the marital status, but had no effect upon the wife's right to support from the husband; that under Illinois law that right survived the divorce, and the later separate maintenance decree was a valid adjudication which this state must recognize under the full faith and credit clause of the United States Constitution, art. 4, § 1. Therefore, the judgment must be reversed.

[6–8] There emerges from the record another equally valid ground for reversal. If it be assumed, contrary to the foregoing holding, that the Nevada decree competently adjudicated that the wife would not be entitled to any future support from the husband, it nevertheless appears that Mr. Lewis did not properly avail himself of that adjudication in the Illinois action which he had started and which was still pending. Armed with a valid judgment which would have constituted a complete defense to the Illinois action (upon the assumption we are now pursuing), defendant ignored that court, did not enter or attempt to enter any supplemental plea of res judicata, and did not appear at the trial. Under such circumstances the Illinois court was not obligated to take cognizance of the Nevada judgment. It was not a matter for judicial notice. A judgment of one state does not automatically assert or prove itself in another, and if he who is entitled to its benefit does not pursue established remedies he cannot thereafter attack in a third jurisdiction a decree of a second which he could have prevented had he properly asserted and proved a first judgment under the defense of res judicata. The full faith and credit clause of the Constitution does not dispense with these procedural prerequisites to the enjoyment of its guaranties.

[9, 10] Respondent's argument that the Illinois court was ousted of jurisdiction by the rendition of the Nevada decree (or perhaps by the filing of the action) cannot prevail. 21 C.J.S. Courts § 548, p. 856: "Of course, the court in which the first action is commenced cannot be ousted of, nor will it yield, jurisdiction by reason of the subsequent commencement of another action between the same parties for the same cause of action in another state or country." Among the supporting citations are the fol-

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[3] Chirgwin v. Chirgwin, 26 Cal.App.2d 506, 79 P.2d 772; Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923; Patterson v. Patterson, 82 Cal.App.2d 838, 187 P.2d 113; Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378; Knowlton v. Knowlton, 155 Ill. 158, 39 N.E. 595; Stephens v. Stephens, 319 Ill.App. 292, 49 N.E.2d 560; Shaw v. Shaw, 332 Ill.App. 442, 75 N.E.2d 411. The same is true of DeYoung v. DeYoung, 27 Cal.2d 521, 165 P.2d 457.

lowing cases involving divorce or maintenance: Hepner v. Hepner, 115 Kan. 647, 223 P. 1095; Gratz v. Gratz, 137 Fla. 709, 188 So. 580; Allen v. Allen, 188 Mich. 532, 155 N.W. 488, 489. In Maloney v. Maloney, 67 Cal.App.2d 278, 280, 154 P.2d 426, 427, this court passed upon a question essentially the same when it held that jurisdiction over custody cannot be defeated by removal of the child from the state: "Numerous decisions are reported in support of the proposition that where jurisdiction of the person or of the res has once attached it is not defeated by the removal of the person or of the res beyond the jurisdiction of the court. 15 Corpus Juris, p. 824; 21 C.J.S. Courts § 93. Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made. * * * Plaintiff cannot question the jurisdiction which by his own act he conferred. Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court below (Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 818, 70 A.L.R. 518), which attached at the time the suit was filed."

In Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438, 64 S.Ct. 208, 213, 88 L.Ed. 149, it is said concerning the full faith and credit clause and the implementing statute: "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other."

That the plea of res judicata in the Illinois proceeding was an essential step for respondent to take in order to avail himself of the full faith and credit doctrine appears from the discussion and ruling in Spitzer v. Superior Court, 74 Cal.App. 494, 241 P. 270. In that case the husband obtained a divorce in Hawaii on December 5, 1923. In September of that year the wife, who had contested the Hawaii action, filed a divorce complaint in this state making only substituted service on defendant, who resided in Hawaii; he failed to appear and a default interlocutory decree of divorce was granted the wife. Later he moved to vacate that decree upon the theory that the California court was without jurisdiction to render it. That motion having been denied he filed an application in the district court of appeal for a writ of prohibition against the entry of a final decree. It was "urged that the circuit court of the territory of Hawaii has by its decree adjudged the dissolution of the marriage of the parties, that respondent was thereby deprived of jurisdiction to proceed further in the action before it, and that the fact of such judgment appearing to this court, respondent should be prohibited from entering a final decree therein." 74 Cal.App. at page 498, 241 P. at page 271. The court after adverting to the rule that a plea of res judicata does not go to jurisdiction but merely presents a matter of defense, said in 74 Cal.App.2d at pages 498–500, 241 P. at page 271: "The provisions of article 4, section 1, of the constitution of the United States that 'Full faith and credit shall be given in each state to the * * * judicial proceedings of every other state' established a rule requiring the enforcement of such judgments without an investigation of the merits of fact, and not a rule affecting the jurisdiction of the court in which the judgment is offered in evidence [citations]; and such judgments though in rem are not executory in another state [citations]. The fact of a judgment urged as a bar, the identity of the parties, jurisdiction to render it, and the legal effect to be given it, are matters for determination in the first instance by the trial court, are questions on which the party against whom the judgment is urged has the right to be heard, and such determination, though erroneous, and hence not an act in the proper exercise of its jurisdiction, would nevertheless be an act in the exercise of its jurisdiction over the parties and the cause. * * * it is also the rule that the court in which an action is pending, wherein it has jurisdiction of the parties and the cause, is not deprived of jurisdiction to hear and determine the cause by the fact that a decree of another court adjudging the dissolution of the marriage has become final during the pendency of such action [citation]. In the instant case it is not alleged or contended that the interlocutory decree does more than to adjudge the right of the plaintiff in the action to a decree dissolving the marriage; or that the entry of a final decree therein, assuming the Hawaiian decree to be valid and to have the legal effect contended by petitioner, would effect a change in the status of the parties. * * * It is our conclusion that the proceedings of respondent Court are within the exercise of its jurisdiction over the parties and the cause, and that for any error therein petitioner has and will have so far as shown a plain, speedy, and adequate remedy by appeal. The petition for a writ of prohibition is denied." This case was cited and quoted with approval concerning the effect of a plea of res judicata in Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640.

In Marshall v. Marshall, 69 Cal.App.2d 20, 157 P.2d 854, it appeared that the wife had obtained an interlocutory decree of divorce in this state after contest; same was rendered on January 9, 1943, and included an award of alimony of $30 a month. In August of that year, the husband being in arrears upon the payments ordered, the trial court directed the issuance of an execution upon the judgment. Defendant husband then appeared and moved to set aside the writ of execution upon the ground that the interlocutory decree was void. He relied upon a divorce procured by him by default in Nevada on November 2, 1942. His motion was denied, and the court in affirming the order said 69 Cal.App.2d at page 28, 157 P.2d at page 858: "And it might be added that when Marshall appeared in the California court and asked for affirmative relief by filing a cross-complaint for divorce, and when he appeared and testified in that divorce proceeding without either pleading or referring to the action in Nevada, he submitted himself to the jurisdiction of that court and sought affirmative relief by way of a decree on his cross-complaint. Under these circumstances he *ought not* now be heard to say that that court had no jurisdiction. See Spitzer v. Superior Court, 74 Cal.App. 494, 498, 241 P. 270; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826." Accord: Hammell v. Britton, 19 Cal.2d 72, 84, 119 P.2d 333; Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1.

This is not a proper forum in which defendant may urge the efficacy of the Nevada decree to terminate the wife's right to future support. He should have appeared in the case he had instituted in Illinois and there have pleaded the Nevada decree as res judicata. Of course, this would have subjected him to the risk of a determination that his Nevada domicile was not bona fide and the decree therefore void. But that was a hazard he must assume if he would rely upon the Nevada judgment as a defense to future alimony claimed by the wife. California is not the jurisdiction in which this contention can be entertained. The later Illinois judgment must prevail in this respect over that rendered in Nevada. See Perkins v. Benguet Cons. Min. Co., 55 Cal.App.2d 720, 744, 132 P.2d 70, certiorari denied, 319 U.S. 774, 63 S.Ct. 1435, 87 L.Ed. 1721.

Next arises the question of validity of the Illinois "Judgment Order" of December 4, 1950, determining the arrearage under the maintenance decree to be $3,078, and reducing same to judgment in that amount. The court found therein that it had jurisdiction of the parties and subject matter and that Lewis was absent from the jurisdiction "so that process cannot be served upon him." There is no recital of any service upon his attorney, nor was there any evidence in the lower court upon that subject. The trial court found "that no summons or process of the Court, or any copy of the Petition for said Judgment Order was ever served upon Defendant in said action;" and that the said judgment order was rendered without any jurisdiction whatsoever, defendant not having appeared upon the said hearing either in person or by attorney.

[11, 12] Under Illinois law, of which we take judicial notice (Code Civ.Proc. § 1875, subd. 3), notice of such an application given to the attorney or client is essential to its validity. See Kaufman v. Kaufman, 279 Ill.App. 1, 4; Schmahl v. Aurora Nat. Bank, 311 Ill.App. 228, 35 N.E.2d 689, 692. Such notice is also requisite to due process of law. Griffin v. Griffin, 327 U.S. 220, 228, 66 S.Ct. 556, 90 L.Ed. 635.

[13–15] In the present instance there was a lapse of three years between the decree for maintenance and the judgment order fixing the amount of arrearages. The authority of the attorney of record had terminated with entry of judgment (Cummer v. Cummer, 283 Ill.App. 220, 237; McNab v. Dunsmure, 274 Ill.App. 560, 567), and hence notice to Lewis himself was necessary. Notice served upon the attorney would have been ineffective and the failure to find thereon is of no consequence.

The judgment order is not a binding judgment or order and the question of the amount of arrears was an open one in the trial court. Defendant testified that he had made no payments since October or November, 1947.

[16] Past due items bear interest under California law (see Anderson v. Anderson, 129 Cal.App.2d 403, 411, 276 P.2d 862), as well as that of Illinois (Pope v. Pope, supra, 117 N.E.2d 65, 69; Simpson v. Simpson, 4 Ill.App.2d 526, 124 N.E.2d 573, 578).

[17] The five year statute of limitation of this state controls (Code Civ.Proc. § 681; 31 Cal.Jur.2d § 15, p. 444), and that is the one upon which defendant relies.

[18] Plaintiff appealed not only from the judgment but also from an order denying her motion to set aside the judgment and to enter a new and different judgment under § 663 of the Code of Civil Procedure. Reversal of the judgment being necessary, that ruling renders moot the appeal from the order denying the motion made under § 663. That appeal is therefore dismissed upon said ground (Lenahan v. City of Los Angeles, 14 Cal.2d 128, 134, 92 P.2d 1014).

The judgment is reversed and the cause remanded to the lower court for further proceedings not inconsistent with the views herein expressed.

MOORE, P. J., and RICHARDS, J. pro tem., concur.

151 Cal.App.2d 583

The PEOPLE of the State of California, Respondent,

v.

Clarence M. PEARSON, Appellant.

Cr. 3282.

District Court of Appeal, First District, Division 2, California.

June 10, 1957.

Defendant was convicted of making and uttering a forged and fictitious check with intent to defraud. The Superior Court, Donald K. Quayle, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence of defendant's guilt was convincing.

Judgment amended to provide that the term of imprisonment should run concurrently with any term or terms that defendant was presently required to serve and, as amended, affirmed.

1. Forgery 🔑44(3)

Evidence sustained conviction for crime of making and uttering a forged and fictitious check with the intent to defraud. West's Ann.Pen.Code, §§ 470, 476.

2. Criminal Law 🔑371(1), 372(1)

Evidence of similar criminal acts occurring on or about the same time as criminal act on which a defendant is prosecuted occurred may be introduced to show common plan or design and criminal intent.

3. Criminal Law ⚷371(5)

In prosecution resulting in conviction of defendant for making and uttering a forged and fictitious check with intent to defraud, evidence of defendant's passing five other similar checks was admissible.

4. Criminal Law ⚷1166(3)

Where public defender had entered a plea of not guilty before committing magistrate in absence of defendant, but defendant was present during examination of all witnesses at preliminary hearing which was held on a subsequent date, defendant was not prejudiced by irregularity of entry of plea.

5. Criminal Law ⚷742(1)

In prosecution resulting in conviction for making and uttering a forged and fictitious check with intent to defraud, credibility of a witness, who had testified that she had seen defendant endorse another's name on check, was question for jury.

6. Criminal Law ⚷722½

Where defendant had testified in criminal prosecution, evidence of defendant's prior convictions of felony was admissible by way of impeachment and there was no impropriety in prosecutor referring to them in argument to jury.

7. Criminal Law ⚷627½

In prosecution resulting in conviction for making and uttering a forged and fictitious check with intent to defraud, trial court did not err in refusing to allow defendant to examine police reports where reports were not used by any witness.

8. Criminal Law ⚷995(6)

Where defendant was under a sentence of life imprisonment, sentence after conviction for making and uttering a forged and fictitious check was improperly made to run consecutively. West's Ann.Pen. Code, §§ 470, 476.

◆

Clarence M. Pearson, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted of the crime of making and uttering a forged and fictitious check for $107.30, with the intent to defraud one Kennedy and the bank on which the check was drawn. He appeals from the judgment of conviction and from orders denying a new trial and motion in arrest of judgment.

The evidence shows that appellant, representing himself to be one Meiss, ordered and had printed by a commercial printer 500 checks in the name of "Amplex Equipment Company, 9607 San Leandro Boulevard, Oakland, California" and drawn on the named bank. Amplex Equipment Company had no account in this bank, the address given was a vacant lot, and no such company was listed on the records of the telephone company or water company. The check passed on Kennedy was given in payment for a gun and the gun and change in cash were given by Kennedy to appellant. This check was purportedly signed by H. L. Madden and made payable to and endorsed with the name of George S. Edwards. Edwards testified that he had never seen or endorsed this check.

The prosecution proved, over defendant's objection, the passing of similar checks by appellant purportedly signed by Madden and payable to Edwards on the fictitious account of Amplex Equipment Company to five separate persons, all of whom identified appellant as the man who had given them the checks.

Defendant admitted giving the check to Kennedy but testified that he had received the check from Edwards already endorsed by Edwards and believed in good faith that it was genuine.

[1] The evidence of appellant's guilt is convincing. According to the testimony appellant, using a name not his own, had 500 checks printed in the name of Amplex Equipment Company, which was probably fictitious, and on a bank in which such com-

pany had no account, giving as the address of the company a vacant lot. He passed at least six of such checks in a short period of time, all made payable to Edwards, whom he admittedly knew, and Edwards denied any knowledge thereof. There are other corroborative details which we need not mention.

[2, 3] Appellant complains of the introduction of the evidence of his passing the other five checks. They were admissible under the well-known rule that evidence of similar criminal acts occurring at or about the same time may be introduced to show common plan or design and criminal intent. People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491; People v. Rodriquez, 135 Cal.App.2d 757, 760, 288 P.2d 147; People v. Fox, 126 Cal.App.2d 560, 569, 272 P.2d 832; People v. Robinson, 102 Cal.App.2d 800, 806–807, 228 P.2d 583.

Appellant argues that he was deprived of his constitutional rights by having the assistance of a public defender forced upon him and by being deprived while confined in the county jail of the privilege of consulting books in the county law library. We are satisfied with the disposal of similar claims in the opinion of Division One of this Court in an appeal by the same defendant from a conviction of other offenses. People v. Pearson, 150 Cal.App.2d 811, 311 P.2d 142.

[4] We have before us the transcript of the preliminary hearing which was not before the other Division in the companion case. This transcript shows that the public defender entered a plea of not guilty before the committing magistrate in the absence of appellant. However appellant was present during the examination of all witnesses at the preliminary hearing which was held on a subsequent date. We cannot find any prejudice to appellant in the irregularity of entry of the plea.

[5] Appellant argues that there was no evidence that he endorsed Edwards' name on the check given Kennedy. Kennedy's niece testified that she saw appellant write the name of Edwards on the back of the check. The effect of the cross-examination of this witness upon the credibility of her testimony presented a question for the jury to decide. Furthermore the circumstantial evidence reasonably supports the inference that appellant forged the entire check.

The denial of a continuance to procure the attendance of two witnesses was justified by the failure of appellant to advise the court of the testimony which he expected them to give. People v. Fountain, 170 Cal. 460, 150 P. 341; People v. Walton, 97 Cal.App. 782, 276 P. 426.

[6] The alleged misconduct of counsel in introducing evidence of a gun and resistance to arrest is not borne out by the record. The offer was made outside the presence of the jury and the court ruled against its admission. Since appellant testified, it was proper to prove his prior convictions of felony by way of impeachment. The evidence of other similar transactions was properly admitted and there was no impropriety in the prosecutor referring to them in argument and exhibiting the several checks to the jury.

[7] There was no error in refusing to allow appellant to examine police reports. These reports were not used by any witness and the refusal to permit their examination was proper. People v. Glaze, 139 Cal. 154, 72 P. 965; People v. Santora, 51 Cal.App. 2d 707, 125 P.2d 606.

There was no variance between the information and the proof. Since the amendment of section 470, Penal Code in 1905 the uttering of a forged check is a violation of that section, People v. Ruiz, 103 Cal.App.2d 146, 149, 229 P.2d 73, and the person uttering it may be prosecuted either under that section or under section 476 of the same code. People v. Carmona, 80 Cal. App. 159, 251 P. 315.

[8] Since appellant was under sentence of life imprisonment it was improper to make the sentence in this case run consecutively. People v. Pearson, supra, 150 Cal.App.2d 811, 311 P.2d 142.

The judgment is amended to provide that the term of imprisonment shall run concurrently with any term or terms that defendant is presently required to serve. The orders appealed from and the judgment as amended are affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

151 Cal.App.2d 431

Vera S. FORD, Plaintiff and Respondent,
v.
PROVIDENCE WASHINGTON INSURANCE CO., a corporation, Defendant and Appellant.
Civ. 17254.

District Court of Appeal, First District, Division 1, California.
June 3, 1957.

As Corrected July 1, 1957.

One who had obtained judgment against alleged driver of insured automobile brought action against automobile liability insurer, on ground that insurer was obligated under automobile liability policy to indemnify alleged driver. The Superior Court, Monterey County, Anthony Brazil, J., entered judgment against the insurer, and the insurer appealed. The District Court of Appeal, Bray, J., held that insurer could not, in action on automobile liability policy, covering the owner and operator of automobile, question implied finding of jury in wrongful death action as to the person operating the automobile, where insurer had knowledge of the automobile accident and the wrongful death action, and that good faith denial of drivership by person whom jury in wrongful death action impliedly found to be the driver, and his failure to ask defense of insurer, did not under cooperation clause release insurer of all obligations under the policy.

Judgment affirmed.

1. Insurance 🔑616½

Generally, judgment in an action, of which automobile liability insurer had no notice, is not res judicata as to the insurer of any of the issues therein.

2. Insurance 🔑616½

The general rule that personal injury judgment is res judicata as to automobile liability insurer of issues thereby determined depends primarily on notice to insurer of the pendency of the action.

3. Insurance 🔑514½

Obligation of automobile liability insurer to defend personal injury action against insured is one that must be determined before the outcome of the action brought against the insured, and not thereafter.

4. Insurance 🔑616½

Insurer could not, in action on automobile liability policy, covering the owner and operator of automobile, question implied finding of jury in wrongful death action as to the person operating the automobile, where insurer had knowledge of the automobile accident and the wrongful death action.

5. Insurance 🔑591½

Right of injured person to recover under automobile liability policy issued for his benefit cannot be defeated by the insured and the insurer.

6. Insurance 🔑514½

Where an injured person sues automobile liability insurer of one causing injury, injured person stands in no better position than the insured, and a violation of the cooperation clause, which would cause insured to be barred from indemnity under the policy, will likewise bar injured person from recovering against insurer.

7. Insurance 🔑514½

Insured is required by cooperation clause of automobile liability policy to give a fair and frank disclosure of information reasonably demanded by insurer to enable insurer to determine if there is a defense or whether insurer should settle.

8. Insurance ⚷514½

Cooperation clause of automobile liability policy requires insured to tell insurer the complete truth concerning accident, and insured must stick to such truthful version throughout the proceedings.

9. Insurance ⚷514½

Good faith denial of drivership by person whom jury in wrongful death action impliedly found to be the driver, and his failure to ask defense of automobile liability insurer, did not under cooperation clause release insurer of all obligations under the policy.

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Hoge, Fenton & Jones, Monterey, for appellant.

Morgan & Beauzay, San Jose, for respondent.

BRAY, Justice.

Defendant appeals from plaintiff's judgment for $5,306.97.

Questions Presented.

1. May an insurer under a public liability policy covering the owner and the operator of an automobile, question in an action on the policy the implied finding of a jury in a personal injury action as to the person operating the automobile?

2. Does the good faith denial of drivership by a person whom a jury in a personal injury action impliedly finds to be the driver, and his failure to ask defense of the insurer, release the insurer of all obligations under the policy?

Record.

Defendant issued to Peter Cardinale a policy covering his Chevrolet automobile, for liability of $5,000 for injury to or death of one person and $10,000 for injuries to or deaths of two or more persons. The policy covered not only Cardinale but anyone operating the automobile with his permission. August 6, 1954, the Chevrolet was involved in a three-vehicle accident. In the car were Barry Ford, aged 15, Roxanna Way, aged 15, and Alfred Gaspar, Jr., aged 15. Both Barry and Roxanna died as a result of their injuries. Alfred sustained major injuries. Barry's mother, Vera S. Ford, filed suit against Alfred, Cardinale and others for the wrongful death of Barry, alleging Alfred to have been driving. A cross-complaint was filed on Alfred's behalf against Barry's mother, Cardinale and others, alleging Barry to have been the driver of the Chevrolet. At the trial the Ford family claimed that Alfred was driving the car, while the Gaspar family claimed that Barry was the driver. Cardinale obtained a judgment of nonsuit both as to Vera Ford's complaint and as to Alfred's cross-complaint. A judgment on a jury verdict was rendered in favor of all defendants and cross-defendants except Alfred, and in favor of Vera Ford against Alfred in a sum in excess of $15,000, based upon Vera's cause of action against Alfred for wilful misconduct in the operation of the Chevrolet. Thereafter Vera brought this action upon the theory that defendant was obligated under its insurance policy, to indemnify Alfred within the liability limit above mentioned. The trial court rendered judgment in her favor for $5,306.97.

Facts.

They are undisputed. The day of the accident Cardinale loaned the Chevrolet to Barry with the understanding that Alfred would drive the car. As above stated, two of the occupants of the car were killed, so their version of who was driving could not be obtained. Alfred was in the hospital for several weeks after the accident. Upon receiving notice of the accident defendant attempted to interview Alfred but his father stated that his physical condition prohibited it. The father agreed to inform defendant when Alfred was in condition to be interviewed. The father obtained an attorney to represent Alfred's interests. That attorney notified defendant that he would handle all dealings with defendant. The attorney stated that Alfred denied driving the car, that the attorney had arranged with the district attorney for Alfred to undergo a lie detector test, and that the results of the test failed to prove that in denying that he was driving, he was not telling the truth. At a coroner's inquest Alfred, under oath, denied that he drove the Chevrolet. Summons and complaint in the Vera Ford action were served on both Cardinale and Alfred. Cardinale delivered his copy to defendant. In connection with that action Alfred's deposition was taken. He again asserted that he did not drive the car. He claimed that Barry Ford was the driver. At the trial he testified that Barry was the driver. As before stated, Alfred was represented throughout the Ford case by his own attorney. Defendant was not requested to appear for Alfred at the inquest, the taking of the deposition, or the trial of the case, although counsel was provided by defendant on all three occasions representing Cardinale.[1] Defendant was at no time requested to provide representation of or assistance to Alfred, nor did defendant ever offer such to either Alfred or his father.

1. Can Defendant Question Drivership?

[1] Of course, defendant's liability to plaintiff depends under the policy primarily upon whether Alfred was driving the automobile at the time of the accident. As Vera Ford's right to recover damages against Alfred for wilful misconduct depended wholly upon the determination that he was operating the car at the time of the accident, the jury's verdict was an implied finding that he was. Defendant contends that it is not bound by that finding, and that the question may be redetermined in the trial court here. While it contended that plaintiff had the burden of proving in this case, independently of the finding in the personal injury case, that Alfred was driving the automobile, it offered to prove that he was not. The trial court did not permit evidence upon the subject, holding that defendant was bound by the jury's determination. We agree with the trial court. Defendant concedes that the general rule is that an insurer who has had an opportunity to defend is bound by the judgment against its insured as to all issues which were litigated in the action against the insured, citing 29 Am.Jur. 813. The rule in California is in accord with that rule. See Bachman v. Independence Indemnity Co., 1931, 112 Cal.App. 465, 468–469, 297 P. 110, 298 P. 57; Lamb v. Belt Casualty Co., 1935, 3 Cal.App.2d 624, 630, 631, 40 P.2d 311. It contends, however, that as no privity could exist between it and Alfred unless he was the driver, the general rule does not apply, and that a rule similar to that where the insurer has no notice of the litigation should apply. With certain exceptions unimportant here, that rule is that the judgment in an action of which the insurer had no notice is not res judicata as to the insurer of any of the issues therein.[2] But that rule could not be applicable here. Defendant knew of the accident, of the coroner's inquest, and the personal injury action. It further knew that the Chevrolet was being driven either by Alfred or Barry, and that whichever one drove, that one was covered by its policy. It knew that the complaint in the personal injury action charged Alfred as being the driver. It knew that the jury must determine which of the two boys was the driver.[3] True, it was never called upon to represent Alfred (or Barry's interests, for that matter) in the litigation. But Alfred could not consistently with his insistence that he was not the driver, call upon defendant for assistance, and had he done so defendant would undoubtedly have said that as its only liability to assist him would be if he

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[1] Counsel left the trial of the case when Cardinale was granted a nonsuit. It apparently was granted on the theory that the owner of a vehicle is not liable for the wilful misconduct of a permissive user.

[2] Defendant cites Merriman v. Maryland Casualty Co., 147 Wash. 579, 266 P. 682, 63 A.L.R. 1040; Transylvania Casualty Ins. Co. v. City of Atlanta, 35 Ga.App. 681, 134 S.E. 632; note, 63 A.L.R. 1043.

[3] While the girl was also an occupant of the Chevrolet, no one ever contended that she drove it.

were the driver and he said he was not, it would not give him the assistance. Defendant's representative informed Alfred's lawyer that because Alfred claimed not to be the driver, defendant would not represent Alfred in the litigation. It must be remembered that in the personal injury action there was not involved the question of drivership between one covered by the policy and one who would not be so covered. The driver could only be one of two persons, and whichever he was he was covered.

[2] The general rule that the personal injury judgment is res judicata as to the insurer of the issues thereby determined depends primarily upon notice to the insurer of the pendency of the action. That requirement was met here. Defendant had notice from its named assured, Cardinale. It further had notice from the very beginning that the operator of the car was one of two persons, either one of whom would qualify for coverage under the policy. While the jury found against Alfred's statement that he was not the driver, no question of his good faith appears in the case. Defendant still contends that Alfred was not the driver. Defendant here was content to set back without taking a position in the personal injury case, as to drivership, without offering to defend either of the persons charged with drivership, and now, regardless of the determination of the jury, to take a position opposite to the jury's implied finding, and relitigate the issue in order to disclaim coverage, and to escape liability; this, in spite of the fact that the policy obligated defendant to be liable whichever of the two persons in question a jury found to be the driver.

[3–5] As pointed out in Greer-Robbins Co. v. Pacific Surety Co., 37 Cal.App. 540, 543, 174 P. 110, the insurer's obligation to defend is one that must be determined before the outcome of the action brought against the assured, not thereafter. In the Greer-Robbins case the insurer took the position that until the outcome of the personal injury case it could not determine whether the one demanding protection was or was not the insured. The case then went on to state (37 Cal.App. at page 544, 174 P. at page 111): "There is a more certain basis for a determination of the liability of the appellant to defend, and that basis is to be found in the allegations of the complaint in each action for damages against the respondent. We construe the policy to mean that it is the duty of the appellant, under its terms, to defend every action in which the complaint shows 'a claim for damages covered by this policy.'" "In determining whether or not the appellant was bound to defend, its denial of liability and refusal to defend, based upon its own investigation of the facts in the case, are to be disregarded. The language of its contract must first be looked to, and next the allegations of the complaints in each action for damages against the insured." Lamb v. Belt Casualty Co., supra, 3 Cal.App.2d at page 630, 40 P.2d at page 314. Applying that test here—the fact that the complaint charged Alfred with being the driver showed a claim for damages covered by the policy and placed the duty on defendant of protecting Alfred against the charges in that complaint. We are not directly concerned here with defendant's failure to defend Alfred other than as it affects the question of defendant being bound by the jury's implied findings. Had defendant performed that duty there could be no question under the authorities that any of the issues determined by the jury would be binding on defendant. Having failed to perform that duty and having had full notice of the issues being presented to the jury, defendant is likewise bound. Moreover, this action is by a third person on a contract (the insurance policy) which under the California rule is regarded "as a contract between the insurer and the insured for their benefit and for the benefit of an unknown third person who becomes known and identified upon being injured by the insured." Bachman v. Independence Indemnity Co., supra, 112 Cal. App. at page 483, 297 P. at page 117. As here, the driver of the car which caused the injury in the Bachman case was not the insured named in the insurance policy. He came under the omnibus clause covering any person legally driving the automobile of the named insured. As there stated, the injured person's right to recover under the contract made for his benefit, cannot be defeated by the insured and the insurer. Of course, the third person (plaintiff) would have no greater rights under the contract than would Alfred. See Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13. However, plaintiff's rights cannot be defeated by the act of defendant in refusing to recognize its possible liability when it received her complaint showing that she alleged Alfred to be the car driver—an allegation which, if true, brought not only Alfred but plaintiff under the protection of the policy.

2. Cooperation.

[6] It is well settled that where an injured person sues the insurer of the one causing the injury, the injured person stands in no better position than the assured and a violation of the cooperation clause which would cause the insured to be barred from indemnity under his policy will likewise bar the injured person from recovering against the insurer. Hynding v. Home Acc. Ins. Co., supra, 1932, 214 Cal. 743, 7 P.2d 999; Valladao v. Fireman's Fund Indem. Co., 1939, 13 Cal.2d 322, 328, 89 P.2d 643.

The policy provided that "If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." The named insured, Cardinale, complied with this clause. "The insured shall cooperate with the company and upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." Defendant contends that Alfred violated both these clauses. Except for refusal to allow interviews while Alfred was in the hospital (which refusal was reasonable in view of Alfred's serious injuries), the only acts of Alfred which defendant claims violated these clauses were his failure to request defendant's assistance (in spite of the fact that defendant had already notified Alfred's attorney that it disclaimed liability and would not defend), and his insistence that he was not the driver of the car. Defendant at no time made any requests of Alfred and therefore he did not refuse any. "The denial of liability on the part of the insuring company and its refusal to defend the suits constituted such a breach of the contract that the insured was released from his obligation to leave the management thereof to it, and was justified in proceeding to defend on his own account." Lamb v. Belt Casualty Co., supra, 3 Cal.App.2d at page 630, 40 P.2d at page 314. See also O'Morrow v. Borad, 27 Cal.2d 794, 167 P.2d 483, 163 A.L.R. 894, where the court held that the refusal of the insured to allow the insurer to defend him in the personal injury action was justified and did not constitute lack of cooperation as required by the policy. While the circumstances there are different from those here, the ruling that "Forfeitures, however, are not favored; hence a contract, and conditions in a contract, will if possible be construed to avoid forfeiture. [Citations.] This is particularly true of insurance contracts" (27 Cal.2d at page 800, 167 P.2d at page 487) is applicable. Moreover, the case shows the extent to which the courts go in determining cooperation under an insurance policy.

As far as the record goes, and as found by the trial court, Alfred's statements were made in good faith and in nowise did he knowingly misrepresent to defendant any material fact.

The jury's implied finding need not necessarily be construed as a finding that Alfred lied in claiming not to have been the driver. It could well have been a finding that he was mistaken. The defendant seems to take the position that the jury and not Alfred was mistaken. Defendant's position is such that an insurance policy which purports to cover the driver of an automobile for liability in an accident does not cover such driver, where in good faith he claims he was not the driver, and yet is found by a jury to have been the driver.

[7, 8] The insured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine if there is a defense or whether the insurer should settle. Valladao v. Firemen's Fund Indem. Co., supra, 13 Cal.2d at page 329, 89 P.2d at page 646. "Truthfulness seems to be the keystone of the co-operation arch. The insured must tell his insurer the complete truth concerning the accident, *and he must stick to this truthful version throughout the proceedings.*" Home Indemnity Co. of New York v. Standard Acc. Ins. Co., 9 Cir., 167 F.2d 919, 924.

[9] The evidence in this case fails to show any violation by Alfred of these rules. The Valladao case, relied upon by defendant, is easily distinguishable from ours. There the insured and his two riders deliberately misrepresented the facts to the insurer. Later, in spite of previous insistence upon the misrepresentations as being true, the three admitted that they had falsified. The court held that repeated and wilful misrepresentations by the insured to the insurer over a period of five months constituted a breach of the cooperation clause of the policy. As pointed out by the trial judge in our case, the Hon. Anthony Brazil, in his memorandum opinion, the decision in the Valladao case must be limited to a situation in which the insured wilfully misrepresents the facts to the insurer. This is not such a case. As Judge Brazil further states: "Here there was no offer by the insurance company to defend; and no request for its assistance. As a matter of fact the company received copies [of] all pleadings in the original case from Mr. Cardinale, the person it actually represented. There appears on the part of Gaspar, Jr. no evasion, no inconsistency, no re-canting of testimony; but only a constant denial on his part that he was the driver; which is the same thing as saying not the insured. Despite his protest and his sworn testimony, the jury chose to believe, under a rule of proof requiring, not certainty, but only preponderance of evidence, that he was in fact the driver (and as a consequence the assured.) * * * There is here no admission of fraud, falsification or wrongdoing. In fact the insurance company, who now claims non-cooperation, offers to prove that the jury was wrong in the first place; and that Alfred Gaspar, Jr. was not in fact driving the car. * * * While I find that Alfred Gaspar, Jr. was the driver of the car, this does not mean, and it is not the equivalent of saying that he 'knowingly, wilfully and repeatedly misrepresented' anything. The record discloses the insurance company still believes him. A logical inference can be drawn; that from the outset, far from being misled or prejudiced by anything Gaspar said or didn't say, did or didn't do, it was completely satisfied with the turn of events that would have exonerated it from financial responsibility for the death of Barry Ford, had the jury found Alfred Gaspar, Jr. was not the driver."

Certain Findings.

Defendant complains that the finding that defendant did not inform Alfred of the existence of the omnibus clause and the finding that defendant still offers to prove that Alfred was not driving the car, are unsupported by the evidence. Strictly speaking, defendant did not inform Alfred of that clause. However, defendant was not required to so inform Alfred for the reason that in the discussion between Alfred's attorney and defendant's attorney, when the latter stated that defendant disclaimed all liability in view of Alfred's insistence that he was not the driver, it was obvious that Alfred's attorney knew of the clause. The record fails to disclose any formal offer by defendant to prove that Alfred was not the driver. However, it is obvious that defendant's desire to relitigate the drivership issue is for the purpose of proving that Alfred was not the driver. These two findings are in nowise necessary to the judgment, and being, strictly speaking, incorrect, may be disregarded.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Appellant,

v.

Jesse HUFFORD and Lillie Hufford, Defendants and Respondents. *

Civ. 8882.

District Court of Appeal, Third District, California.

June 3, 1957.

Hearing Granted July 31, 1957.

Action to condemn easements and rights of way for construction, operation, and maintenance of electric transmission line and for a service road. The Superior Court, Shasta County, Richard B. Eaton, J., entered judgment adverse to condemner, and condemner appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that evidence was not sufficient to sustain the severance damages awarded.

Judgment reversed.

1. Eminent Domain 🔑223

In action to condemn easements and rights of way for construction, operation, and maintenance of electric transmission line and for service road, verdict, which asked jury to find the market value of the easements taken and the severance damage to remainder of defendants' land was proper. West's Ann.Code Civ.Proc., § 1248.

2. Eminent Domain 🔑126(1)

Anything condemner might do within the embrace of the easement rights taken would have to be paid for in price for such taking, and, therefore, any detriment to condemnees' continued use of land remaining after the taking could not become subject of further award without double damages resulting.

3. Eminent Domain 🔑221

In action to condemn easements and rights of way for construction, operation, and maintenance of electric transmission line and for a service road, evidence was not sufficient to raise, on issues of value of rights taken and of severance damages, question for jury as to possible existence of gas and oil within the land involved or possibility of farming such land under irrigation. West's Ann.Code Civ.Proc., § 1248.

4. Evidence 🔑471(1)

Opinion evidence based on incompetent and inadmissible matter should be rejected and cannot be submitted to the jury.

5. Eminent Domain 🔑203(1), 262(5)

Where, in condemnation proceeding, expert witness' testimony is substantially based on items or elements of damage which are speculative and remote, and an appropriate and precise motion is addressed to subject matter of admitting such testimony, permitting such evidence to go to jury is error, and such error is not cured or minimized by instructing jury that they, having heard the evidence, are to pass upon the question of its admissibility.

6. Eminent Domain 🔑134

Where it is not shown, in condemnation proceeding, that a suggested use of land involved would be profitable or it appears that the operation could not be carried out except at a loss, prospect of use for such a purpose is not a proper element of value.

7. Eminent Domain 🔑202(4)

In proceeding to condemn easements and rights of way for construction, operation, and maintenance of electric transmission line and service road, permitting nearby landowner to testify that an oil company had done some drilling on his property about a year and a half prior to trial, that gas had come out at high pressure, and the hole had been cemented closed was error. West's Ann.Code Civ.Proc., § 1248.

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* Opinion vacated 319 P.2d 1033.

8. Evidence 🔑555

In action to condemn easements and rights of way for construction, operation, and maintenance of electric transmission line and service road, admission of valuation testimony of witness, whose qualification as expert valuation witness consisted in fact that he was a farmer and stock raiser in vicinity of the farm land condemned, was error, in absence of showing that he had knowledge of effect upon market value of possibility of oil or gas in the property, and in view of his testimony that he had never investigated the sale of other properties with power lines on them to determine effect of such line on sale prices.

9. Eminent Domain 🔑124

Right to compensation and damages in an eminent domain proceeding is deemed to accrue at date of issuance of summons, and actual value at such date is basis for measuring compensation and damages. West's Ann.Code Civ.Proc., § 1249.

10. Eminent Domain 🔑222(5)

In condemnation proceeding, instruction that jury was not confined to value of the property in its condition at time summons was issued, or to consideration of its use only at time of taking but could also consider the reasonably substantial possibility of its being capable of being put to a more profitable use had it not been taken but that jury was not to consider remote, speculative, imaginary, uncertain or conjectural possibilities did not violate rule that value of property on date of issuance of summons should be basis for measuring compensation and damages. West's Ann. Code Civ.Proc., § 1249.

11. Eminent Domain 🔑205

In condemnation proceeding, evidence was not sufficient to sustain severance damages awarded.

12. Trial 🔑96

Where, in condemnation proceeding, it is established that valuation witnesses' opinion as to diminution in value of the property is based partly on noncompensable items of damage and partly on sheer speculation which witness is unable to segregate from lawful elements of damage, his testimony should be stricken upon motion accurately pointing out the defects.

◆

Robert H. Gerdes, F. H. Pearson, Charles T. Van Deusen, San Francisco, and Carr & Kennedy, Redding (Malcolm A. MacKillop, San Francisco, of counsel), for appellant.

L. C. Smith, Redding, for respondents.

VAN DYKE, Presiding Justice.

This is an action brought by Pacific Gas and Electric Company, a corporation, hereinafter called Pacific, against Jesse and Lillie Hufford, husband and wife, hereinafter called Hufford, to condemn an easement and right of way for the construction, operation and maintenance of an electric transmission line, together with an easement and right of way for a service road, across lands owned by Hufford in Shasta County. Pacific also sought the right to erect gates in any fences which might be erected across the easements and to prohibit the construction of buildings and prevent the drilling of wells thereon. The transmission line across the Hufford property will consist of one line of six steel towers grounded with customary wires and cross arms. The towers will be so constructed that they afford a ground clearance of 18 feet below the bracing. The transmission line easement is 5,171 feet in length and 80 feet in width, covering approximately 9.5 acres. The road easement is 20 feet wide and covers approximately 3.6 acres. The total area of the Hufford property is 1,179 acres. The land is rolling, some with oak and pine trees, but mostly foothill land, except for a flat portion along a creek. The transmission line easement is in the rolling hill portion of the property. The land is used for grazing cattle six months of the year from November through May. The jury found the market value of the easements to be $1,000 and awarded severance damages in the sum of $12,500. To present the contentions of error, a review of the testimony is necessary.

Luther F. Prawl testified that about a year and a half prior to the trial his land, about two miles away from the Hufford property, had been drilled by the Humble Oil Company to a depth of 3,100 feet; that during the drilling gas was expelled at high pressure; that the hole was cemented closed; that no commercial use had ever been made of it. He said that only one hole was drilled and that it was the only one he had ever heard of in Shasta County. This testimony was objected to as incompetent, irrelevant and immaterial and without foundation. Hufford contended that the evidence would tend to prove the value of the Hufford land for mineral content, meaning gas and oil.

Hufford called three witnesses to establish damages. John Bryant, a licensed real estate broker, qualified as an expert on land values in the general locality of the Hufford property. From general knowledge and from inspection of the subject property, he testified that it was best adapted for agricultural use and for the production of gas and oil. He put the over-all value of the property at $115,000 and said that the taking of the easements lowered the over-all value by $15,500, $500 for the easements taken and $15,000 severance damages. He listed the elements he took into consideration in arriving at severance damages as follows:

1. Hindrance to Stock.
   (a) Others have use of gates.
   (b) Steers or cows won't fatten as fast if disturbed.
2. Hindrance to farming.
   (a) Erosion.
   (b) No contour plowing.
   (c) Hard to harrow and broadcast seed.
3. Hindrance to privacy.
   (a) Television and radio.
   (b) Free access to property.
   (c) Can't build house or have well.
4. Hindrance to irrigation.
   (a) Very dangerous to operate sprinkler system near.
5. Damage while actual building.
   (a) Workmen disturb cattle.
   (b) Vehicles, men, etc., disturb and ruin feed.
   (c) Might not clean up.
6. Mineral.
   (a) Couldn't have gas well near.

He said he could not and did not give any value to any particular element, nor could he give a revised figure if some elements were excluded. The witness amplified the foregoing as follows: The hindrance to stock consisted of the following factors: Steers purchased in the fall to be fed and sold in the spring come out of Oregon and Nevada ranges and will not gain "for quite awhile under a power line", because the noise disturbs them. In handling the steers trouble would be encountered in driving them under the lines, not a great amount, but one thing: While the lines were being built, range cattle would be disturbed. The result of disturbance is failure to gain as rapidly as the stock otherwise would. Hindrance to farming was made up of the following factors: The land could be farmed, much of it to grain. For that purpose, contour plowing was desirable to stop erosion, and the roads would interfere with such plowing. Also, the towers would interfere with the passage of farm equipment, such as harrows. The presence of the towers made the land, said the witness, unadaptable completely to contour plowing and very hard to farm "if you want to contour"; also, the roads would cause erosion. Hindrance to privacy was made up of the following factors: Pacific would have free access to the property, and that is not good for range cattle. Access to the land through gates would hurt the resale value of the property. A prospective buyer might want to build a house under one of the lines and could not do so. The witness related an experience he had had in selling an irrigated tract with a $20,000 house built under a power line. Prospective buyers anticipating interference with television would not freely buy, and so the sale value was hurt. Hindrance to irrigation consisted in the danger of operating a sprinkler system near the lines. The witness said the property could not be irrigated with a check system, but that it was "not out of the realm of possibility" some day with a sprinkler system, and he would hate to have his son changing sprinklers with a 30 or 40 foot pipe under a power line. In using sprinkler systems, the operator carries pieces of pipe around over his shoulder and might hit a power line with the pipe. As to mineral, the witness testified that anything in Northern California has a mineral potential, and that mineral possibilities increased market value appreciably. By mineral uses he meant gas and oil. He had made no geological tests of the property, knew that it had never been drilled for gas or oil and knew of no oil or gas in Shasta County in commercial quantities. He did not know whether or not the property could profitably be put to a mineral use. Concerning the irrigation, he said he knew of no water rights belonging to the ranch but was thinking in terms of a well. The ranch could not be irrigated unless wells were drilled, and he did not know what quantity of water might be obtained by drilling, and that one might hit a good well or might not. The entire ranch was not suitable for irrigated farming, and he did not know how much of it was, for it depended entirely on how far one had to go for water and the pumping cost. The witness said that in regard to the use of the gates by others, he referred to the use by Pacific's employees and to the danger that they might leave gates open, allowing cattle to stray. Pacific moved to strike his testimony concerning this element of damage as being noncompensable by way of severance damage, and the court directed the witness to eliminate that element and to modify his evaluation accordingly, but said he could still consider the effect of the company's employees entering by the gates to go up and down the road to service the power line. The witness then said that the matter of leaving the gates open had not, in fact, entered into his estimates of damage, and he, therefore, refused to revise the estimate. Concerning the item of damage by reason of danger to be encountered in operating a sprinkler system near the lines, Bryant said he did not know whether or not there were sprinkling systems available that could effectively sprinkle the area nor the cost of installation if there were. He said that not much could now be sprinkled, but that it was not out of the realm of possibility that a good part could be sprinkled in the future. He did not know whether it would be economically feasible to sprinkle the property or to put it under irrigation at all, and he could not state what added value the property had because of its irrigation possibilities. These questions were asked, and answers given: "Q. Now, can you tell me what added value this property would have in your purchaser's mind at this time because of its irrigated farm possibilities? A. I couldn't break it down. Q. Can you tell me what value, if any, this probability would have in a purchaser's mind at this time because of what you consider its gas and oil possibilities? A. I can't tell, no." Returning to hindrance to steer fattening, the witness said that the interference would be felt over the whole ranch. He said the ranch had a double power line across it already; that Hufford had been pasturing cattle on the ranch a long time; and that the witness did not know what effect it had had on the cattle in past years. (Neither of the Huffords was called to supply that information.) In considering the restriction against building a house or drilling a well on the right of way, the witness said that this related entirely to the 13.1 acres in the right of way area, except that the rest of the property might be depreciated in the eyes of a prospective purchaser if he felt the right of way area contained the best building site or if he wanted to drill a well there.

He said that a part of the damage within the figure of total severance damages he gave was due to inability to drill for gas or oil off the right of way as well as on. He said that, although he put $500 as the damage accruing from the taking of the easements, his severance damage figure included additional damage to the area in the right of way, but he could not tell how much.

George Nathan Hunt was the second valuation witness called by Hufford. He was a farmer and stock raiser in Shasta County, operated ranch properties for W. H. Hunt Estate Company, some of which adjoined the Hufford property. He gave the best use of the Hufford property as stock raising, the next best as farming, by which he meant dry farming, since he felt the property had no great potential for irrigation. He said the third best use was mineral, by which he meant gas and oil. By way of qualifying as an expert on values, Hunt said that he knew of and had been informed of all sales of real property that had taken place in that locality for a number of years. He testified the over-all value of the Hufford property was $112,000. Over objection that he was not qualified to do so, he stated his opinion that the depreciation of the market value of the Hufford property by being impressed with the easements being taken amounted to $16,500; of this he attributed $1,500 to the value of the rights of way and $15,000 to severance damages. The last valuation witness called by Hufford was Blanche Abbott, a life-long resident of Shasta County, a rancher by occupation, who testified she was familiar with the Hufford property, having all her life lived within two miles of it and having recently made an inspection of it. She said she had made an investigation of sales of property in that locality for years past. She gave the reasonable market value of the Hufford property before being impressed with the easements as $117,900. Over objection, she testified that the value of the whole property after being impressed with the easements was $99,000. She fixed $1,000 as the value of the easements and $17,900 as severance damages. One valuation witness for Pacific placed the reasonable market value of the Hufford ranch before being impressed with easements at $72,500, fixed the value of the rights taken at $666 and found no severance damages. A second witness gave the figures of $64,000 over-all value, $640 for the rights of way and no severance damages. Pacific introduced evidence that driving cattle under electric lines has no effect on them, and that routine inspections involving entry upon the area under the wires generally happened about twice a year.

Pacific first contends that the jury's award of severance damages included a sum attributable to damage to land within the easement area and was, therefore, to that extent, an award of double damages. In support of this contention, it refers to the language of Section 1248 of the Code of Civil Procedure, which provides that severance damages are "the damages which will accrue to the portion not sought to be condemned", and that severance damages are to be assessed separately from "the value of the property sought to be condemned." Pacific says the portions sought to be condemned were the easements, and that in fixing the value thereof, the jury necessarily considered the detriment in the way of limitation of use of the land within the rights of way. Therefore, says Pacific, severance damages cannot include further damage to the land within the rights of way since that has already once been considered and allowed.

The court prepared and handed to the jury a form of verdict which read as follows:

> "We, the jury in the above entitled case, find:
>
> "1. That the market value of the easements taken by plaintiff is $———.
>
> "2. That the severance damage to the remainder of defendants' property is $———."

Concerning this form of verdict and its use, the court told the jury:

> "You are instructed that if by your verdict you determine that damages will accrue to or be caused *to defendants' entire tract of land* by reason of said severance, of said easements from the remainder of the property, or by reason of the construction and installation of the power line or roads, then you will insert such amount in the second blank space in the form of verdict just read to you.
>
> "On the other hand, if you determine that no damages will thus accrue or be caused to the property of defendants, then you will indicate such determination by writing the word 'none' in such second blank space." (Emphasis added.)

[1, 2] We think there was nothing wrong with the form of verdict, and that it complied with the provisions of Section 1248 of the Code of Civil Procedure. The property sought to be condemned consisted of easements to erect and maintain the lines, construct and maintain the service roads and to exercise the incidental and subordinate rights of ingress and egress and the like. The jury were told to find the market value of these easements, and they purportedly did so. They were then told to find the severance damages to the remainder of the defendants' property. The remainder of defendants' property was that portion thereof not sought to be condemned, that is to say, everything except the easements, the value of which had already been found and awarded before severance damages were to be considered. Since the verdicts conformed to the statute, we cannot ascribe error in this respect. But, aside from the form of verdict, double damages may have been awarded and the instruction regarding the verdict forms, quoted above, invited that result. The portion not sought to be condemned was all of the land lying outside the rights of way and also the land within those rights of way subjected to the easements. Title to the easements left title remaining in Hufford. But in determining severance damages to the title remaining, as distinguished from severance damages to land outside the easement boundaries, it is obvious that the elements going to make up the damages would be necessarily quite different. For instance, since the easements prohibited the construction of buildings and the drilling of wells within the easement area and gave the right of partial occupancy for towers and lines and the right of access for maintenance purposes, an exercise of those rights would necessarily lessen and limit Hufford's possession and use of the ground. But for detriment inflicted by Pacific's use of the easements, payment was made in the award for the taking of those easements. It must necessarily be so. To say otherwise would be to compel Pacific to pay twice for easement rights. In considering this contention of error the testimony of Bryant is revealing. In testifying as to the elements which he considered in arriving at his estimate of severance damages, he included such elements as use by Pacific of gates on or giving access to the rights of way; detriment in fattening cows or steers feeding on the rights of way; inability to properly farm the rights of way; erosion thereon from the road building; interference with cultivation of the rights of way by the presence of the towers, making use of farm equipment difficult; inability to build a house or bore a well on the rights of way; prevention of irrigation of the rights of way; damage to the land in the rights of way while the improvements were being built, which element he said included disturbance of cattle by the workmen, destruction of herbage by vehicles and workmen; and leaving the rights of way cluttered after construction. Most, if not all, of the detriment so described by the witness arose from the right of Pacific to the use of the easements for which it was paying. Anything that the condemner may do within the embrace of the easement rights taken must be paid for in the price of that taking. Any det-

riment to the continued use of the remainder by the condemnee has thus been paid for and cannot become the subject of further award, else double damages will have been awarded. Objections were made by motions to strike Bryant's testimony as to severance damages which, in so far as they related to the remainder interest of Hufford in the rights of way, were denied by the court. From the scope and nature of that testimony which thus went to the jury as we have related it, we conclude that in all probability the jury did award double damages respecting the area within the rights of way. It is, of course, impossible to say how much double damages were thus awarded, and, in any event, it could not be a great sum in view of the evidence that the value of the whole of the land within the right of way before severance amounted to $100 per acre, or $1,310, while the lowest estimate of value of the easements taken was that of Bryant, who fixed the sum at $500.

Pacific next contends that error was committed in the trial court's refusal to strike the testimony of Bryant based on speculative and remote elements of value and speculative and remote elements of damage. The Supreme Court stated in People v. Ocean Shore R., 32 Cal.2d 406, 425–426, 196 P.2d 570, 582, 6 A.L.R.2d 1179:

> "Under section 1249 of the Code of Civil Procedure the measure of compensation for property taken is its market value, which is to be determined by a consideration of all the uses to which it is adapted and for which it is available. * * * In this connection, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as the measure of value, but to the extent that the prospect of such use affects the market value of the lands; however, elements affecting value which, while possible, are not reasonably probable, should be excluded. * * * Accordingly, where it is not shown that a suggested use would be profitable, or where it appears that the operations cannot be carried on except at a loss, the prospect of use for such a purpose is not a proper element of value."

It was stated in Arnerich v. Almaden Vineyards Corporation, 52 Cal.App.2d 265, 272, 126 P.2d 121, 124:

> "To recover severance damages under section 1248, subdivision 2, of the Code of Civil Procedure, the loss in market value claimed must directly and approximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible, * * *, or recovery in advance for torts or other injuries that may or may not be committed cannot serve as a legal basis for recovery."

[3] Bryant testified that the Hufford property is best adapted to grazing, farming and the production of gas and oil. He said the possibilities of gas and oil increased the market value appreciably. He admittedly had no knowledge as to the presence of gas or oil within the land in paying quantities, but said he felt that anything in Northern California now has a mineral potential. There was no evidence that there was gas or oil within the land under the rights of way in commercial quantities nor anywhere within the Hufford property, save the testimony of Prawl concerning the presence of gas in a well drilled two miles from the exterior boundaries of the Hufford ranch. If valuations were to be affected by the possibility of the presence of gas or oil in the subject property, some showing at least should have been made concerning the matter by a qualified expert, which Prawl certainly was not. The most serious aspect of this phase is that Bryant considered the possible presence of gas or oil within the land in fixing his severance damages, although no proof was offered that Pacific's use of its rights could in anywise affect the extraction of gas and oil, if there was

any. Under the evidence presented here, the possible existence of gas and oil within the land of Hufford in commercial quantities or in quantities such as would affect the judgment of a prospective buyer was altogether too speculative to be submitted to the jury for their consideration in fixing either value of rights taken or severance damages from the taking. The same is true concerning Bryant's testimony as to the adaptability of the land within the right of way to farming under irrigation since there was a complete absence of any showing that water in sufficient supply was available. Again, on this phase Bryant considered as an element of severance the danger of operating a sprinkling system under the lines if water should become available, although there was not the slightest attempt to show that there was any such danger, and there was testimony directly to the contrary introduced by Pacific. It may be noted also that there was not the slightest attempt to show economical feasibility in respect of this irrigation of the land or the operation of a sprinkling system for that purpose. Testifying on severance damages, Bryant stated that noise from the power line would disturb cattle and keep them from making a normal gain of weight. Strangely enough, there was no direct testimony that power lines are noisy to any appreciable extent. With respect to the area contained in the rights of way, Bryant spoke of a prospective buyer perhaps wanting to build a house where the power lines were to go, although there was no evidence that there was any site within the rights of way possessing qualities not equally available in other places. In view of the state of the record, these matters also were open to the objection of being so speculative, remote, imaginary, contingent or merely possible to the extent that they ought not to have been submitted to the jury, and to the extent that Bryant ought not to have been permitted to place his valuations in part in dependence thereon in the presence of timely and precise motions for orders to the contrary. During the presentation of these motions based on the speculative and remote character of the considered elements of damage, the trial court ruled that the question was one to be determined by the jury, and the jury was instructed not to consider elements found to be speculative and remote. However, the question was for the court, not for the jury.

> "The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; * * * It follows that, so far as the admissibility in law depends on some incidental question of fact * * * this also is for the judge to determine, before he admits the evidence to the jury." (Wigmore on Evidence, 3rd ed., sec. 2550.)

[4, 5] Opinion evidence based on incompetent and inadmissible matter should be rejected. It cannot be submitted to the jury. San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604; People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 268 P.2d 117; City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228; Coast Counties Gas & Electric Co. v. Miller & Lux Inc., 118 Cal.App. 140, 143–144, 5 P.2d 34. Where the testimony of an expert witness is substantially based upon items or elements of damage that are speculative and remote, as were those we have related, and where appropriate and precise motions are addressed to the subject of admitting that testimony is error to permit the evidence to go to the jury, and the error is not cured or minimized by instructing the jury that they, having heard the evidence, are to pass upon the question of its admissibility. The seriousness of this error is demonstrated by the following facts. Bryant's testimony was the only testimony of an expert valuation witness, whose training specially fitted him to testify concerning market value and concerning particularly the effect upon market value of various detrimental effects flowing from the construction and maintenance of Pacific's lines. He was the only witness to give any detailed

reasons for his estimate of market value and for his estimate of severance damages.

[6, 7] Pacific contends that error was committed in admitting the testimony of Prawl, who testified on direct, as heretofore related, that the Humble Oil Company did some drilling on his property about a year and a half prior to the trial of this action. Upon preliminary objection being made, based upon incompetency, irrelevancy, immateriality and the want of foundation laid to relate the testimony to the issues in the case, Hufford's counsel made an offer of proof proposing to show by the witness that gas had been discovered on the witness' property, counsel contending that this evidence should be given to the valuation witnesses who were to follow Prawl as an element to be considered by them in arriving at their valuations. He stated that no attempt would be made to show that Prawl's property had a proven gas field on it or to qualify Prawl as an expert on such matters. Pacific's objections were overruled, and Prawl testified that a well was completed on his property, that gas came out at high pressure, and that the hole was cemented closed. There was no further testimony concerning the presence within the Hufford property of commercially valuable oil or gas, but every valuation witness presented by Hufford considered the matter of gas and oil being present in the Hufford property. The rule heretofore quoted from People v. Ocean Shore R., supra, exactly fits this situation, that is, that, "where it is not shown that a suggested use would be profitable, or where it appears that the operations cannot be carried on except at a loss, the prospect of use for such a purpose is not a proper element of value." From all that was shown here, there is no more reason to suppose gas and oil in paying quantities exist under the Hufford property than there is to suppose the same with regard to any and every acre of land in Northern California. Indeed, that such a supposition should be indulged in was the direct statement of Mr. Bryant. The court erred in permitting Prawl's testimony to be received and in permitting it later to be considered by the valuation witnesses. That it was deemed material by Hufford is apparent from the following excerpts from the argument of Hufford's counsel: "Here we have got a gas well just recently struck there, down just a little ways. They try to tell you that hasn't got any influence on the market value of that property at all. Now, if you folks can take that, I am sure you will have to put some grease on it before you swallow it because it is going to be hard on your tonsils as it goes down. It would be on anyone's. * * * Don't we all guess on the future and isn't it gambling on the future that makes our country the most prosperous and the most progressive people on earth. I am saying to you, members of the jury, that that situation is to a great degree going to be more than eighteen thousand dollars worth of detriment in the event that those fields, and when those fields are developed; and you know as a matter of common knowledge from the reading of your paper that the development of gas and oil is going forth. And we have here some very positive evidence that we have a potential possibility there that it is real in character."

[8] Pacific next contends that error was committed in admitting the valuation testimony of the witness Hunt, who, it asserts, based his valuations on speculative considerations, and who, it asserts, did not know the effect of transmission line easements on market value. Hunt was an expert valuation witness whose qualifications consisted in the fact that he was a farmer and stock raiser in the vicinity of the Hufford property, knew the best uses of the Hufford property which he said were stock raising and dry farming. But he also said the land was mineral land useful for the production of gas and oil. No attempt was made to show that he had the slightest knowledge of the effect upon market value of a possibility of oil or gas in the property, or that he had any way of knowing whether or not there were such minerals present in commercial quantities. And as we have seen, there was no competent proof the

land held oil or gas. His testimony as to the presence of gas and oil in the property was allowed to stand, and he testified, as heretofore related, as to the market value of the Hufford property having in mind all of the uses and purposes to which it is best adapted. His valuation, therefore, was based in part upon his testimony and the testimony of Prawl concerning the presence of gas or oil within the land and thus was based in part on elements of value which he was not entitled to consider. He also testified as to the market value of the property after being impressed with the easements, over the objection of Pacific that he was not qualified to express an opinion as to the effect upon that market value of the easement taking. In support of the objection, he was cross-examined and testified that he had never investigated the sale of other properties with power lines on them to determine what effect the presence of such lines had on sale prices; and when the court asked him if he had any way of evaluating the existence of a power line in the mind of either the buyer or the seller, he replied: "I don't know how I would have." Pacific's objections were overruled, and the witness was permitted to give his opinion both as to market value and severance damages. The following is stated in Reed v. Drais, 67 Cal. 491, 492, 8 P. 20, 21:

> "A witness called upon to give an opinion on the subject of value, whether offered as an expert or not, must lay a proper foundation for the introduction of his opinion, by showing he possesses the means to form an intelligent opinion, 'derived from an adequate knowledge of the nature and kind of property in controversy, and of its value.'
>
> "* * * [H]e must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit or branch of business, or department of science, he may yet be heard. Where, however, the knowledge is wanting the opinion should be rejected."

As said in Coast Counties Gas & Electric Co. v. Miller & Lux Inc., supra, 118 Cal. App. at page 143, 5 P.2d at page 35:

> "* * * Here again we find no abuse of the trial court's discretion in ruling against the opinions of these witnesses on the amount of the severance damage as the evidence failed to show that these witnesses had any sufficient experience based upon sales of land with similar easements to qualify them as experts on the amount of such damage, if any."

We think this assignment of error must be sustained.

[9, 10] Pacific next contends that error was committed in the court's instruction to the jury that it was not confined to a consideration of the real property in its condition on June 16, 1954, and that it might also consider "the reasonably substantial possibility" of its being put to a more profitable use. The instruction attacked reads as follows: "You are not confined to the value of the property in its condition on the 16th day of June, 1954, or to a consideration of its use only at the time of taking; but you may also consider the reasonably substantial possibility of its being capable of being put to a more profitable use had it not been taken, but in so doing, you are not to consider remote, speculative, imaginary, uncertain or conjectural possibilities." The right to compensation and damages in an eminent domain proceeding is deemed to have accrued "at the date of the issuance of summons" and "its actual value at that date" is the basis for measuring compensation and damages. C.C.P. sec. 1249. Here the indicated date was June 16, 1954, when summons was issued in this case. Although the jury could properly consider uses other than those to which the property was then being put where the evidence was found by them to have shown that there were such other uses, nevertheless, that does not mean that they were not confined in their considerations to the value of the property in its condition on the day summons was issued. They were so confined.

[11] Pacific next contends that the award of severance damages is based on inadmissible evidence and is, therefore, without support. As we have seen, the testimony of Bryant and Hunt, two of the three valuation witnesses for Hufford, both as to market value before impressment of the easements and as to severance damages afterward, was based in part on remote and speculative considerations that should not have been in the case and in part on improper elements of damages. In addition, Hunt, the remaining valuation witness, was shown to be unqualified to testify as to severance damages. We have not heretofore discussed the testimony of Blanche Abbott. Mrs. Abbott testified that she had a power line on her property and had had it there since 1926, and, as she put it, that she knew the effect of a high tension power line on property similar to Hufford's; that she believed she knew how such a power line affected market value, because a Mr. Hathaway had told her he would have given more for a ranch he bought if it had not had a power line on it. She had made no investigation of other sales to determine what, if any, effect the power line had upon the selling price of the property and admitted she was not familiar with the effect on sales of the presence of a power line. She said she had never found in her investigations that the presence of the lines had any effect on the sale price. While she may have been well qualified to testify as to the market value of the land within the rights of way, she was obviously not qualified to testify as to the severance damages arising from the depressing effect of the lines on market value.

[12] The situation we have here, taking the whole record into consideration, is one where the probable effect of the errors pointed was to greatly enhance the severance damages allowed, to cast doubt on the award for the easements taken, and to leave the record in a condition wherein we cannot say that grave injustice has not been done to the appellant. We think that where it is established that the opinion of a valuation witness as to the diminution in the value of property is based partly upon noncompensable items of damage and partly on sheer speculation which he is unable to segregate from lawful elements of damage, a motion to strike his testimony, accurately pointing out the defects, ought to be granted. If that had been done in this case, there would have been no proof for severance damages.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

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48 Cal.2d 649

In the Matter of the Estate of Edgar Laurence DOW, also known as E. L. Dow, Deceased.

Maxine Patricia HUTCHINSON, Appellant,
v.
Maxine B. DOW, Respondent.
S. F. 19406.

Supreme Court of California,
In Bank.
June 17, 1957.

Rehearing Denied July 16, 1957.

Estate proceeding wherein widow sought allowance during daughter's appeal from decree of final distribution. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., granted the allowance, and daughter appealed. The Supreme Court, Spence, J., held that where daughter had taken appeal from decree which, while denominated decree of final distribution, specifically provided for further proceedings, including payment of all obligations of estate, sale of certain property, if necessary, to satisfy such obligations, and expressly ordered a supplemental account, it was not inconsistent for court to grant allowance to widow during period she was deprived of her distributive share of estate by reason of daughter's pending appeal.

Affirmed.

Gibson, C. J., and Schauer and McComb, JJ., dissented.

Opinion, 305 P.2d 205, vacated.

See also 308 P.2d 475.

1. Executors and Administrators 🔑194(6)

Where court directed termination of widow's prior monthly allowance from estate, on basis that there were no matters pending which called for further administration, and three months thereafter, when widow filed final account and petition for distribution, daughter objected that mother was entitled to no share of estate and appealed from final decree of distribution, estate was no longer in condition to be closed because of pending appeal, and, prior order terminating allowance did not preclude renewed consideration of propriety of granting allowance to widow. West's Ann.Prob.Code, §§ 300, 680, 750.

2. Executors and Administrators 🔑194(2)

The mere entry of final decree of distribution did not deprive court of power to make reasonable allowances from estate for living expenses for widow during period while daughter's appeal was pending. West's Ann.Prob.Code, §§ 300, 680, 750.

3. Executors and Administrators 🔑315(6)

Where daughter of decedent took appeal from decree which, although denominated decree of final distribution, specifically provide for further proceedings, including payment of all obligations of estate, sale of certain property, if necessary, to satisfy such obligations, and expressly ordered supplemental account, the final decree did not make such a disposition of all property in estate as to make it inconsistent for court to grant allowance to widow during period she was deprived of her distributive share of estate by reason of daughter's pending appeal. West's Ann.Prob.Code, §§ 300, 680, 750.

◆

William A. White, Hutchinson & Quattrin and J. Albert Hutchinson, San Francisco, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Joseph L. Alioto, Erskine, Erskine & Tulley and Morse Erskine II, San Francisco, for respondent.

SPENCE, Justice.

Appellant, who is decedent's daughter and a beneficiary under his will, appeals from an order granting a family allowance to her mother, who is decedent's widow and also a beneficiary under his will. The daughter contends that the probate court, having entered a final decree of distribution in the estate, thereupon lost jurisdiction to enter the challenged order. However, the daughter had appealed from certain portions of that decree, and the widow contends that pending determination of that appeal, the court had power to make the order granting the family allowance. The particular circumstances presented by the record here clearly sustain the widow's position.

Disputes concerning various proceedings in this estate have been the subject of prior decisions (In re Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698; In re Estate of Dow, 120 Cal.App.2d 296, 260 P.2d 970; Dow v. Superior Court, 140 Cal. App.2d 399, 297 P.2d 30), and the history of this prolonged litigation is set forth in the cited opinions. For the purposes of the present problem, the initial fact to be noted is the entry of a final decree of distribution on February 2, 1955. That decree settled the final account of the widow as administratrix of the estate, directed payment of the debts, expenses of administration and a legacy, ordered the filing of a supplemental account, and awarded the residue in equal shares to the widow and the daughter. It specifically decreed that "all of the balance of the real and personal property of said estate, *after payment of all obligations, costs, and attorneys' fees,* as herein provided, be, and the same is hereby divided and distributed equally between" the widow and the daughter; that the widow, the administratrix, file *"a supplemental account showing all receipts and disbursements of said estate since the date of the filing of the fourth and final account and petition for distribution* * * *"; and that the administratrix, in order *"to fully and finally discharge all of the debts and obligations and outstanding claims against said estate,* be "authorized to sell" sufficient shares of certain stock as might be required therefor. (Emphasis added.)

On the same day, February 2, 1955, the daughter appealed from the whole of the decree. Then on March 8, 1955, she modified the scope of her appeal by limiting it to the awards to the widow (the legacy, a debt, reimbursement for certain expenses and compensation as administratrix) and to awards to certain attorneys for services rendered the estate. Dow v. Superior Court, supra, 140 Cal.App.2d 399, 404, 297 P.2d 30.

On February 18, 1955, the widow filed a petition for an allowance from the estate. After a hearing the challenged order was made on April 13, 1955. It directs that $500 a month "be appropriated from said Estate" for the maintenance of the widow, commencing as of February 2, 1955, and continuing "during the progress of the settlement of the Estate, and the Appeal now pending from the Judgment and Decree of Final Distribution, or until the further Order of this Court." It is apparently conceded that there was ample evidence to sustain the findings of fact embraced within the following findings and conclusions upon which the order was based: the total assets of the estate are approximately $391,937; the widow has no assets of her own with which to support and maintain herself pending the hearing of the daughter's appeal from the decree of distribution and is completely without funds for necessary medical care and hospitalization; the widow is entitled to a reasonable allowance out of the property of the estate for her maintenance and support according to her circumstances; and $500 per month is a reasonable amount to be paid therefrom for that purpose.

[1] In view of the foregoing findings, the decision of September, 1953, in this estate which had directed the termination of the widow's prior monthly allowance (In re Estate of Dow, supra, 120 Cal.App.2d 296, 298, 260 P.2d 970) did not preclude the court from granting her the present allowance. As the basis for that termination, there were findings that at that time there were no matters pending which called for further administration other than payment of an asserted claim of the administratrix in her individual capacity and certain expenses of administration, and that it was to the best interests of all parties concerned to close the estate immediately. Some three months thereafter the mother filed her final account and petition for distribution; the daughter filed objections to that account and alleged that her mother was entitled to no share in the estate; the final decree of distribution was ultimately filed on February 2, 1955, and the daughter at once appealed therefrom. See Dow v. Superior Court, supra, 140 Cal.App.2d 399, 297 P.2d 30. The estate was therefore no longer in a condition to be "immediately" closed because of the pending appeal. Upon such change in conditions, the prior order terminating the widow's allowance, which was made upon the theory that the estate then appeared to be in a condition to be "immediately" closed, would not prevent the court's renewed consideration of the propriety of granting another allowance under the circumstances. In re Estate of Dow, supra, 91 Cal.App.2d 420, 427–429, 205 P.2d 698.

[2] Nor did the mere entry of the above-mentioned final decree of distribution deprive the court of power to make the widow an appropriate allowance. As above stated, that decree had not become final but was subject to the daughter's pending appeal when the presently challenged allowance was made. The property of a decedent is "chargeable with the * * * payment of * * * the allowance to the family" (Probate Code, § 300) and such allowance is payable "during the progress of the settlement of the estate." Prob. Code, § 680. The allowance is wholly statutory (In re Estate of King, 19 Cal.2d 354, 362, 121 P.2d 716) and is preferred to most other claims against the estate. Prob.Code, § 750. Its continuance during "the progress of the settlement of the estate" would indicate the Legislature's intent "to make a provision for the family of the deceased prior to the time when the estate could be finally distributed to them." In re Estate of McSwain, 176 Cal. 280, 284, 168 P. 117, 119; see, also, In re Walkerly's Estate, 77 Cal. 642, 644–645, 20 P. 150; In re Estate of Blair, 42 Cal.2d 728, 730–731, 269 P.2d 612; In re Estate of Jacobs, 61 Cal.App.2d 152, 155–156, 142 P.2d 454. Manifestly, this eventuality cannot occur while the daughter's appeal from the final decree of distribution is pending, and accordingly, the court had the power to make a reasonable allowance for living expenses during such period.

[3] The daughter argues that the final decree of distribution disposed of all property in the estate and there was nothing left for the probate court to "appropriate" for the payment of the widow's allowance as thereafter ordered. In support of her position, the daughter relies on the early case of In re Estate of Garraud, 1868, 36 Cal. 277, 279–280, declaring that an order distributing the entire estate was a "final order * * * and its effect, unless subsequently modified or reversed on appeal, was a final disposition of all the funds of the estate * * *; nothing of the estate remained for the Court to act upon * * * and, pending [an] appeal, no action could be taken by the Court below for the enforcement of the order, or upon any subject matter embraced therein."

Accordingly, it was held that the court thereafter had no power to direct payment of certain attorney fees and expenses from the estate funds, for the "subsequent order" operated "upon the same subject matter as the former order," disposed "of a portion thereof in direct conflict with the former order," and was "therefore, null and void for want of jurisdiction of the Court at the time it was made." The same principle was followed in Re Estate of Freud, 1901, 134 Cal. 333, 337, 66 P. 476, and In re Estate of Baird, 1919, 181 Cal. 742, 744, 186 P. 351. But these cases all concerned the propriety of orders purporting to make subsequent inconsistent awards of specific funds or property which had been the subject of disposition in prior orders or decrees from which an appeal was pending. None of these cases involved a decree of distribution similar to that in the present case, and none involved the propriety of an order granting a family allowance pending the determination of an appeal from a decree of distribution.

The particular circumstances of this case must be kept in mind. There may be cases in which the final decree of distribution disposes of the property of the estate in such manner that any order for a family allowance thereafter might be wholly inconsistent with the terms of the prior decree; and there may be cases in which an appeal from the decree is taken by the widow herself in bad faith, simply for the purpose of prolonging the administration and of obtaining a further family allowance pending final settlement. But here the daughter, not the widow, has taken the appeal from the decree; and the decree, while denominated a decree of final distribution, specifically provides, as above indicated, for further proceedings, including the payment of all obligations of the estate and the sale of certain property, if necessary, to satisfy such obligations; and it expressly orders a supplemental account. Consequently, there is nothing inconsistent in the further order of the court granting a family allowance, a statutory obligation of the estate under sections 300 and 680 of the Probate Code, for the purpose of providing "for the needs of the surviving family during the period of readjustment following the death of a spouse" (In re Estate of Blair, supra, 42 Cal.2d 728, 730, 269 P.2d 612, 613) and until the approximate time when the widow might come into possession of her distributive share in the estate. There is therefore no question of conflicting decrees and orders such as were involved in the above-cited cases on which the daughter relies. We conclude that under the circumstances presented here, the trial court properly granted to the widow a reasonable allowance for her maintenance during the time that she is deprived of her distributive share by reason of the daughter's pending appeal.

Since the oral argument in this case, the decision upon the appeal from portions of the final decree of distribution has become final. In re Estate of Dow, 149 Cal.App.2d 47, 308 P.2d 475. The determination of that appeal, however, can have no effect upon the questions presented herein.

The order is affirmed.

SHENK, CARTER and TRAYNOR, JJ., concur.

GIBSON, Chief Justice, and SCHAUER and McCOMB, Justices.

We dissent for the reasons expressed by Mr. Justice WOOD in the opinion which he prepared for the First District, Division I, of the District Court of Appeal. See In re Estate of Dow, Cal.App., 305 P.2d 205.

Rehearing denied; GIBSON, C. J., and SCHAUER and McCOMB, JJ., dissenting.

48 Cal.2d 647

William Francis RUPP, Appellant,
v.
Harley O. TEETS, as Warden of the California State Prison at San Quentin, California, Respondent.
S. F. 19692.

Supreme Court of California,
In Bank.
June 14, 1957.

One who had been sentenced to death after conviction of first degree murder brought mandamus to compel warden to institute proceedings for purpose of determining his present sanity. The Superior Court of Marin County, N. Charles Brusatori, J., denied the petition and petitioner appealed. The Supreme Court held that mandamus would not lie to compel warden to institute such proceedings.

Appeal dismissed and stay of execution terminated.

1. Mandamus ⚷61

Mandamus does not lie to compel a warden to institute proceedings to determine present sanity of a prisoner awaiting execution.

2. Mandamus ⚷187(9)

On appeal from denial of mandamus to compel warden to institute proceedings to determine sanity of prisoner awaiting execution, reviewing court would not disregard form of petition filed in Superior Court and treat it as one for some other type of relief which might be available.

3. Mandamus ⚷187(8)

Appeal from denial of mandamus to compel warden to institute proceedings to determine sanity of prisoner awaiting execution of death sentence, would be dismissed and stay of execution theretofore granted would be terminated.

◆

A. J. Zirpoli, San Francisco, and P. Basil Lambros, Los Angeles, for appellant.

Edmond G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a motion to dismiss an appeal from an order and judgment denying a petition for a writ of mandate.

Appellant was sentenced to death following his conviction of first degree murder, and, on August 14, 1953, this court affirmed the judgment and the order denying a new trial. People v. Rupp, 41 Cal.2d 371, 260 P.2d 1. On November 17, 1954, and February 1, 1955, respectively, we denied his petitions for a writ of habeas corpus and for a stay of execution pending an appeal in that proceeding to the United States Supreme Court. That court denied certiorari on March 28, 1955. Rupp v Teets, 348 U.S. 977, 75 S.Ct. 540, 99 L.Ed. 761. Thereafter, appellant sought unsuccessfully to obtain habeas corpus in the federal courts. In re Rupp's Petition, D.C., 142 F.Supp. 821, affirmed Rupp v. Teets, 9 Cir., 235 F.2d 674, certiorari denied 352 U.S. 900, 77 S.Ct. 139, 1 L.Ed.2d 92.

The date set for appellant's execution was February 1, 1957. On the morning of that day, the mandamus petition involved here was filed in the Superior Court of Marin County on appellant's behalf by his sister to compel the warden of San Quentin prison to institute proceedings for the purpose of determining the present sanity of appellant. Immediately following the superior court's denial of the petition, an appeal was noticed to this court, and we stayed the judgment of death, pending final determination of the appeal.

[1, 2] It is settled that mandamus does not lie to compel a warden to institute proceedings for the purpose of determining the present sanity of a prisoner awaiting execution. Caritativo v. Teets, 47 Cal.2d 304, 303 P.2d 339. In view of the record before us and the fact that the case is here on appeal, we cannot accept appellant's argument that we should disregard

the form of the petition filed in the superior court and treat it as one for some other type of relief which might be available.

[3] The motion to dismiss the appeal is granted, and the stay of execution heretofore granted is terminated. Let the remittitur issue forthwith.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion on the same ground and for the same reasons expressed in my concurring and dissenting opinion in Caritativo v. Teets, 47 Cal.2d 304, 303 P.2d 339.

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151 Cal.App.2d 589

Jack ALTMAN and Betty Altman, husband and wife, Plaintiffs and Respondents,

v.

Lessie E. POOLE, Defendant and Appellant.

Civ. 22097.

District Court of Appeal, Second District, Division 1, California.

June 10, 1957.

Rehearing Denied July 8, 1957.

Hearing Denied Aug. 6, 1957.

Action for declaratory relief and to quiet title to realty, wherein defendant filed cross-complaint. From interlocutory and final judgments and from order denying motion to vacate interlocutory judgment and enter a new judgment and order granting motion for final judgment, defendant appealed and plaintiffs made motion to dismiss appeals. The District Court of Appeal, Fourt, J., held that since no record on appeal from final judgment had been requested or filed and no record on appeal from interlocutory judgment had been filed because appellant refused to pay for preparation of supplemental clerk's transcript, ordered at respondents' request in order to make record sufficient for review, appeals were dismissible for failure to comply with West's Ann.Rules on Appeal, rule 5(a–d).

Appeals dismissed.

1. Appeal and Error 🔑597(1)

Where appellant did not designate any part of judgment roll to be incorporated in clerk's transcript on appeal, transcript as requested would not contain the judgment or any pleadings but would contain only notice of appeal, notice to prepare clerk's and reporter's transcripts, notice or stipulation for preparation of settled or agreed statement, any notice of intention to move for new trial or motion to vacate judgment and any ruling thereon. West's Ann.Rules on Appeal, rules 4(a), 5(a, d).

2. Appeal and Error 🔑671(1)

Reviewing court is not required to pass on any question not presented by the record on appeal.

3. Appeal and Error 🔑596, 640

Appellant has the burden of presenting a record which will enable reviewing court to review and correct alleged errors, and in absence of a proper record, appeal will be dismissed.

4. Appeal and Error 🔑671(1)

Where clerk's transcript, as requested by appellant, did not contain any pleadings or the judgment appealed from, record on appeal would be insufficient for any review. West's Ann.Rules on Appeal, rule 5(a, d).

5. Appeal and Error 🔑640

Where no record on appeal from final judgment had been requested or filed almost eight months after appeal was taken, record on appeal from interlocutory judgment, as requested by appellant, was insufficient for any review and no record on appeal from interlocutory judgment had been filed more than one year after appeal was taken because appellant refused to pay for supplemental clerk's transcript ordered at respondents' request to make record sufficient for review, appeals were dismissible for failure to comply with rules. West's Ann.Rules on Appeal, rule 5(a–d).

◆

Roscoe C. Carroll, Los Angeles, for appellant.

Robert L. Kronick and L. Lee Bernstein, Los Angeles, for respondents.

FOURT, Justice.

This is a motion to dismiss appeals from (1) the interlocutory judgment and the order denying motion to vacate said judgment and (2) the final judgment and the order granting the motion for final judgment.

The plaintiffs herein filed a complaint on May 2, 1955, for declaratory relief and to quiet title to certain real property and for the appointment of a receiver. The relief prayed for, in essence, was that the defendants be required to set forth the nature of their claim and that all of the adverse claims to the real property be determined by a decree of the court; that it be adjudged that the defendants have no title or interest in the property; that the plaintiffs have title thereto and that a writ of possession issue to oust the defendants from the possession of the property, and to deliver the same to the plaintiffs. Further, that the defendants account for rents and income since March 25, 1955, and that it be decreed that the defendants forfeited all rights in the premises and to the money paid the plaintiffs by the defendants under the agreement and for such other relief as might be proper. There was a cross-complaint for declaratory relief, fraud and deceit in the inducement to contract, and breach of agreement to sell real estate. The prayer of the cross-complaint was in the usual form for such an action.

The cause was tried and an interlocutory judgment entered March 29, 1956, wherein the defendant was to have 120 days from the date of entry of said judgment within which time to cure all of the defaults under the agreement dated June 28, 1954, between the plaintiffs and defendant, by paying to the plaintiffs all delinquent installments due thereunder, and all taxes paid by the plaintiffs on the real property and improvements covered by the agreement, and further, to be entitled to said 120 days to cure the defaults, the defendant was to pay the current installments which fell due under the contract, namely $160 per month during the 120-day period, and to pay the March 1956 installment within five days after service of notice of the entry of the judgment. If the defendant made the payments ordered, the defaults were to be cured and all of her rights under the agreement were to be restored. It was also ordered that upon the failure of the defendant to cure such defaults, that the plaintiffs should make a motion for the entry of a final judgment. The defendant took nothing by the cross-complaint.

The notice of entry of judgment was filed April 2, 1956, and was served by mail April 2, 1956, on the defendant and cross-complainant and her attorney of record. A notice of intention to move to vacate the judgment and for the entry of a new judgment was filed April 6, 1956, and such motion was denied April 16, 1956.

No notice of intention to move for a new trial was filed.

Notice of appeal to this court from the judgment entered March 29, 1956, and from the order denying the motion to vacate judgment was filed April 27, 1956. Notice to the clerk to prepare clerk's and reporter's transcripts was filed April 30, 1956, and pursuant to Rule 4(a) of Rules on Appeal, a copy of such notice was mailed June 6, 1956, to the court reporter.

The clerk's transcript was filed July 25, 1956. The reporter's transcript was filed August 22, 1956. Notice of the completion of the clerk's and reporter's transcripts on appeal was filed August 22, 1956.

The plaintiffs made a request for a correction of the clerk's transcript on appeal, which was filed August 27, 1956, and a minute order of September 25, 1956, entered September 27, 1956, orders the clerk's transcript corrected to include the pleadings, findings of fact and the conclusions of law and the interlocutory judgment. The Civil Transcript Section contacted the office of the attorney for the appellant on October 10, 1956, regarding the cost ($55.95), for the preparation of the supplemental clerk's transcript. On October 19, 1956, the attorney was again contacted in reference to the cost of the supplemental transcript. As of April, 11, 1957, no arrangement had been made with the clerk for the payment of the money to prepare the supplemental transcript, and accordingly, no such supplemental clerk's transcript has been certified or filed.

A notice of motion by the defendant to vacate the order for additional matters in the clerk's transcript on appeal was filed November 28, 1956, and such motion was denied November 29, 1956.

Notice of motion for entry of the final judgment was filed June 12, 1956, and by minute order of August 17, 1956, entered August 21, 1956, the motion was granted. The final judgment, entered August 27, 1956, orders that the plaintiffs are the owners of the property and improvements described, and that a writ of possession issue and that the defendant's rights in the property are terminated.

A notice of appeal to this court from the judgment entered August 27, 1956, and from the order granting the motion for final judgment, was filed August 28, 1956. No notice to the clerk requesting a record on appeal has been filed, and accordingly, no transcript has been certified or filed pertaining to the appeal filed August 27, 1956.

Respondents' motion to dismiss the appeals is upon the grounds that (1) the judgment entered on March 29, 1956, was only an interlocutory judgment, not final and not being within the statutory classes of appealable interlocutory judgments, is non-appealable; (2) appellant has failed to comply with the requirements of Rules 5(a) and 5(c) of Rules on Appeal, in that she has not paid the costs of preparing a clerk's transcript on the appeal from the interlocutory judgment, and she has failed to request or pay for a clerk's transcript on the appeal from the final judgment, within the time provided by law, and (3) appellant has failed to use reasonable diligence to effect and prosecute her appeal.

In his counter affidavit to the motion to dismiss, appellant's counsel states that he "ordered and paid for the matters desired on appeal and accordingly, they were completed." Counsel further states in his affidavit that he informed the clerk that respondents should pay for any matters ordered by them by reason of Rule 5(b) on appeal and that he made repeated requests to the clerk to transmit to the reviewing court the matters ordered and paid for by affiant; that "there is no reason why the matters prepared for appellant should not be sent to the reviewing Court. Accordingly, affiant is now seeking a Writ of Mandate to compel the transfer of appellant's records to the reviewing Court."

With respect to the appeal from the final judgment, appellant's counsel states in his affidavit that, "[t]he second notice of appeal was filed for the sole purpose of bringing under the authority of the reviewing Court, the administrative act of entering a final judgment. Since there is nothing more to be ordered, affiant did not think it necessary to ask the Clerk and Reporter to duplicate their work for another $258.95."

[1] Rule 5(a), Rules on Appeal, provides that within the prescribed time appellant "shall serve on the respondent and file with the clerk of the superior court a notice designating the papers or records on file or lodged with the clerk, * * * which he desires incorporated in the record on appeal." Appellant's notice to the clerk to prepare the transcript requested only "a clerk's transcript and a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and

all matters to which the same relate, and also all proceedings taken on motion to vacate judgment and for entry of new and different judgment and all matters to which the same relate, to be made up and prepared." Appellant did not designate any part of the judgment roll to be incorporated in the clerk's transcript. Therefore, the transcript as requested would not contain the judgment or any of the pleadings but would contain only (1) the notice of appeal; (2) the notice to prepare the clerk's transcript and the reporter's transcript, and the notices or stipulations for the preparation of a settled statement or agreed statement, if any; (3) any notice of intention to move for a new trial or motion to vacate the judgment, and the ruling thereon, if any. Rule 5(d), Rules on Appeal. The certificate of the clerk of the superior court, attached to respondents' motion to dismiss, indicates that no notice or stipulation for the preparation of a settled statement or agreed statement and no notice of intention to move for a new trial were filed.

[2–4] An appellate court is not required to pass on any question not presented by the record on appeal. The burden is upon the appellant to present a record which will enable the appellate court to review and correct alleged errors and in the absence of a proper record, the appeal will be dismissed. The appeal from the interlocutory judgment was taken more than a year ago and the appeal from the final judgment was taken about eight months ago and no record has reached this court as yet. Appellant asserts that the fault is not hers but respondents' that the record is not before this court, since she wants included therein only that part of the record which she ordered and paid for. She has declined to pay for the addition thereto of any of the pleadings, the findings of fact and conclusions of law and the interlocutory judgment. At the present time there is no record before this court and the record which appellant insists is all she wants reviewed is clearly insufficient for any review since it lacks not only all of the pleadings but the judgment appealed from.

[5] Appellant not having complied with the rules on appeal, the motion is granted and the appeals are dismissed.

WHITE, P. J., and DORAN, J., concur.

151 Cal.App.2d 542

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Santiago TORRES, Defendant and Appellant.
Cr. 2747.

District Court of Appeal, Third District, California.
June 6, 1957.

Defendant was convicted of assault with a deadly weapon. The Superior Court, Merced County, R. R. Sischo, J., entered order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained conviction.

Order affirmed.

1. Criminal Law 🔑829(3)

Where, in prosecution for assault with a deadly weapon, court correctly defined to jury elements of such crime, refusal to give requested instructions that, if defendant fired revolver with intent only to frighten, act would not constitute crime charged nor crime of simple assault but would be only a violation of statute prohibiting the drawing, exhibiting, or using of a firearm or deadly weapon except in self-defense and that the offense charged necessarily included the offense of drawing, exhibiting, or using a firearm or deadly weapon, was not error. West's Ann.Pen.Code, § 417.

2. Assault and Battery ⚷92

Evidence sustained conviction for assault with a deadly weapon.

3. Indictment and Information ⚷191(6)

Misdemeanor defined by Penal Code provision prohibiting the drawing, exhibiting, or using of a firearm or deadly weapon except in self-defense is not an offense necessarily included within crime of assault with a deadly weapon. West's Ann.Pen. Code, § 417.

4. Weapons ⚷14

Penal code provision, which forbids the drawing, exhibiting, or using of firearms or deadly weapon except in self-defense, prohibits the unlawful use in a fight or quarrel of a deadly weapon and the exhibition of such weapon in presence of another in a rude, angry, or threatening manner. West's Ann.Pen.Code, § 417.

5. Indictment and Information ⚷191(6)

An assault with a deadly weapon can be committed without violating Penal Code provision prohibiting the drawing, exhibiting, or using of a firearm or deadly weapon except in self-defense, such as by firing a gun through a coat pocket without either drawing or exhibiting the weapon and without then being engaged in a fight or quarrel. West's Ann.Pen.Code, § 417.

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Don A. Welsch, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged with the crime of assault with a deadly weapon. He was convicted as charged and now appeals from the order denying his motion for a new trial.

Appellant owns and operates the El Charrito Cafe in the City of Los Banos. On September 30, 1956, appellant entered his cafe about 9 o'clock in the evening. There, he found his waitress and four Mexican Nationals, including Pedro Fuentes, the victim of the assault. After some time, these men requested appellant to drive them back to their labor camp, and upon his refusal, an argument developed, during which appellant swore at two of the Nationals. Fuentes remonstrated with him, and the two men went outside the cafe. They reentered, apparently on amicable terms with one another, but appellant then requested the men to leave the cafe. One of the men attempted to strike appellant. After a time appellant went into his kitchen and reappeared with a revolver. Fuentes and the waitress were dancing near a juke box. Without warning, appellant fired a shot, the bullet striking Fuentes, who was about ten feet away. Thereafter, appellant fired two other shots that struck a refrigerator on the opposite side of the room. One of the men was requested to call the police. Appellant was standing near the telephone with the revolver in his hand. He pointed it and said, "Whoever gets close gets shot." He refused to let the telephone be used. He appeared angry but not drunk. When asked why he fired the shots, he said, "So they would leave", "I shot because I didn't have no head on that night", "So they would leave because the others wanted to beat him up", "I didn't have no head". Appellant testified he did not intend to hit anyone with the shots he fired.

Appellant contends the trial court erred in refusing to give a requested instruction, the burden of which was to inform the jury that if defendant fired the revolver with intent only to frighten, the act would not amount to a felony; that the act would fall short of the charged crime of assault with a deadly weapon or the crime of simple assault, and would constitute no more than a misdemeanor, that is, a violation of Penal Code Section 417, which reads:

> "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, or any

> other deadly weapon whatsoever, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor."

Appellant also requested, and the court refused to give, an instruction that the jury might find the defendant guilty of any offense, the commission of which was necessarily included in that with which he was charged, if, in the judgment of the jury, the evidence would support such a verdict. The requested instruction then continued:

> "To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of assault with a deadly weapon of which the defendant is charged necessarily includes the crime of drawing, exhibiting or using a firearm or deadly weapon in a rude, angry or threatening manner."

[1–3] We find no error in the refusal to give the requested instructions. The court correctly defined to the jury the elements of the crime of assault with a deadly weapon. The evidence was ample to sustain the charge. The crime defined by Penal Code Section 417 is not an offense necessarily included within the crime of assault with a deadly weapon. In People v. Greer, 30 Cal. 2d 589, 596, 184 P.2d 512, 516, it is said:

> "* * * The test in this state of the necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense."

[4, 5] Section 417 of the Penal Code forbids the unlawful use in a fight or quarrel of a deadly weapon and the exhibition of such a weapon in the presence of another person in a rude, angry, or threatening manner. An assault with a deadly weapon can be committed without violating any provision of Penal Code Section 417, as by firing a gun through a coat pocket without either drawing or exhibiting the weapon and without then being engaged in a fight or quarrel.

The order appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

Augustine AMBRIZ and Titotea Vargas Ambriz, Plaintiffs and Respondents,

v.

PETROLANE, Ltd., a corporation, Dyer Trucking Co., a corporation, and Jack Junior Hanley, Defendants and Appellants.*

Civ. 5389.

District Court of Appeal, Fourth District, California.

June 17, 1957.

Rehearing Denied July 15, 1957.

Hearing Granted Aug. 13, 1957.

Action by parents against supplier and deliverers of butane for wrongful death of their three children as result of butane explosion in cabin, which had been used several days after tank had been filled with butane by defendants, one of whom had inspected central distributing system a year or two before. From adverse judgment of the Superior Court, Kings County, Gregory P. Maushart, J., the defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence was insufficient to support finding that there was a leak at time butane was delivered or that defendants were required to make a reasonable inspection to ascertain and discover any dangerous condition.

Judgment reversed.

1. Gas 🔑16

Supplying of butane is not an ultrahazardous activity, and supplier could not be held absolutely liable for injuries sustained by tenants of customer as result of explosion in cabin occupied by tenants.

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* Opinion vacated 319 P.2d 1.

2. Torts ⚷28

Question of whether a case is a proper one for imposing rule of absolute or strict liablity for tort without fault is one of law for the court.

3. Master and Servant ⚷315

Subject to certain exceptions, when property is turned over by owner to an independent contractor, owner is not liable to third persons for negligence of independent contractor.

4. Gas ⚷20(2)

In action against supplier and deliverers of butane for wrongful death of plaintiffs' three children as result of butane explosion in cabin which had been used several days after tank had been filled with butane by defendants, one of whom had inspected central distributing system a year or two before, evidence was insufficient to support finding that there was a leak at time butane was delivered, or that defendants were required to make a reasonable inspection to discover any dangerous condition.

5. Gas ⚷16

A supplier of gas, which does not install gas pipes or appliance on another's premises, does not own or control them, has no duty to inspect them, and has no actual knowledge of leaks or defects, is not liable for damages resulting from gas explosion on said premises.

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Spray, Gould & Bowers, Los Angeles, for appellant Petrolane Ltd.

Walch & Griswold, Roger R. Walch, Hanford, for appellants Dyer Trucking Co. and Jack Junior Hanley.

Bruce Walkup, San Francisco, Edmond A. Chevalier, and Eugene L. Adams, Fresno, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents, husband and wife, brought this action against defendants and appellants for damages for their own personal injuries and for the wrongful deaths of their three children as a result of a butane explosion and fire on October 8, 1953, in one of the cabins of a farm labor camp in Corcoran, on the ranch of Philip Hansen, their employer.

Defendant and appellant Petrolane Ltd. (hereinafter refered to as Petrolane) was the supplier or distributor of the butane. Defendant and appellant Dyer Trucking Co. (hereinafter referred to as Dyer) and its driver employee, Jack Junior Hanley, were the deliverers of it. A trial without a jury resulted in a judgment for plaintiffs against all defendants, totaling $138,727.46. Defendants appealed.

A separate action was brought by these plaintiffs against Philip Hansen, owner of the premises, for the same claimed injuries and deaths, resulting in the payment by Hansen to plaintiffs of $15,000, and a dismissal of that action under a covenant not to sue.

Plaintiffs' complaint alleged generally that defendants Petrolane and Dyer were doing business in Kings County; that Hansen owned certain cabins and maintained them for his workers; that on the premises was located a butane gas tank erected by Hansen which was connected to a distributing system by gas pipe lines with outlets extending into the cabins; that on October 4, 1953, plaintiffs and their three children moved into one of these cabins; that defendant Jack Hanley, as agent of Dyer and Petrolane, on September 26, 1953, filled the tank with butane gas; that the pipe ending in plaintiffs' cabin was not capped or otherwise properly closed, permitting the escape of gas into the cabin; that Hanley and the other defendants did not make a proper inspection to see that no gas outlets were leaking; that their said carelessness in filling the gas tank, with pipes leading to an uncapped or improperly closed gas outlet in plaintiffs' cabin, proximately caused the explosion and fire therein on October 8th, resulting in the damage indicated. The answers put in issue the question of defendants' negligence. They also alleged an unavoidable accident and contributory negligence. The court found generally in accord with the allegations of plaintiffs' complaint.

According to the evidence, plaintiffs, a Mexican couple speaking little, if any, English, with their three children, aged 2, 5 and 7, (boy 7 years old) respectively, came to the Hansen ranch and applied for work picking cotton. They were given a job and assigned to one of the 30 rather crude unfurnished one-room wooden cabins about 12 ft. by 14 ft. in width and length, with one door and two windows. It was wired for an electric light fixture. Plaintiffs brought with them a coal-oil burner stove, one large mattress and a few other furnishings. All five slept on the mattress laid on the floor. About 12 to 18 inches above the floor and near their heads was a one-half inch galvanized gas pipe leading into the room from the main 600 gallon butane tank located a considerable distance from the cabin. Plaintiffs informed the keeper they did not intend to use the gas but only the oil stove. Near the outlet end of the gas pipe extending into the room was affixed a petcock or valve that could be turned on or off by means of a wrench. The end of the pipe was threaded to permit it to be connected with a stove or other such utility. Apparently there was no screw cap over the end of the pipe. There was a master shut-off valve near the tank which, when closed, precluded gas from traveling to the cabins. All of this equipment was on the Hansen property and was installed by him several years before. These cabins and the butane tank were only used during the picking season and remained empty and unoccupied during the rest of the year. On October 8th a few of the cabins were occupied by other workmen. Some were using gas from the main tank which had been delivered to it on *September 26, 1953*, which was about eight days before plaintiffs moved in and about twelve days before the explosion.

There is testimony by the caretaker of this camp and the foreman that these cabins were piped for butane about five years previously; that before and after the tank was filled this particular season they checked the outlets in this and the other cabins, both by smell and by lighting matches, and that they had no complaints from tenants about gas leakage. The caretaker said that he checked the cut-off switch in this particular cabin and that it was in a closed position and there were no leaks; that he checked it again the day after plaintiffs moved in; that he saw they were not going to use it but would use a coal oil stove; that he asked, in English, in the presence of the children and the wife, if Mr. Ambriz was going to use the butane and he said "no"; and that he warned him not to bother the gas valve because it "will blow you up, put you to sleep, kill you".

The district manager for Petrolane testified he inspected the facilities at the Hansen ranch in 1951 or 1952, at the request of one of Hansen's employees; that he checked with soap suds the lines and valves for leaks in each cabin and at the tank; that he furnished a new regulator and did find about three slightly leaking valves or connections and they were repaired; that he then recommended to Hansen that the type of valves used in the cabins be replaced; that this was the only time he inspected them or was requested to do so; that the September 26, 1953 delivery of butane that was ordered by Hansen's foreman through co-defendant Dyer was the first delivery of that season and he knew this fact; that there was no agreement with Hansen to have any further or later inspections made and that the custom of the trade was that butane deliveries on a route basis such as Hansen's are made without checking the tanks or lines. He then produced a written agreement (Defendants' Exhibit B) with Dyer for delivery of butane for his company. It provided that Dyer was an "independent contractor" and was not the agent or employee of Petrolane; that both parties agreed that Petrolane was interested only in having butane delivered to its customers and Petrolane "shall have no control over" the butane trucks, the drivers thereof, or the manner and method of operation. He testified that no information or instructions were given by Petrolane to Dyer or his drivers about finding certain leaks in Hansen's lines in 1951 or 1952, or that the drivers should check for future leaks. It appears that Petrolane billed Hansen directly for the butane sold.

The driver for Dyer testified he delivered 600 gallons of butane to the tank on September 26th and had no instructions from anyone to inspect the cabins or gas lines on the Hansen property; that he had been delivering gas there for several years and never was requested to make such examination; that when the gas was ordered by the owner he filled the tank and checked everything around it, including the soap test for leaks, and he never noticed any signs or odor of escaping butane. Apparently the main valve, at the tank, had been closed by a Hansen employee and was opened the next morning by him, thus allowing the butane to be distributed to the various cabins.

Plaintiffs testified generally that there was no furniture or water in the cabin when it was assigned to them; that they did notice the gas pipe protruding into the room but never touched it; that a few days after they moved in, on October 3rd, they did notice a few flies in the cabin and a disagreeable odor, but assumed it was from the filth in the cabin; that they were not familiar with the odor of butane; that they left the doors and windows open for ventilation; and that on the afternoon of October 8th the father and the oldest child closed the doors and windows on account of the excess number of flies in the cabin, lay down on the mattress, and later arose with headaches; that in the evening plaintiff wife prepared tortillas on the oil cook stove; that they ate, turned off the stove, which burned the wick for some delayed time thereafter, and went to bed; that soon thereafter an explosion occurred resulting in the injuries indicated.

Plaintiffs claim that the 10″ crescent wrench found near the butane pipe was placed under the mattress by them each evening as a weapon for protection against possible intruders. There was considerable corroborated testimony that after the fire the pipe valve in the cabin was partially open and left bright marks indicating it had been closed again after the fire; that a small stream of fire was coming out of the end of the pipe when the fire department arrived, and that the petcock was then turned off after the discovery of this flame. It was necessary to use a wrench to open and close the valve. The wrench, found on top of the burned mattress, was so set that it just fit the valve head. It is defendants' argument, and the evidence might well have supported it, that plaintiffs or the 7-year-old child was probably playing with or experimenting with it to see if there was water piped into the house. The court rejected this contention and found that all defendants were guilty of negligence, as charged, and that plaintiffs were not guilty of contributory negligence.

There was additional testimony of an expert engineer, produced by plaintiffs, that butane gas has mixed with it a substance which produces an odor similar to rotten eggs, and that such escaping gas has a great attraction for flies; that a small leak may not be noticeable if the room is well ventilated; that the gas valve or shut-off cocks attached to the pipes in this and some of the other cabins were not designed for butane gas, and if these valves were not filled with a grease or some other such substance, when tapped at the base, it could leak to some extent; that it was the general practice of butane truck operators to warn an owner of the filling of a tank or to check and see that the main valve is closed. Another witness testified it was bad practice to leave an exposed end of such a pipe without it being capped with a metal screw cap. Another expert, testifying for the defendants, said the gas cock valve here used was of common use with butane.

Plaintiffs' expert further testified that when a butane tank remains empty for some period of time, air accumulates in the line, and in case of a slow leak, by refilling, it might take a week or two before the air is forced out of the leaking valve at the end of the line and the butane gas itself would later start to leak into the cabin, depending considerably on the extent of the leak; that one not acquainted with the odor of butane might not recognize it; that there are certain possible tests to discover leakage in the line that could be made by one delivering the butane without checking each cabin, i. e., by cutting out a piece of the pipe or disconnecting the line from the tank, putting in a valve and pressure gauge or monometer, and determining the leakage rate, if any, which process may take minutes or days, depending on the volume of leakage. He testified, however, that in doing so it would be necessary to obtain the consent of the owner of the line.

Plaintiffs' witness Hill, a motel operator at Lake Tahoe, testified he once was engaged in the business of distributing butane gas in that locality. He offered to testify as to the custom of a deliverer of such butane gas in that vicinity when cabins and clubs were closed for the winter months and butane was again delivered in the summer season. Objection was made to the offer of proof of custom in that district as compared to this district. It was sustained but the witness later testified, over some limited objections, that when he first filled a tank after the winter season and there *was no one at the place responsible for it,* he would fill the tank, shut it off from the distributing system and whenever he would later open it up he would always use a monometer or pressure gauge to check for leaks. In answer to the court's inquiry, counsel for plaintiffs stated that as to Petrolane, plaintiffs were not relying on customer usage but were relying upon some *inherent duty* on Petrolane apart from custom and usage. This last statement becomes important when considered in connection with a special finding and the reasoning expressed by the trial judge for attaching liability against Petrolane in an opinion sent up with the record. This opinion states in part that the truck driver, Hanley, knew this was the first delivery of the season and the tank was empty; that he took no precautions nor made any tests to determine whether or not there were any leaks in the line or any valves on or off; that he permitted gas to go into the line from the main tank and into this cabin; that Petrolane's manager, in 1951 or 1952, inspected the outfit and found three leaks in the line valves in certain undetermined cabins, apparently not this one, and recommended the valves be replaced; that he made no subsequent inspections and failed to notify Hansen as to the conditions he previously found; that Petrolane knew butane gas was a highly dangerous commodity and those engaged in that business for profit are engaged in an ultra-hazardous activity. He quoted and relied upon Luthringer v. Moore, 31 Cal.2d 489, 498, 190 P.2d 1, 7, reading:

> "'One who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm. * * * An activity is ultra-hazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage. * * * An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who carries it on.'"

He found "That at all times herein mentioned the butane gas which was sold and distributed by defendants was extremely dangerous and highly explosive; that at all times herein mentioned the defendants, and each of them, were engaged in an ultra-hazardous activity and business; that the sale and distribution of such butane gas is an inherently and intrinsically dangerous activity and business; that the defendant Petrolane Ltd., a corporation, as well as the other defendants, was under a duty to use care commensurate with the danger in the conduct of such activity and business, and such duty of said defendant could not be delegated to any other person."

[1] It would therefore appear from the quotation of this paragraph, the reference to the inherent duty of Petrolane, and the special finding quoted, that the court was attaching liability against these defendants upon the theory of ultra-hazardous activity, believing the exercise of the utmost care on their part to prevent the harm would be no defense, and that the duty to exercise such care could not be delegated. We do not believe the business in which defendants were engaged can be so classified. There were over 200 customers of such butane gas in that community, and on ranches and outlying homes not accessible to a natural gas system. This commodity has come into popular use and is a necessity in such localities. The complaint alleged certain special acts of negligence and the court found them to be true. Apparently the complaint was not predicated upon ultra-hazardous activity.

[2] If this rule of law is adopted, all distributors of butane gas, even where public utilities are employed for its conveyance, would become liable for any injuries caused by it, even though the distributor exercised the utmost care. We do not believe the rule in Luthringer v. Moore, supra, is here applicable. That case involved an action for damages as a result of breathing hydrocyanic acid gas, a deadly poisonous gas used by defendant Moore in exterminating cockroaches by fumigation in a restaurant occupying part of a large building. Even in that case the court held that the question of whether a case is a proper one for imposing the rule of absolute or strict liability for tort without fault is one of law for the court. The same distinction is to be noted in Green v. General Petroleum Corporation, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; and Gall v. Union Ice Company, 108 Cal. App.2d 303, 239 P.2d 48, upon which plaintiffs rely. It has been held that a gas company, though they be the owners of a distributing system and under regulation of the Public Utilities Commission, are not insurers of the safety of their customers or of the general public, and their liability is not absolute. 24 Am.Jur. secs. 22 and 32, pp. 681 and 686.

[3] In Clay v. Butane Gas Corporation, 1949, 151 Neb. 876, 39 N.W.2d 813, it was held that the rule of absolute liability is not to be imposed in such cases, and stated the general rule to be that a higher degree of care and vigilance is required in dealing with a manufactured liquefied gas than in the ordinary affairs of life and business; that one who handles such a dangerous agency must use a degree of care to prevent damage from the escaping of gas which is commensurate with the danger which it is its duty to avoid; that a gas company which does not install, own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries or damages caused by a leak therein of which it has no knowledge; that the rule as to the legal duty of the gas company in reference to the escape of gas from service pipes owned and controlled by others on private property, which pipes have been properly installed and tested, does not extend to thereafter making inspection, unless the gas company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom; that while a distributor of gas is not an insurer of the safety of the consumer's premises or the personal property therein, and the law does not impose upon it the arduous duty of inspection in every case, yet when its agent has good cause to believe

that an inspection should be made, it may be negligence not to inspect, and if so, it is liable for damages proximately caused by such negligence. The court then said the responsibility of the gas company arises from knowledge of a dangerous condition, and not by reason of the condition. If the liability of defendants was predicated solely on the theory of ultra-hazardous activity a reversal of the judgment would be imperative. The decision indicating that the duty could not be delegated is also unauthorized. The general rule is that when property is turned over by the owner to an independent contractor the owner is not liable to third persons for the negligence of the independent contractor. There are certain exceptions to this rule. Sabin v. Union Oil Company, 150 Cal.App.2d 606, 310 P.2d 685.

[4] As we see it, the question then arising is whether the evidence would support the additional finding that, at the time butane gas was supplied to the tank by defendants, there was a dangerous condition existing, and whether defendants had knowledge of such dangerous condition, or whether a reasonable inspection to ascertain and discover such dangerous condition, if any, was required or met. Ray v. Pacific Gas & Electric Company, 3 Cal.App.2d 329, 39 P.2d 812; Ingledue v. Davidson, 102 Cal.App. 703, 283 P. 840; Sawyer v. Southern California Gas Company, 206 Cal. 366, 274 P. 544.

In this connection it is argued by defendants that to place the burden on them to make an inspection of gas distributing systems on their entire route of probably 100 to 200 customers, at the beginning of each season, would place on this industry, which runs into thousands of seasonal customers, an unrealistic, unnecessary and serious burden and handicap; that to make a pressure check of a multiple outlet system requires the cooperation and participation of the owner and each of his tenants whose premises are connected with the distributing line; and that the absence of tenants and inaccessible appliances present practically an insurmountable problem for such inspection.

As to claimed knowledge of Petrolane that a defective condition did exist in 1951 or 1952 in three of the cabins, without designation as to which ones, there is some testimony that at Hansen's request, Petrolane, as an accommodation, did inspect the system to the extent referred to; that at that time there was no indication that Petrolane was to be the distributing agent for that or the succeeding years. It had a competitor in that field in this same community. Several suggested corrections were indicated. Butane gas was furnished in 1951 or 1952, or both years, without any evidence of leakage or defect in the system. During these years the employees of Hansen had been fully instructed in the manner of detecting and correcting leaks and apparently inspected the cabins for this purpose. Defendants delivered butane to the tank. According to the evidence, Hansen's employees closed the valve to the distributing system before it was delivered. Hansen ordered its delivery and knew it was being delivered that day. No notice of any leaks or defects was brought to the attention of defendants. The next day Hansen's employee opened the valve to the distributing system and no leaks were indicated. After the gas valve was turned on, Hansen's employee again inspected the cabins, including this one, for leaks. Tests were made and none were discovered. There is no testimony that a test made at that time by defendants would have been different. At least there was no sufficient notice brought home to these defendants at that time calling for a greater or more extensive inspection than that made by Hansen's employees who assumed the duty of inspection after the butane had been delivered in the manner indicated. It cannot be reasonably said that the gratuitous inspection made in 1951 or 1952 and the discovery then made, was sufficient notice to defendants that this same condition persisted in September, 1953, in the cabin indicated, which would require a full inspection by them for leaks before delivering the butane to the tank on the Hansen premises in the manner indicated. Apparently the trial court did not believe the testimony of defendants' witnesses that the main valve had been turned off by them before delivery of the butane and turned on again by them the next day, or that proper inspection had been made and no leaks were in evidence. There is no substantial evidence that there was a leak at that time. The great weight of the testimony is that the escaping gas developed later by virtue of some unforeseeable causes. It is true that a court is not required to believe the testimony of a witness, if untrustworthy, but the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discredited.

[5] In Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P.2d 254, 257, the rule pertaining to the duties of a gas supplier is stated to be:

> "A supplier of gas which does not install gas pipes or appliances on another's premises, does not own or control them, has no duty to inspect them, and has no actual knowledge of leaks or defects, is not liable for damages resulting from a gas explosion on said premises."

Many cases are cited for this general rule including Lewis v. Southern California Gas Co., 92 Cal.App. 670, 268 P. 930. See also 23 Cal.Jur.2d 726, sec. 6.

There may be some merit to the general claim that in refilling a butane tank after it has been emptied and allowed to remain empty for several months, one who subsequently delivers butane to the tank and into the system is charged with knowledge of the natural results and the responsibility of making adequate inspection to determine whether, due to the dangerous propensities of the butane gas, it is safe to refill the tank without exposing the tenants or occupants of the premises served to the dangers which are known to him and which might reasonably result. Koch v. Southern Cities Distributing Co., 18 La.App. 664, 138 So. 178, 182; Clay v. Butane Gas Corp., 151 Neb. 876, 39 N.W.2d 813; 24 Am.Jur. 686, sec. 32.

Here, the claimed cause of the injury was a leak in one of the pipes making up the system. Defendants did not own or operate this system and had taken no part in its installation and had assumed no responsibility to keep it in repair. It does not appear to us that the evidence in this case would support a conclusion or finding that defendants, particularly defendants Hanley and Dyer, had notice of the claimed leak or should have had knowledge of it at the time the delivery was made or within any reasonable time thereafter, so as to avoid the accident. There was no substantial evidence of a leak at the time the gas was delivered or during the five-day period prior to the occupancy of the cabin by plaintiffs. In fact, there was no evidence of any leak after that time except the inference that it may have subsequently started leaking because a few flies assembled in the cabin a few days before the explosion and many were noticed about 11 a. m. on October 8th, the day of the explosion, plus the additional evidence of some peculiar odor resembling human vomit, and the possibility that air may have preceded the arrival of the butane gas in the pipeline. Apparently defendants had no notice of this claimed leak in the pipe in the cabin. Plaintiffs cooked, lived in the cabin during this period, and slept with their heads within a few feet of the pipe without noticing any leak or other evidence of it. How, then, would defendants be chargeable with notice, as found by the court, that such a leak existed on *September 26th,* the date the butane was delivered?

The possibility of the owner's liability has been fairly well established. He selected the materials, installed the plant on his own property, employed a caretaker whose duty it was to test and properly maintain the system for the benefit of his tenants. A separate action for these same claimed damages was first instituted against the owner. Plaintiffs elected to settle with him for $15,000. This was their choice. No sufficient reason is shown or evidence produced indicating that defendants should also share in that claimed liability.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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151 Cal.App.2d 559

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION et al., Defendants and Appellants.

Civ. 9048.

District Court of Appeal, Third District, California.

June 7, 1957.

As Modified on Denial of Rehearing July 1, 1957.

Hearing Denied July 31, 1957.

Action respecting insurance company's protested payment of tax on amount of payroll deductions representing its employees' contribution into company's voluntary retirement plan. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment for insurance company, and State Board of Equalization appealed. The District Court of Appeal, Van Dyke, P. J., held that such payroll deductions were not taxable under constitutional provision taxing gross premiums received by insurers upon business done in the state.

Affirmed.

Taxation 🔑140

Payroll deductions representing insurance company's employee's contribution to voluntary retirement plan of company were not taxable to company under constitutional provision levying an annual tax on amount of insurer's gross premiums received upon its business done in the state. West's Ann. Const. art. 13, § 14⅘.

Edmund G. Brown, Atty. Gen., by Harold B. Haas, Deputy Atty. Gen., for appellants.

Downey, Brand, Seymour & Rohwer, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Respondent, as its name implies, is an insurance company doing business as such in this state and elsewhere. It is subject to taxation under the provisions of Article XIII, Section 14⅘, of the State Constitution. The basis of its annual tax is (in respect to each year) the amount of gross premiums, less return premiums, received in such year "upon its business done in this State". In 1949, the company adopted an employees' retirement plan. No employee was compelled to participate, but those who elected to do so authorized respondent to make monthly deductions from salary or wages due them for service. The state contended that these payroll retentions were gross premiums on business done in the state by respondent and, therefore, assessed the same as such. Respondent paid the taxes thus imposed, under protest, and brought this action to recover. The trial court gave judgment in the company's favor and the state has appealed.

Respondent's employees' retirement plan, although exactly what its name implies, nevertheless contains so many features and provisions generally found in group annuity policies that the state contends it is, in fact, an insurance contract and, therefore, constitutes insurance business put into effect and continued in this state. We deem this view strained and unrealistic.

Obviously, the plan does contain many features that can be found in group annuity contracts regularly issued by insurers. The same could be said of any comprehensive retirement plan.

This plan provides for elective individual participation by respondent's employees and for withdrawal from participation at the option of the employee, for payment to the company by deduction from pay of a sum of money monthly and for return of such on withdrawal from participation, together with interest at the rate fixed by the plan, compounded annually. While the employee participates, the respondent credits him with monthly retirement credits or retirement units, and if he remains a participant for a stipulated length of time and acquires a stipulated age he will receive retirement pay for life. If, after retirement, his retirement benefits received do not equal before his death his accumulated contributions, plus interest, the balance is paid in cash to his beneficiary. A participating employee may also elect, by larger contributions, to purchase increased retirement benefits. The evidence showed, without conflict, that the employee contributions were markedly lower than amounts which would have to be paid under formal group annuity policies to a company issuing the same, whether paid wholly or partly by employer and employee and that, viewed in this way, employee contributions were not calculated by actuarial methods commonly used in the insurance world. Thus it was shown that where actuaries calculating the premiums on insurance contracts, whether of the life or of the annuity type, consider three elements, namely, the rate of mortality, the rate of interest and the rate of expense, the amount of contributions by respondent's employees were arrived at by non-actuarial methods. For instance, employee contributions varied according to amount of salary or wages earned and to that extent were arbitrary rather than actuarial, and the gap between the cost of the plan and the employee's contributions was thus arbitrarily assumed by respondent as its contribution. In brief, respondent proposed to any employee who desired to accept the offer that it would pay retirement benefits for a price that must eventuate in loss to respondent, while contenting itself with the imponderable benefits of better employer-employee relationship as compensation for its loss. We think it unnecessary to relate in detail the many provisions of the plan relating to the rights of the participating employees concerning retirement benefits, withdrawal privileges and the like. We would hesitate to say that any considerable number of contract provisions of such nature could not be found in group annuity policies commonly sold by insurers.

The trial court found that the assessment and levy of the protested tax was illegal and void; that the retentions by respondent of a part of wages due participating employees were not premiums received by respondent upon its business done in this state as that term is used in the Constitution; that respondent's employee retirement plan did not and does not constitute an insurance policy or an annuity contract within the meaning of the constitutional provisions as to taxing gross premiums of insurers. We think the trial court arrived at the correct result. Regardless of the noted similarities in so many of the provisions contained in the plan to those found in annuity policies regularly sold by insurers, the great dissimilarity which inheres in the total absence of profit motive—never ignored by successful insurers—compels a conclusion that the establishment and maintenance of respondent's employees' retirement plan cannot be classified as insurance business done by it in this state. Such was not its purpose and such was not its nature. Had this plan been established and maintained by an employer who was not an insurer, we think no one would contend that it was an insurance contract or that its establishment and maintenance constituted the doing of insurance business. The fact that respondent is an insurer is not competent to alter either the purpose or the nature of its employees' retirement plan.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

151 Cal.App.2d 732

Clyde FRITSCH and Esta Fritsch, Plaintiffs and Appellants,

v.

Arthur C. FISHER, Defendant and Respondent.

Civ. 22182.

District Court of Appeal, Second District, Division 1, California.

June 17, 1957.

Action for delay rentals under oil and gas lease after lessee had failed to drill on leased land and refused to pay delay rental. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment for lessee and lessors appealed. The District Court of Appeal, Doran, J., held that lease was a typical "unless" type of lease under which lessors were not entitled to collect any delay rentals.

Affirmed.

1. Mines and Minerals 🔑78(1)

Where oil and gas lease contained no language typical of the "drill or pay" type of lease, but instead provided for termination of lease if lessee failed to drill within a certain time and also failed to pay delay rentals, when lessee failed to drill or pay delay rentals, and offered to furnish a quitclaim deed, lessors were not entitled to any delay rentals.

2. Evidence 🔑357

In action to collect delay rentals under oil and gas lease, correspondence between lessors and lessee relative to terms of lease was admissible for purpose of properly construing instrument by showing circumstances under which it was made. West's Ann. Civ.Code, § 1647; West's Ann.Code Civ. Proc., § 1860.

◆

Morrison, Foerster, Holloway, Shuman & Clark, Alfred L. Gibson, San Francisco, for appellant.

John C. Campbell, Alhambra, Arthur C. Fisher, Los Angeles, for respondent.

DORAN, Justice.

The action herein was instituted by appellants, husband and wife, for delay rentals under an oil and gas lease, after respondent lessee had failed to drill on the leased land and had refused to pay delay rental. The case was submitted upon a Statement of Agreed Facts and resulted in a judgment for the respondent.

The appellants, owners of certain land in Monterey County, executed an oil and gas lease to the defendant on July 22, 1952, covering a five-year period. It is conceded that the defendant never commenced any drilling operations and had never paid any rental. The lease was never recorded and there had been no quit claim by the defendant although the defendant offered to execute such a deed.

The principal contention raised by the plaintiff (appellant), quoting from the written opinion of the trial court, "is that this lease is of the 'pay or drill' type and consequently the lessee is liable for delayed rental. The defendant contends that the lease is of the 'unless' type and that he is not liable for the payment of any such rent."

Attached to and forming a part of the Statement of Agreed Facts are several letters which passed between the parties, which, as stated by the trial court, "are received for the purpose of showing the surrounding circumstances, but not to vary the terms of the written instrument". A letter from respondent, dated June 24, 1952, prior to the signing of the lease on July 22, 1952, "pointed out that there were two problems which must be solved before any exploratory well could be seriously considered: first, to obtain leases from other land owners, and second, obtain assignments from about two hundred government leases. It was pointed out that if leasing could be completed that the defendant would like to see the test well drilled during that year".

On July 11, 1952, the defendant wrote the plaintiffs, "that he could not tell where the test well would be drilled if one was drilled, but as soon as sufficient leases were obtained * * * geologists would be sent to the area. On September 11, 1952, the plaintiffs * * * stated that they had not received the initial down payment for the first year in advance in lieu of drilling. The defendant replied that the first year's payment under all the leases was to become due one year from the date of the lease.

On August 31, 1953, the plaintiff called the defendant's attention to the letter of September 16, 1952, and stated that the payment due on July 22, 1953 was past due and payable. On September 1, 1953, the defendant replied that there had not been sufficient cooperation of a number of owners to warrant drilling a test well; that the lease was never recorded and that if the plaintiffs wished a quit claim deed it would be promptly furnished them". This letter concluded that the defendant's statement, "I shall await further word from you."

The lease in question was on a printed form and, as found by the trial court, "does not contain any provision requiring the payment of rental by defendant to plaintiff for the year July 22, 1952 to July 22, 1953." The language of the instant lease "is substantially identical with the leases involved in the cases of Walston v. Flintridge Oil Co., 133 Cal.App.2d 660, 284 P.2d 895; Alexander v. Oates, 100 Cal.App.2d 266, 223 P.2d 264; Norris Oil Co. v. Von Glahn, 104 Cal.App.2d 159, 230 P.2d 885; Wilcox v. West, 45 Cal.App.2d 267, 114 P.2d 39; and Richfield Oil Corp. v. Bloomfield, 103 Cal.App.2d 589, 229 P.2d 838. The lease attached as Exhibit 'A' to the written Stipulation of Facts was and is an 'unless' type of lease."

As stated in Walston v. Flintridge Oil Co., 133 Cal.App.2d 660, 662, 284 P.2d 895, 897, "The main difference between the 'drill or pay' type of lease and the 'unless' type, so far as material here, is that the former contains terms requiring the payment of rent when drilling operations are not commenced within the time specified, while the latter contains terms providing for a termination of the lease when the lessee fails to drill within the time limit and also fails, as an alternative, to pay delay rentals".

[1] Nowhere in the present lease is to be found any express provision, typical of the "drill or pay" type of lease, obligating the lessee to "pay or tender to the Lessor", any stipulated sum as rental "for so much of said land as may then still be held under this lease, until drilling operations are commenced or this lease terminated as herein provided". (Summers Oil and Gas, Volume 7, Forms, page 35.)

Moreover, the lease in question provides that the "Lessee *may* extend the time for drilling operations", etc. (Italics added.) "by paying to Lessor annually in advance, as rental in lieu of drilling $5.00 per acre until drilling operations are commenced or this lease is terminated". And, as said in the respondent's brief, "The uncontradicted evidence therefore shows that appellants were informed at the commencement of negotiations that the lease would only be utilized in the event that respondent obtained leases from the fee owners whose lands adjoined and * * * assignments or operating agreements from about 200 government lessees". The respondent never obtained such leases.

[2] In ascertaining the real meaning of the lease terms, the trial court was justified in applying the rule expressed in Section 1647 of the Civil Code which provides that "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates". Section 1860 of the Code of Civil Procedure likewise provides that "For the proper construction of an instrument, the circumstances under which it was made * * * may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

All of the appellant's contentions must be deemed untenable. The decision reached by the trial court is amply supported by both law and evidence, and the record discloses no reversible error.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

151 Cal.App.2d 568

Gustave ODEGARD and Betty ODEGARD, Plaintiffs and Respondents,

v.

Joe Thurman THOMASON, Defendant and Appellant.

Civ. 9066.

District Court of Appeal, Third District, California.

June 7, 1957.

Action by husband and wife to recover for injuries and consequential damages arising out of motor vehicle collision. The jury awarded $3500 to wife for back injury and $1500 to husband for medical expenses, property damages, and loss of services and society of wife. The Superior Court, Siskiyou County, James M. Allen, J., granted a new trial, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that granting a new trial on ground of inadequacy of the damages awarded by the jury was not abuse of discretion, in view of the evidence.

Judgment affirmed.

1. New Trial ⚿163(1)

Minute order granting new trial on ground of insufficiency of the evidence was sufficient to satisfy statutory requirement that order granting new trial on such ground shall so specify in writing and be filed with clerk within ten days in order to preclude conclusive presumption that order was not based on such ground. West's Ann.Code Civ.Proc., § 657.

2. Damages ⚿130(4), 133, 135, 139

Granting a new trial on all issues on ground of inadequacy of damages of only $3,500 awarded plaintiff wife for back injury sustained in motor vehicle collision and $1,500 awarded her husband for medical expenses, property damages, and loss of services and society of wife was not abuse of discretion, in view of evidence as to past and future medical expenses and that wife must undergo surgery.

3. Appeal and Error ⚿979(5)

Order granting a new trial on ground of inadequacy of damages awarded by jury could not be disturbed on appeal, in absence of showing of abuse of discretion.

◆

Tebbe & Correia, by M. H. Messner, Yreka, for appellant.

Carlton & Shadwell, by Daniel S. Carlton, Redding (Robert A. Haughwout, Redding, of counsel), for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting a motion for a new trial on the ground of the inadequacy of the damages awarded by the jury.

Respondent Betty Odegard sustained a back injury when the automobile which she was operating was struck in the rear by a truck driven by appellant. There was evidence that as a result of the accident the respondents had suffered special damages in an amount in excess of $1,400. There was also uncontradicted medical testimony that Betty would have to undergo surgery and that her future medical expenses would be approximately $1,500. The jury assessed damages in favor of respondents, as follows:

> "1. The sum of $3500.00 in favor of Betty D. Odegard for personal injuries suffered by her.
>
> "2. The sum of $1500.00 in favor of Gustave Odegard for medical expenses and property damages and loss of the services and society of his wife."

Upon respondents' motion, the trial court, by minute order, granted a new trial on all the issues on the ground of the insufficiency of the evidence. No formal order was filed, although the court in its memorandum of decision directed that one be prepared by respondents. Appellant contends that the judgment must be reversed, as the only ground herein upon which a new trial could be granted was insufficiency of the evidence, but it must be conclusively presumed that it was not granted on that ground in view of the following provisions of Section 657 of the Code of Civil Procedure:

> "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order."

[1] Appellant's argument that, there being no formal order, it must be conclusively presumed that the new trial was not granted on the ground of insufficiency of the evidence was considered and answered by the Supreme Court in Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 113–117, 142 P.2d 929, wherein it was held that the statutory requirement (C.C.P., sec. 657) was met by a minute order.

[2, 3] Appellant further argues that the trial court granted the motion for a new trial because of an erroneous belief that the jury was bound by the uncontracted, expert testimony as to the nature and extent of the respondent wife's injuries and her need of future medical treatment. No matter what concept the trial court may have had as to the weight to be accorded the expert testimony, it was within the province of the trial judge to determine that the damages awarded respondents were inadequate. Moreover, the trial court did not limit the new trial to the issue of damages but granted it as to all the issues. It cannot be said that the trial court abused its discretion in granting a new trial. Therefore, its ruling cannot be disturbed on appeal. Dempsey v. Market Street Ry. Co., supra, 23 Cal.2d at page 113, 142 P.2d at page 930.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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151 Cal.App.2d 481

ESTATE of Louis LUCKEL, Deceased.

John E. PETTIJOHN, as Administrator with Will-Annexed of Estate of Louis Luckel, Deceased, Mary Roberts and Adelaide E. Pettijohn, Appellants,

v.

Myrtle Frazee LUCKEL, Respondent.

Civ. 22194.

District Court of Appeal, Second District, Division 3, California.

June 4, 1957.

In the matter of a decedent's estate. From judgments of the Superior Court of Los Angeles County, Clyde C. Triplett, J., determining interests in the estate, and an amended judgment adding a provision for payment of specified sum monthly to decedent's widow for her life, the administrator-with-the-will-annexed of the estate and decedent's daughter and granddaughter appealed. The District Court of Appeal, Vallée, J., held that bequest by a provision of will that funds or property of estate be invested or taken to assure widow monthly income of $100 during her life was an annuity entitled to preference over legacy of specified sum to granddaughter as proceeds of realty entrusted to testator.

Appeal from original judgment dismissed, and amended judgment affirmed.

See also, Cal.App., 312 P.2d 34.

1. Wills ⚿706

A judgment determining interests in decedent's estate was superseded by amended judgment containing all provisions of original judgment, but adding provision that decedent's widow was bequeathed an annuity of specified sum monthly for her life, so as to require dismissal of appeal from original judgment.

2. Wills ⚿706

Where probate court's construction of will was based solely on its terms without aid of evidence, District Court of Appeal owes duty to construe will on appeal from probate court's judgment determining interests in testator's estate.

3. Wills 🔑619, 669

In determining whether testamentary gift is an annuity or merely income from trust fund, testator's intention is of paramount importance.

4. Wills 🔑440

A will must be construed according to testator's intention as expressed therein, and such intention must be given effect, if possible.

5. Wills 🔑467

Words of recommendation, request, and the like, when used in will in direct reference to testator's estate, are prima facie testamentary and imperative, not precatory.

6. Wills 🔑467

While testator's desire, expressed in will, for disposal of his estate, is mere request when addressed to his devisee, it must be construed as a command when addressed to executor, and all expressions indicative of testator's wish or will are commands.

7. Wills 🔑619

A testamentary gift of income is not an annuity.

8. Wills 🔑684(2), 729

An "annuity" is a periodic payment made unconditionally without any contingency, while beneficiary of trust to pay income or legatee of income is ordinarily dependent on existence of income, amount received by him fluctuating with income. West's Ann.Prob.Code, § 161(3).

See publication Words and Phrases, for other judicial constructions and definitions of "Annuity".

9. Wills 🔑732(1)

An annuity, bequeathed by will, may be made payable out of any assets of testator or from a fund set aside for such purpose.

10. Wills 🔑684(2), 729

A legatee of annuity is entitled to stipulated payments per annum, irrespective of earnings from particular corpus or fund, but beneficiaries of trust fund created by will are entitled to entire income earned on portion mentioned therein.

11. Wills 🔑684(2), 729

Where income from which annuity bequeathed by will is payable is insufficient for payment thereof, executors or trustees may encroach on principal, even in absence of specific direction in will to do so, but trustees of real or express trust created by will cannot pay out any portion of principal, unless will specifically so authorizes.

12. Annuities 🔑1

Annuities are favored under probate law of California.

13. Wills 🔑619

An intention to create annuity by will is not overcome by provision therein that money to pay annuity shall be raised in particular way or out of particular fund.

14. Wills 🔑619

Directions in will to invest a fund sufficient to produce a certain amount and pay such amount to beneficiary periodically establishes an "annuity".

15. Wills 🔑619, 669

A bequest by provision of will expressing testator's wish that funds or property of his estate be invested or taken to assure his widow a monthly income of $100 during her natural life was not a trust, but an "annuity".

16. Wills 🔑729

Where a will creates annuity, annuitant is entitled to stipulated payments, irrespective of earnings from principal, and if income therefrom is insufficient to pay annuity, principal should be encroached on to extent necessary to make up deficiency, irrespective of any provision for gift over of principal as remainder interest, in absence of different intention appearing from will.

17. Wills 🔑729

The statutory provision that if fund or property out of which an annuity is payable under will fails in whole or part, resort may be had to general assets of testator's estate, is controlled by testator's express intention. West's Ann.Prob.Code, §§ 161, 163.

18. Wills ⚷733(9), 734(10)

Testamentary annuities commence at testator's death, are due at end of annual, monthly or other period specified in will, and bear interest at 4% per annum on amount of any unpaid accumulations held by executor on each anniversary of testator's death, computed from date of such anniversary. West's Ann.Prob.Code, § 162.

19. Wills ⚷733(9)

The right of testator's widow to annuity, bequeathed to her by provision of will that funds or property of testator's estate be invested or taken to assure widow specified monthly income during her natural life, commenced on date of testator's death, in absence of any provision in will as to date from which payment thereof should commence. West's Ann.Prob.Code, § 162.

20. Wills ⚷734(1)

Interest on amount of annuity bequeathed by will is part of or accretion to annuity. West's Ann.Prob.Code, § 162.

21. Wills ⚷729

Testamentary annuity payments, accruing during administration of testator's estate, and interest thereon, inure to annuitant's benefit and are payable on distribution of estate.

22. Wills ⚷706

Where Superior Court's judgment, determining interests in testator's estate, prescribed conditions on which administrator-with-will-annexed might purchase an annuity for testator's widow by provision that if petition to purchase annuity were filed by interested party, administrator should use residue of estate or as much thereof as might be required to purchase annuity under prescribed conditions, District Court of Appeal, on appeal from such judgment must consider point raised by appellants as to whether Superior Court had power to direct purchase of annuity, though such court did not direct purchase thereof. West's Ann.Prob.Code, § 584.

23. Executors and Administrators ⚷102

Under statute providing that probate court, pending or at time of settlement of decedent's estate, may order investment of any money in executor's or administrator's hands in purchase of annuity expressly granted by will to any legatee therein, on petition of executor or administrator or any person interested in estate, probate court had power to prescribe conditions under which annuity should be purchased for testator's widow under provision of will that funds or property of estate be invested or taken to assure her a specified monthly income during her natural life, if petition were filed for such purpose. West's Ann. Prob.Code, § 584.

24. Wills ⚷729

An annuity created by will may be considered a bequest of sum to be expended for purchase of a contract yielding beneficiary a specified sum for life; purchase of annuity being purely a matter of procedure incidental to carrying out testator's expressed intention.

25. Wills ⚷806

In determining whether annuity bequeathed by will is entitled to preference over specific legacy to another than annuitant, fundamental and controlling factor is testator's intent when will was executed.

26. Wills ⚷807

Under statute providing that abatement of legacies takes place in any class only as between legacies of that class and that legacies to testator's spouse or kindred shall abate only after abatement of legacies to persons not related to him, abatement takes place equally between all legacies of certain class and cannot apply to only one of one class and one of another. West's Ann.Prob.Code, § 752.

27. Wills ⚷729, 755

An annuity bequeathed by will has qualities of "demonstrative legacy," which is a legacy to be taken or paid from particular fund or personal property pointed out by will. West's Ann.Prob.Code, § 161(2).

See publication Words and Phrases, for other judicial constructions and definitions of "Demonstrative Legacy".

28. Wills ⚷813

Where property or fund pointed out in will as means of paying a demonstrative legacy is in existence, such legacy has priority over all other legacies as against such property or fund.

29. Wills ⚷808

Generally, a legacy supported by valuable consideration or given in satisfaction of claim is entitled to preference over other legacies, unless will expresses different intention.

30. Wills ⚷807

An annuity bequeathed to testator's widow by provision of will that funds or property of testator's estate should be invested or taken to assure widow monthly income of $100 during her life was entitled to preference over specific legacy to testator's granddaughter of $2,500, being "the proceeds of real property belonging [to her] of which I was entrusted including interest accrued thereon", and hence payable irrespective of sufficiency of assets to pay other legacies.

31. Wills ⚷807

An exception to general rule that legacies will abate pro rata, where testator's estate is insufficient to pay all general legacies in full, is that a legacy to near relative of testator, such as his widow, will be preferred over other legacies.

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Potter & Rouse and Frank Wickhem, and Bernard Potter, Los Angeles, for appellants.

John N. Hurtt, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from judgments determining interests in an estate.

Louis Luckel died May 3, 1952 leaving a will and three codicils. The will first bequeaths and devises the testator's furniture, household goods, and a parcel of realty to his wife, Myrtle Frazee Luckel, who survived him. The paragraph making these bequests and devises contains this provision:

> "It is also my wish that funds or property of my estate be invested or taken to assure her [his wife] during her natural life a monthly income of One Hundred dollars, and in the event the appraised value of my estate shall exceed the sum of $50,000.00 then such monthly sums paid her shall be One Hundred and Fifty dollars, in such manner as the Executors of my estate determine."

It bequeaths $2,500 to Mary Roberts, granddaughter, "being the proceeds of real property belonging of which I was entrusted including interest accrued thereon," and $200 to a Masonic lodge. A devise of realty called "Noah Beery Paradise Troutfarm" was made subject to a life estate in Frank H. Luckel, son, and Adelaide E. Pettijohn, daughter, and their descendants living at the death of the testator. The devisees of the fee in the trout farm renounced the devise.

The first codicil bequeaths the income from the trout farm to the testator's children and their descendants during their lives. The second codicil gives the residue of the estate to Frank H. Luckel and Adelaide E. Pettijohn. The third codicil is not relevant. Frank H. Luckel assigned his interest in the estate to Adelaide E. Pettijohn.

John E. Pettijohn, as administrator-with-the-will-annexed, petitioned for a decree determining interests in the estate. He alleged there was a bequest of income to Myrtle Frazee Luckel, surviving spouse, "providing that there should be invested or taken funds or property of said estate not specifically devised to assure her the sum of $100.00 per month during her life." Myrtle Frazee Luckel, surviving widow, filed a statement of her claim alleging that under the terms of the will she was bequeathed $100 a month for and during her natural life; the will provides "funds or property of my estate be invested or taken to assure [her] during her natural life a monthly income of One Hundred dollars"; said annuity accrues from the date of death of the deceased with interest at 4 per cent per annum; said annuity is a charge on the general assets of the estate. Adelaide E. Pettijohn, a daughter of the deceased, filed a statement of her claim alleging that the estate consists of separate property; she and Frank H. Luckel, a son of the deceased, are the residuary legatees; the appraised value of the estate is less than $50,000; the property of the estate, other than the trout farm, is sufficient to assure Myrtle Frazee Luckel an income of $100 a month; she is entitled to the residue of the estate subject to a life estate in the trout farm and subject to the rights of Myrtle Frazee Luckel in the balance of the estate; she is entitled to a life estate together with others, not including the widow, in the trout farm.

The court found that by the terms of the will and codicils the estate is bequeathed and devised as follows: 1. It was the wish of the deceased that funds or property of his estate be invested or taken to assure the widow during her natural life a monthly income of $100 in such manner as the executors may determine. The appraised value of the estate is less than $50,000. 2. To Mary Roberts $2,500, being the proceeds of realty with which deceased was entrusted. 3. To Acacia Lodge No. 438 F. & A. M. $200 to be donated or used for the benefit of the Masonic Orphans Home and Old Peoples' Home. 4. Noah Beery Paradise Troutfarm to the entities named in the will. 5. The residue to Frank H. Luckel and Adelaide E. Pettijohn. 6. In the event the entities named in the will do not accept the devise of the trout farm, the same to pass to Acacia Lodge of Masons and the Masonic Board of Relief, subject to life estates in the children and descendants of deceased. The court further found that: 1. Frank H. Luckel has assigned his interest in the estate to Adelaide E. Pettijohn. 2. The devisees of the trout farm have renounced the devise to them.

The court concluded, among other things, that the will bequeathed an annuity of $100 a month for life to Myrtle Frazee Luckel; the annuity begins as of the date of death of the deceased; and that the $2,500 bequest to Mary Roberts be reduced to the extent that abatement may take place if the residue be insufficient to pay the cost of the annuity.

On May 23, 1956 the court rendered a judgment which decreed: 1. Adelaide E. Pettijohn, Mary Roberts, Frances Jones and Maury Jones have a joint and survivor life estate in the trout farm. 2. The $2,500 bequest to Mary Roberts, or such portion as may be payable, be reduced to the extent that abatement may take place if the residue be insufficient to pay the cost of the annuity for Myrtle Frazee Luckel. 3. "[I]f a petition to purchase an annuity, under Probate Code, Section 584, be filed by an interested party, then the administrator shall use the residue of the estate, rateably reduced to the extent necessary to proportionately pay the bequest of $2,500 to Mary Roberts, or as much thereof as may be required to purchase an annuity of $100 per month payable to Myrtle Frazee Luckel from the date of death of Louis Luckel to the date of death of Myrtle Frazee Luckel; provided if the amount available be insufficient to purchase an annuity in such amount, then it shall be purchased in an amount for which funds are available, having in mind possible rateable abatement of the $2,500 bequest to Mary Roberts; that the accrued and unpaid payments of $100 per month to draw interest from the date of death of the deceased Louis Luckel at the rate of 4% per annum, which interest shall be distributed in cash; if sufficient funds be available after payment of such $2,500 bequest and purchase of such annuity, then the $200 cash bequest to Acacia Lodge shall be paid in full, otherwise such bequest shall abate to the extent that such funds are not available. If no interested party files a petition to purchase an annuity, under Probate Code, Section 584, then the court retains jurisdiction to determine distribution of the estate. * * *" 4. Adelaide E. Pettijohn is entitled to the residue of the estate.

On July 3, 1956 the court rendered an amended judgment. This judgment contains all the provisions of the judgment of May 23, 1956 and adds this:

> "Myrtle Frazee Luckel is bequeathed, and she is entitled to, an annuity of $100.00 per month, payable to her from the date of the death of the deceased Louis Luckel to the date of her death; and that said Myrtle Frazee Luckel is entitled to interest on all accrued and unpaid payments of $100.00 per month, payable in cash, from the date of death of said decedent, at the rate of 4% per annum."

[1] The administrator, Adelaide E. Pettijohn, and Mary Roberts appeal from both judgments. We deem the judgment of May 23, 1956 to have been superseded by the judgment of July 3, 1956. Accordingly, the appeal from the judgment of May 23, 1956 will be dismissed.

The points urged for reversal are: 1. The will does not provide an annuity for Myrtle Frazee Luckel. 2. Payment to her does not begin on the date of death of deceased but on the date of distribution. 3. The court erred in directing the purchase of an annuity. 4. The $100 a month to be paid the widow is not a charge against the general assets of the estate. 5. The court erred in decreeing that the bequest to Mary Roberts should abate. It is asserted that the bequest of $100 a month to the widow is income from a trust and not an annuity.

[2] The probate court's construction of the will was based solely on its terms without the aid of evidence. Accordingly, it is the duty of this court to construe it. In re Estate of Moody, 118 Cal.App.2d 300, 305, 257 P.2d 709.

[3–6] In determining whether a testamentary gift is an annuity or merely income from a trust fund, the testator's intention is of paramount importance. A will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect if possible. Each case depends on its own particular facts and precedents are of small value. In re Estate of Wilson, 184 Cal. 63, 66–68, 193 P. 581. Lord Coke made the sage observation that "wills and the construction of them do more perplex a man than any other learning, and to make a certain construction of them, this excedit juris prudentum artem." (Roberts v. Roberts, 2 Bulstr. 130, 80 Eng.Rep. 1008.) "It has been stated frequently that when words of recommendation, request and the like are used in direct reference to the estate, they are *prima facie* testamentary and imperative, and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor. All expressions indicative of his wish or will are commands." In re Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893, 896.

It must be determined from the will whether the testator intended, on the one hand, to give the widow a fixed sum of money payable at the stated intervals, to be derived from income if sufficient or from income and principal if income alone be not sufficient; or whether, on the other hand, it was his purpose to give her only the income of the principal whether the income be large or small.

Section 161(3) of the Probate Code defines an annuity. It reads:

> "An annuity is a bequest of certain specified sums periodically; * * *."

[7–9] There is a well recognized legal distinction between an annuity and a bequest of income. In re Estate of Bourn, 25 Cal.App.2d 590, 595, 78 P.2d 193. A gift of income is not an annuity. Id., 25 Cal.App.2d 597, 78 P.2d 193. "An annuity is a periodic payment which is payable unconditionally, there being no contingency present. * * * On the other hand the beneficiary of a trust to pay income or the legatee of an income is ordinarily dependent upon the existence of income, the amount received by him fluctuating with the income." In re Estate of Markham, 28 Cal.2d 69, 73, 168 P.2d 669, 673; 3 C.J.S. Annuities § 1(b), p. 1374. An annuity may be made payable out of any assets of the testator or from a fund set aside for that purpose. In re Estate of Bourn, supra, 25 Cal.App.2d 590, 598, 78 P.2d 193.

[10, 11] "The distinction between 'annuities' and trusts for the payment of income to beneficiaries is a substantial one. Where an annuity is created the annuitant is entitled to the stipulated payments per annum, irrespective of the earnings derived from a particular corpus or fund. Where a trust fund is created, however, the beneficiaries are entitled to the entire income earned on the portion mentioned in the will. In the case of annuities, where the income is insufficient, the executors or trustees may encroach upon the principal, even in the absence of a specific direction. In the case of a real or express trust, the trustees are not permitted to pay out any portion of the principal unless the will specifically so authorizes." In re Kohler, 96 Misc. 433, 160 N.Y.S. 669, 675.

[12] The relevant part of the will in In re Estate of Oliver, 10 Cal.App.2d 336, 51 P.2d 1118, reads: "9th. I bequeath to my friend, Mrs. Julia A. Carr, $1,800 per year during her life, the same to be paid in monthly instalments, if possible, at the rate of $150 per month." The court held, 10 Cal. App.2d at pages 337, 338, 51 P.2d at page 1119:

> "Paragraph nine of the will creates an annuity in favor of Mrs. Carr. There is no provision or statement of any kind in the will to the effect that this annuity shall be limited to income. The bequest to Mrs. Carr is positive and certain, clear and distinct, and there is no condition attached as to how it shall be paid. * * *
>
> "Annuities are favored under the probate law of California."

Also see In re Estate of Oliver, 21 Cal.App. 2d 106, 108, 68 P.2d 735.

In In re Maybaum's Will, 296 N.Y. 201, 71 N.E.2d 865, 169 A.L.R. 1357, the will directed the executor to divide the residue of the estate into three parts and to pay one part consisting of 60 per cent of the residue to the testator's wife in monthly payments of $35. The provision was held to be a bequest of an annuity to the wife of $35 a month to be paid during her lifetime from the income, or principal, or from both, of 60 per cent of the residue.[1]

[13, 14] An intention to create an annuity is not overcome by a provision in the will that the money to pay the annuity be raised in a particular way or out of a particular fund. In re Sykes' Will, Sur., 53 N.Y.S.2d 442, 454; 96 C.J.S. Wills § 902, p. 353. It is held that a direction to invest a fund sufficient to produce a certain amount and to pay such amount to a beneficiary periodically establishes an annuity. Woods v. Gilson, 178 Mass. 511, 60 N.E. 4, 61 N.E. 58; Steelman v. Wheaton, 72 N.J. Eq. 626, 66 A. 195, 196–197, affirmed 73 N. J.Eq. 743, 70 A. 1102; In re McKenna's Estate, 173 Misc. 579, 18 N.Y.S.2d 482.

[15] It is patent from the language of the will that the testator intended a defi-

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[1] Also see Pierrepont v. Edwards, 25 N.Y. 128, 129; In re Vanderbilt's Will, 229 App.Div. 574, 243 N.Y.S. 165; In re Proctor's Will, 235 App.Div. 6, 255 N.Y. S. 722; In re Gabler's Will, 140 Misc. 581, 251 N.Y.S. 211, 219; In re Kidd's Estate, 142 Misc. 512, 254 N.Y.S. 152; In re Burton's Estate, 156 Misc. 175, 281 N.Y.S. 579; In re Ingraham's Estate, 158 Misc. 602, 286 N.Y.S. 128; In re Bamberger's Estate, 163 Misc. 549, 297 N.Y.S. 547; In re Mead's Will, 171 Misc. 148, 12 N.Y.S.2d 104; In re Savin's Will, 171 Misc. 818, 13 N.Y.S.2d 916; In re Weir's Will, 172 Misc. 74, 14 N. Y.S.2d 655, 659; In re Sheehan's Will, Sur., 15 N.Y.S.2d 547; In re McKenna's Estate, 173 Misc. 579, 18 N.Y.S.2d 482; In re Topazio's Estate, 175 Misc. 132, 22 N.Y.S.2d 847; In re Sykes' Will, Sur., 53 N.Y.S.2d 442; In re Tomasetti's Petition, Sur., 147 N.Y.S. 2d 885; In re Kaegebehn's Estate, 16 N.J.Misc. 388, 1 A.2d 56; In re Ellertson's Estate, 157 Kan. 492, 142 P.2d 724; 3 Page on Wills, Lifetime Ed., 476, §§ 1172, 1173.

nite, fixed monthly amount to be obligatorily payable to the widow and that it was not his intention to provide her trust income which could fluctuate from month to month. The will places on the executors in express language the duty to invest or take funds or property of the estate to assure the widow $100 a month during her life. It expresses the intention that $100 a month—no more and no less—shall be paid at all events. The widow is assured that amount each month absolutely without diminution or contingency. It cannot be satisfied by payment of the income of the funds or property "invested or taken" or of any fluctuating or variable sum. The bequest is not subject to diminution resulting in a change from the rate of interest, the payment of taxes, or a failure for any reason of the funds or property to produce the amount.

The form of the bequest is not that of a trust. It is not couched in language similar to that generally used in creating a trust. No powers or duties of a trustee are invested in the executors. The direction is not to pay the widow $100 a month from the income or out of the net income of the funds or property to be "invested or taken." It is a direction to pay her $100 a month absolutely and unconditionally. It may not be increased at the direction of a trustee, nor may it be decreased by the exercise of discretion by a trustee.

Although the testator directed the executors to invest or take funds or property of the estate ample in amount to meet the requirement of the annuity, the language does not imply that the sum to be received by the widow is to vary in accordance with the income of the funds or property. The intent disclosed is rather one of precaution that the executors will invest or take funds or property sufficient to produce the annuity. Welch v. Hill, 218 Mass 327, 105 N.E. 1067, 1068. The wording of the will that the funds or property are to be invested or taken to assure the widow a monthly "income" of $100 does not indicate that the bequest is not an annuity. In the same paragraph the testator referred to the payments as "such monthly sums paid her." The probate court correctly concluded that the bequest in question is an annuity.

[16] Where an annuity is created by will, the annuitant is entitled to the stipulated payments, irrespective of the earnings derived from the principal. And in the absence of a different intention appearing from the will where the income from the principal given is insufficient to pay the annuity, the principal should then be encroached on to the extent necessary to make up the deficiency in each payment, irrespective of any provision for a gift over of the principal as a remainder interest. 96 C.J.S. Wills § 1134, p. 910.

[17] Section 161 of the Probate Code expressly provides that if the fund or property out of which an annuity is payable fails, in whole or in part, resort may be had to the general assets. This provision is controlled by the testator's express intention. Prob.Code, § 163. If it appears from the will that it was the intention of the testator that resort is not to be had to the general assets, such intention must prevail. In re Estate of Phelps, 179 Cal. 703, 707–710, 178 P. 846. We find nothing in the will at bar to indicate an intention of the testator that resort is not to be had to the general assets to pay the annuity to the widow.

[18–21] Annuities commence at the testator's death and are due at the end of the annual, monthly or other specified period and bear interest at 4 per cent per annum on the amount of any unpaid accumulations held by the executor on each anniversary of the decedent's death, computed from the date of such anniversary. Prob. Code, § 162; Crew v. Pratt, 119 Cal. 131, 134, 51 P. 44; In re Estate of Pratt, 119 Cal. 153, 51 P. 1099. This is the general rule. 96 C.J.S. Wills § 1135, p. 916; Rest., Trusts, § 234. Since there is no provision in the will as to the date from which payment of the annuity shall commence under Probate Code, section 162, the right of the widow to the annuity commenced on the date of the testator's death. Interest is a part of or an accretion to the annuity. In re Estate of Hubbell, 216 Cal. 574, 578, 15 P.2d 503. The payments which accrue during administration, and interest thereon, inure to the benefit of the annuitant and are payable on distribution. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825.

In re Estate of Brown, 143 Cal. 450, 77 P. 160, and Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870, cited by appellants, do not conflict with the views we have expressed. They are cases in which the wills disclosed no intention to create annuities. Pure bequests of income were there made payable each severally out of income or net profits and an intention was expressed that payment should not commence until distribution. It was so held in Re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397, and In re Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349, also relied on by appellants, were expressly overruled in Re Estate of Platt supra, 21 Cal.2d 346, 131 P.2d 825.

[22–24] Appellants say the court directed the purchase of an annuity and that it was without power to do so. Respondent says the court did not direct the purchase of an annuity and that the point need not be considered. It is true the court did not direct the purchase of an annuity. It adjudged: "That if a petition to purchase an annuity under Probate Code Section 584, be filed by an interested party, then the administrator shall use the residue of the estate, * * * or as much thereof as may be required to purchase an annuity" under prescribed conditions. Since the judgment prescribes the conditions under which the annuity may be purchased, the point must be considered. If the administrator may not purchase an annuity, such provisions are erroneous. Probate Code, section 584, provides:

> "Pending the settlement of an estate, or at the time of settlement of an estate, on the petition of the executor or administrator, or of any person interested in the estate, and upon good cause shown therefor, the court may order any money in the hands of the executor or administrator, to be invested * * * in the purchase from an insurer admitted to do business in this State and for any legatee named in the will of an annuity expressly granted to him by said will * * *."

We think that under section 584 the probate court had the power to prescribe the conditions under which the annuity shall be purchased in the event a petition is filed for that purpose. See In re Estate of Pierce, 28 Cal.App.2d 8, 81 P.2d 1037; In re Estate of Belknap, 66 Cal.App.2d 644, 152 P.2d 657. In re Harris' Will, Sur., 143 N.Y.S.2d 746, holds that an annuity may be considered a bequest of a sum to be expended for the purchase of a contract to yield the beneficiary a specified sum for life. The purchase of the annuity is purely a matter of procedure, incidental to carrying out the expressed intention of the testator. In re Estate of Lawrence, 17 Cal.2d 1, 12, 108 P.2d 893.

In re Estate of Mesmer, 94 Cal.App. 97, 270 P. 732, relied on by appellants is not controlling. Mesmer held the court should not have directed the purchase of an annuity; that the purpose of the testator would be served by having the executors make the payments. That case was decided in 1928. Section 584 was amended in 1943 to empower the probate court to direct the purchase of an annuity.

[25–28] The soundness of the contention that the court erred in adjudging the legacy to Mary Roberts, the testator's granddaughter, should abate proportionately depends on whether the annuity is entitled to preference over the legacy. The will gives her $2,500, "being the proceeds of real property belonging of which I was entrusted including interest thereon." The probate court adjudged the legacy should abate proportionately in the event the residue should be insufficient to pay the annuity in full. In determining whether the annuity is entitled to preference, the fundamental and controlling factor is the intent of the testator at the time the will was executed. In re Estate of Buck, 32 Cal.2d 372, 374, 196 P.2d 769. Section 752 of the Probate Code reads:

> "Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator."

In re Estate of Wever, 12 Cal.App.2d 237, at page 242, 55 P.2d 279, at page 282, referring to section 752, declares:

> "The reasonable interpretation of this section is that abatement takes place equally between all legatees of a certain class and cannot apply to one only of one class and one of another. The 'class' mentioned in this section is any one of the five kinds of legacies stated and defined 'according to their nature' in section 161 of the Probate Code. Thus, if there are three demonstrative legatees and three annuitants, abatement cannot be charged to one or more of those in each class and not to all of that class."

Section 161 classifies legacies as (1) specific, (2) demonstrative, (3) annuity, (4) residuary, (5) general. An annuity has the qualities of a demonstrative legacy. "A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid." Prob.Code, § 161(2); In re Estate of Cline, 67 Cal.App.2d 800, 803, 155 P.2d 390; 4 Page on Wills, Lifetime Ed., 133, § 1399. If the fund or property out of which "a demonstrative legacy or an annuity is payable fails in whole or in part, resort may be had to the general assets." Prob.Code, § 161(3). If the property or fund to which the testator has pointed as a means of paying a demonstrative legacy is in existence, a demonstrative legacy has priority over all other legacies as against such property or fund. (4 Page on Wills, Lifetime Ed., 330, § 1499.)

[29] It would appear from the face of the will that the legacy to Mary Roberts is supported by a valuable consideration or that it is given in satisfaction of a claim. The testator gave her $2,500, "the proceeds of real property belonging [to her] of which I was entrusted including interest accrued thereon." The general rule is that a legacy supported by a valuable consideration or given in satisfaction of a claim is entitled to preference unless the will expresses a different intention.[2]

[30] We think the will at bar expresses a different intention. Construing the will in its entirety it indicates an intention that the annuity shall have preference over the legacy to Mary Roberts. The widow was uppermost in the testator's mind. She was the first object of his bounty. The bequests and devises to her and the annuity are the first provisions of the will. The annuity is charged on all property of the estate. The legacy to Mary Roberts is not charged on any specific property. The testator's intention seems to have been that the annuity should be paid irrespective of the sufficiency of assets to pay the other legacies. Funds or property are to be invested or taken to assure the widow $100 a month for life even if it takes the entire estate to do so; and if the estate is appraised at more than $50,000, the amount to be paid to her is $150 a month.

[31] In re Hardenbergh's Will, 144 Misc. 248, 258 N.Y.S. 651, at page 656, states:

> "The primary wish of the testator was to give his widow $6,000 annually and, under the terms of the will, the

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[2] In re Paulson's Estate, 208 Minn. 231, 293 N.W. 607, 610; Easterday v. Easterday, 105 Ind.App. 80, 10 N.E.2d 764, 768; First Nat. Bank v. Hessong, 83 Ind. App. 531, 149 N.E. 190, 191; In re Cameron's Estate, 278 N.Y. 352, 16 N.E. 2d 362, 364, 117 A.L.R. 1333; Harper v. Cumberland & Allegheny Gas Co., W. Va., 83 S.E.2d 522, 526; Reynolds v. Reynolds, 27 R.I. 520, 63 A. 804, 806; 4 Page on Wills, Lifetime Ed., 334, § 1501; 96 C.J.S. Wills § 1165(d), p. 976.

sister is to receive no income unless the total income from the residuary estate exceeds $6,000. Consequently, the sister can receive no income whatsoever, and nothing is left to provide an income of $2,400 for the mother. The right of the widow to a priority and a preference over other legatees is recognized in Matter of Neil's Estate, coming out of this court, 117 Misc. 498, 191 N.Y.S. 362, reversed in the Appellate Division, 205 App.Div. 605, 200 N.Y.S. 160, and the opinion of the Surrogate being affirmed in 238 N.Y. 138, 144 N. E. 481 [34 A.L.R. 1245].

> "One of the few exceptions to the general rule that, where an estate is not sufficient to pay in full all the general legacies in the absence of an expressed indication otherwise, the legacies will abate pro rata, is that, where a legacy is for a near relative, such as the wife in the instant case, it will be preferred. Such must have been the intention of the decedent."

Loocock v. Clarkson, Book 20 S.C. Reprint 179, at page 181, 1 Desaus.Eq. 471, written long ago, says:

> "But in the case before us, the annuity is a general charge on the testator's whole estate. There is no sum specified to be laid out in the purchase of an annuity—there is no particular fund pointed out by the testator, from whence the annuity is to be drawn. The words of the will are 'I give and devise and bequeath unto my dear and affectionate wife Mary Loocock the annual sum of 300*l* sterling, each and every year, during the term of her natural life, in order that she may live in quiet and easy circumstances.'
>
> * * *
>
> "Here the rule of construction of wills presents itself, and must influence the decision of this point; that is, what was the testator's intention? When this is ascertained, and it does not militate against the rules of law, it must prevail. There never has been a case presented to this court for consideration, in which the intention of the testator has been more clearly manifested. Who is the first object of his bounty? His wife. And is it not right that she should be so? He had no child. Who then so naturally, so justly, and so consistently with every law, divine and human, ought to have a claim on his benevolence as his wife?"

We hold the annuity is entitled to preference over the legacy to Mary Roberts.

The probate court correctly construed the will and correctly determined the interests in the estate.

The appeal from the judgment of May 23, 1956 is dismissed. The judgment of July 3, 1956 is affirmed. Appellants Adelaide E. Pettijohn and Mary Roberts shall bear respondent's costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

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151 Cal.App.2d 845

ESTATE of Louis LUCKEL, Deceased.

John E. PETTIJOHN, as Administrator with Will-Annexed of Estate of Louis Luckel, Deceased, Mary Roberts and Adelaide E. Pettijohn, Appellants,

v.

Myrtle Frazee LUCKEL, Respondent.

Civ. 22195.

District Court of Appeal, Second District, Division 3, California.

June 4, 1957.

In the matter of a decedent's estate. From an order of the Superior Court of Los Angeles County, Clyde C. Triplett, J., granting a family allowance to decedent's widow, the administrator-with-will-annexed of the estate and decedent's granddaughter and daughter appealed. The District Court of Appeal, Vallée, J., held that appeal was abandoned, where there was no statement of case or summary of material facts, no points were made, and appeal was unsupported by argument or citation of authority.

Order affirmed.

Executors and Administrators 🔑194(7)

An appeal from Superior Court's order granting family allowance to testator's widow was abandoned, where there was no statement of case or summary of material facts, no points were made, and appeal was unsupported by argument or citation of authority. West's Ann.Rules on Appeal, rule 13.

◆

Potter & Rouse, Frank Wickhem, and Bernard Potter, Los Angeles, for appellants.

John N. Hurtt, Los Angles, for respondent.

VALLÉE, Justice.

This is a companion case to Estate of Luckel, Cal.App., 312 P.2d 24. It is an appeal from an order entered August 1, 1956 granting a family allowance.

The appeal is not pressed. There is no statement of the case or summary of the material facts. Rule 13, Rules on Appeal. No points are made and the appeal is unsupported by argument or citation of authority. Counsel say "The purpose of said appeal was to apprise this court of the facts relating to the condition of the estate, and that from the date of death of decedent a family allowance was paid originally of $150 per month until the filing of the inventory, and thereafter $115 per month up to the present time, and that if the administrator was compelled to pay the $100 per month from date of death, as well as the family allowance, it would amount to a double payment which was impossible to do." It appears from the order that it expired December 1, 1956. We deem this appeal to have been abandoned.

The order granting a family allowance is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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151 Cal.App.2d 579

Clifford J. JOHNSON, Plaintiff and Respondent,

v.

Torsten R. LEHTONEN, Defendant and Appellant.

Civ. 17438.

District Court of Appeal, First District, Division 2, California.

June 10, 1957.

Suit for specific performance of a contract for the sale of a portion of two lots. Judgment for the plaintiff in the Superior Court, County of Santa Clara, Michael di Leonard, Judge pro tem., and the defendant appeals. The District Court of Appeal, Dooling, J., held that specific performance would lie, notwithstanding that property was held in joint tenancy by the defendant and his wife since it could be granted as to the interest which the defendant actually possessed; that the description while uncertain was made certain by proof; and that defendant was entitled to award of only one-half of the purchase price.

Decree affirmed.

1. Pleading 🔑36(3)

Where defendant expressly admitted in answer that he executed agreement for sale of property, he could not dispute such fact on trial.

2. Pleading 🔑36(3)

Where defendant expressly admitted in answer that he executed agreement for sale of property, his attempt to prove lack of written authority by his alleged agent over objection that such fact was not in issue was unavailing, where the defendant at no time asked leave to amend his answer in such respect.

3. Specific Performance ⚷10(1)

If vendor has any interest in property he has contracted to convey, vendee, at his option may enforce a contract with respect to whatever interest the vendor possesses.

4. Specific Performance ⚷10(2)

Where property, the sale of which was sought to be specifically enforced was held in joint tenancy by defendant and his wife, specific performance would lie as to the interest which the defendant actually possessed.

5. Specific Performance ⚷29(2)

A description of property in a contract is sufficient to support a decree for specific performance where there is but one tract owned by the vendor answering the description.

6. Specific Performance ⚷29(3)

Specific performance would lie for conveyance of portion of lots which the defendant agreed to sell where the description while uncertain on its face as to what portion of the lots was covered by the contract was made certain by proof that the portion covered by the decree was the portion of the lots in fact owned by defendant and his wife.

7. Husband and Wife ⚷262(1), 264

Where property was held by defendant and his wife in joint tenancy, the presumption was that it was not community property, and proof that it was purchased with community funds was not sufficient standing alone to overcome the presumption, that it was not community property.

8. Specific Performance ⚷99

Where contract provided that purchase price was to be paid on receipt of approval from the Planning Commission of the City to subdivide the lots purchased into two separate building sites, provision was for the benefit of the buyer and the seller could not defeat specific performance by complaining of the delay in obtaining the approval.

9. Specific Performance ⚷130

Where parties intended to convey the entire fee in property owned by defendant and his wife in joint tenancy and defendant could convey only an undivided one-half thereof, the award of one-half of the purchase price was all that he was entitled to in granting specific performance to the buyer.

Henry B. Lister, San Francisco, P. J. C. Lindfors, San Francisco, of counsel for appellant.

John P. Wilson, Menlo Park, Leon E. Shiells, San Francisco, of counsel, for respondent.

DOOLING, Justice.

This appeal is taken from a decree of specific performance. By a written contract dated August 23, 1954, appellant agreed to convey to respondent for a price of $8,500: "Portion of Lots Nos. 12 and 13, Block 114, Crescent Park Subdivision" in the City of Palo Alto. The contract was signed for appellant: "Torsten R. Lehtonen by Jarl Lindfors, his attorney in Fact."

It developed that the property in question was held in joint tenancy by appellant and his wife and by the decree appellant is compelled to convey his undivided one-half interest therein for one-half of the purchase price, $4,250.

[1, 2] The appellant's argument that Lindfors had no authority in writing to execute the contract is foreclosed by the admission in his answer. The complaint alleged: "That * * * defendant, Thorsten [sic] R. Lehtonen, and the plaintiff did enter into that certain agreement, a copy of which is attached hereto, designated Exhibit 'A', and by reference is made a part hereof." A copy of the agreement was attached to the complaint marked "Exhibit A". In the answer the truth of the above quoted allegation was expressly admitted. Having admitted that he executed the agreement appellant could not dispute this fact on the trial and his attempt to prove lack of written authority in Lind-

fors over objection that the fact was not in issue could not avail him, since he at no time asked leave to amend his answer in this respect.

[3, 4] There is no difficulty in enforcing the contract by specific performance as to the interest which appellant actually possessed. "If the vendor has any interest in the property that he has contracted to convey, the vendee, at his option, may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance." Miller v. Dyer, 20 Cal.2d 526, 529, 127 P.2d 901, 903, 141 A.L.R. 1428; Smiddy v. Grafton, 163 Cal. 16, 124 P. 433; Farnum v. Clarke, 148 Cal. 610, 84 P. 166; Easton v. Montgomery, 90 Cal. 307, 27 P. 280; Armstrong v. Sacramento Valley Realty Co., 52 Cal.App. 110, 198 P. 217. Marshall v. Caldwell, 41 Cal. 611, was an exactly parallel case. There the vendor agreed to convey described property and, as here, owned only an undivided one-half interest. The court affirmed a decree of specific performance as to the one-half interest and said (41 Cal. at page 615): "To entitle the defendant to the relief, it was necessary for him to pay or tender as the purchase money only one half of the contract price."

[5, 6] The description in the contract, while uncertain on its face as to what "portion" of Lots 12 and 13 was covered by the contract, was made certain by the proof that the portion covered by the decree was the portion of those lots in fact owned by the appellant and his wife. The description of property in a contract is sufficient to support a decree for specific performance where there is but one tract owned by the vendor which will answer the description. Carr v. Howell, 154 Cal. 372, 375–378, 97 P. 885; Beverage v. Canton Placer Mining Co., 43 Cal.2d 769, 776, 278 P.2d 694; Joyce v. Tomasini, 168 Cal. 234, 142 P. 67.

[7] Appellant argues that the presumption is that this land was the community property of himself and his wife. The property being held in joint tenancy the presumption was just to the contrary and proof that it was purchased with community funds is not sufficient standing alone to overcome the presumption that it was not community property. Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656; Schindler v. Schindler, 126 Cal.App.2d 597, 602, 272 P.2d 566.

[8] The contract provided that the purchase price was to be paid "on receipt of an approval from the Planning Commission of the City of Palo Alto to subdivide the said lots into two (2) separate building sites." This provision is obviously for the benefit of the buyer and might have been waived by him. Appellant cannot complain of the delay in obtaining it. In fact such approval was given as pleaded and found by the trial court.

[9] The evidence is clear that the parties intended the contract to cover the entire fee in the property and since appellant can convey only an undivided one-half thereof the award of one-half the purchase price is all that he is entitled to.

Decree affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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151 Cal.App.2d 545

Stanley C. ANDERSON, Plaintiff, Cross-Defendant and Appellant,

v.

Joseph D. BRADY, Walter L. Nossaman, John O. Paulston, Charles M. Walker and James L. Wood, Defendants and Respondents,

Joseph D. Brady and Walter L. Nossaman, Cross-Complainants and Respondents.

Civ. 21936.

District Court of Appeal, Second District, Division 3, California.

June 7, 1957.

Rehearing Denied July 2, 1957.

Hearing Denied July 31, 1957.

Action by attorney against his alleged copartners for an accounting and declaratory relief. The alleged copartners cross-complained for an accounting and for reasonable rental value of alleged copartners' office and facilities used by attorney to complete certain matters after withdrawing from the firm. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment that attorney take nothing by reason of the complaint and that alleged copartners recover upon the cross-complaint, and attorney appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained Superior Court's findings that there had been complete agreement as to basis of attorney's compensation, that the agreement had been mutually performed, and that attorney had been paid the full compensation which he earned and agreed to accept.

Judgment affirmed.

1. Attorney and Client ⚷30

In action by attorney against his alleged copartners for an accounting and declaratory relief, wherein alleged copartners cross-complained for an accounting and for reasonable rental value of alleged copartners' office and facilities used by attorney to complete certain matters after withdrawing from the firm, evidence sustained Superior Court's findings that there had been complete agreement as to basis of attorney's compensation, that the agreement had been mutually performed, and that attorney had been paid the full compensation which he earned and agreed to accept.

2. Appeal and Error ⚷1071(5)

If one or more of the findings, which are supported by substantial evidence, sustain the judgment, questions relative to other findings are immaterial.

3. Appeal and Error ⚷991

In action by attorney against his alleged copartners for an accounting and declaratory relief, wherein alleged copartners cross-complained for an accounting and for reasonable rental value of alleged copartners' office and facilities used by attorney to complete certain matters after withdrawing from the firm, question as to reasonable value of attorney's services, which were involved in completing the matters, and value of which was set off against fees received by attorney and withheld from firm pending a final accounting under the alleged partnership agreement, was question of fact for trial court.

4. Pleading ⚷236(7)

Where, in action by attorney against his alleged copartner for an accounting and declaratory relief, the alleged copartners cross-complained for an accounting and other relief, and attorney knew that alleged copartners were asserting that attorney had been fully paid, denial of attorney's motion, made on tenth day of trial, to amend his pleadings to include an additional issue was not an abuse of discretion, in absence of showing that motion was based upon facts not known to attorney for a considerable time prior to making of the motion.

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N. E. Youngblood, Beverly Hills, and Robert M. Maslow, Hollywood, for appellant.

Frank P. Doherty, Frank W. Doherty, and Robert M. Barton, Los Angeles, for respondents.

PARKER WOOD, Justice.

The complaint alleged that plaintiff and the defendants Brady, Nossaman, and Paulston entered into an oral partnership agreement for the practice of law. Plaintiff sought an accounting and declaratory relief. Defendants denied generally and specifically the allegations of the complaint, except that plaintiff was an attorney at law; and defendants alleged that plaintiff and defendants were partners under certain conditions, restrictions, and limitations.

Defendants Brady and Nossaman filed a cross-complaint, alleging that plaintiff and defendants Brady and Nossaman entered into an oral partnership agreement under certain conditions, restrictions, and limitations; that plaintiff voluntarily withdrew from the partnership; that after such withdrawal plaintiff, while completing certain work pursuant to agreement, received money belonging to cross-complainants and used an office and facilities of cross-complainants. Cross-complainants sought an accounting and reasonable rental value of the office and facilities. Plaintiff, in his answer to the cross-complaint, offered to account for the money in connection with the final accounting in the partnership matter.

The judgment was that plaintiff take nothing by reason of the complaint, and that cross-complainants recover $8,359.91 upon the cross-complaint. Plaintiff appeals from the judgment.

Appellant contends (1) that the court erred in finding that plaintiff was not a partner; (2) the court erred in determining the amount due under the cross-complaint; and (3) the court abused its discretion in denying plaintiff's motion to amend his "pleadings."

For several years prior to December, 1942, Mr. Joseph D. Brady practiced law in Los Angeles, specializing in tax matters. In December, 1942, Mr. Brady and Mr. Walter L. Nossaman formed a partnership to practice law under the firm name of Brady and Nossaman, and thereafter they practiced law as partners.

On January 1, 1943, Mr. John O. Paulston, an attorney at law, was employed by the firm of Brady and Nossaman under an oral agreement that he would be paid a reasonable amount for his services, and that from time to time he would be paid such amounts as he would request and as would be approved by the firm, and that at the end of each fiscal year (which was November 30) Mr. Brady would review the services performed by Mr. Paulston during the year, and Mr. Brady would determine, with the approval of Mr. Nossaman, an additional amount that should be paid to Mr. Paulston for his services.

On December 15, 1943, Mr. Anderson, plaintiff herein, was employed by the firm under an oral agreement which was in substance the same as the agreement between Mr. Paulston and the firm.

Mr. Paulston and Mr. Anderson rendered services under the oral agreements. During each fiscal year, prior to January 1, 1947, and pursuant to the employment agreements, the firm paid Mr. Paulston and Mr. Anderson such amounts as they requested; and also at the end of each fiscal year Mr. Brady held a conference with each of them, reviewed each one's services for the year and determined, with the approval of Mr. Nossaman, the additional amount that was to be paid to each one for that year.

About November 30, 1946, when Mr. Brady held the third year-end conference with Mr. Anderson, Mr. Brady gave Mr. Anderson his additional or augmentation check for that year. About that date there was a conversation between Mr. Brady and Mr. Anderson which allegedly constituted a partnership agreement.

Mr. Brady testified that on said November 30, 1946, or shortly thereafter, he told Mr. Anderson that he had talked to Mr. Nossaman about asking Mr. Anderson if he would like to become a partner of a very restricted type; that Mr. Anderson replied that "he would like to"; Mr. Brady told Mr. Anderson at that time that insofar as the financial arrangement that would exist in the future between him and Brady and Nossaman, that it would be exactly the same as it had been during the past three years.

Plaintiff took the deposition of Mr. Brady. Mr. Brady testified therein that in November, 1946, about the time he determined the additional amount that should be paid to Mr. Anderson for that year, he told Mr. Anderson that he "had suggested to Walter [Mr. Nossaman] that both John Paulston and Stanley Anderson be told that if they wished to do so they could become—could be called partners within the restrictions set forth in our Answer." He also testified therein that he thought he did not use the word "restrictions", but he "told Mr. Anderson that as far as the financial arrangements between him and the firm of Brady & Nossaman, they would remain just as they had been in the past." He also testified therein that he told Mr. Anderson that Mr. Nossaman and he liked Mr. Paulston and Mr. Anderson and they "thought his being called a partner would lend prestige to him in—in his relations with other lawyers and contemporaries at the bar and otherwise."

Mr. Anderson testified that about November 25, 1946, he and Mr. Brady had a conversation in Mr. Brady's office, and that "Mr. Brady said that Mr. Nossaman and he had decided or had come to the conclusion that it would be a good idea for Mr. Paulston and me to become members of the firm."

About the same date (November 30, 1946) there was a similar conversation between Mr. Brady and Mr. Paulston.

The effective date of the alleged partnership agreements was January 1, 1947. Thereafter Mr. Anderson and Mr. Paulston rendered services in the same manner as they had rendered services theretofore. Also, they were compensated in the same manner as they had been compensated, except that in 1949 and thereafter Mr. Anderson was permited to withdraw $1,000 a month. At the end of each fiscal year in 1947, 1948, and 1949, Mr. Brady held conferences with each of them, reviewed each one's services for the year, and determined, with the approval of Mr. Nossaman, the additional amount to be paid to each one. At the end of the fiscal year in 1950, a conference was not held with Mr. Anderson regarding the additional amount to be paid to him, but a check for an additional amount of $4,000 was placed on Mr. Anderson's desk. He accepted the check. At the end of the fiscal year in 1951, Mr. Brady held a conference with Mr. Anderson regarding the additional amount to be paid, and he determined, with the approval of Mr. Nossaman, that the additional amount should be $4,750 (making a total payment of $16,750 for that year). Mr. Anderson testified that he replied, in substance, that he thought the fees received by the firm in 1951 which were attributable to his services amounted to $43,000, and that the additional amount of $4,750 suggested by Mr. Brady was not acceptable until he had more data; that Mr. Brady replied that the fees totaling $43,000 were the result of services rendered by Mr. Anderson not only in 1951 but necessarily in prior years. On December 4, 1951, Mr. Anderson told Mr. Brady that he was withdrawing from the firm and that his withdrawal would be effective as of November 30, 1951 (the end of the fiscal year).

In January, 1952, Mr. Anderson accepted $5,000 (instead of $4,750) as the additional amount for 1951, without prejudice to his claim that the additional amount should be more.

After January 1, 1947 (the date of the alleged partnership agreement), Mr. Anderson was paid the following amounts: 1947—$14,000; 1948—$15,000; 1949—$15,000; 1950—$15,000; 1951—$17,000.

On or after January 1, 1947, the date of the alleged partnership agreement, there was no segregation of assets (on that date the amount of the firm's accounts receivable was between $150,000 and $200,000 and the firm had approximately $30,000 in a bank); no new books of account were opened; Mr. Anderson did not make a capital investment; he was not consulted regarding the personnel of the office; he did not attend any meeting with respect to the gross or net receipts of the firm, and he did not have information as to such receipts until after this action was filed; he did not know the amount of income of the firm or the amounts which were received from the firm by Mr. Brady or Mr. Nossaman; he had not seen the books of account, and he did not have access to those books.

After January 1, 1947, the firm of Brady and Nossaman sent out announcements, announcing "the admission to the partnership of" Mr. Paulston, Mr. Anderson, and Mr. Shaw. (The arrangement with Mr. Shaw was similar to the arrangement with Mr. Paulston and Mr. Anderson, except that he was paid a specified amount each month.) Also, after January 1, 1947 the firm of Brady and Nossaman listed, in an attorneys' directory, the name of Mr. Anderson as a member of the firm. In 1950 a certificate of doing business under the fictitious name of Brady and Nossaman was filed, reciting that Mr. Anderson was a partner. The firm filed a registration form with the California Department of Employment stating thereon that Mr. Anderson was a partner. The firm filed federal and state income tax returns, listing Mr. Anderson as a partner. The firm authorized Mr. Anderson, as a partner, to sign checks on bank accounts at the Union Bank and Trust Company and the Farmers and Merchants National Bank.

The bank accounts in the Union Bank and Trust Company and the Farmers and Merchants National Bank were in the amounts of $2,000 and $10,000 respectively. Those were inactive accounts and were for the purpose of promoting good will. The main or active bank account of the firm was with the Citizens National Bank, and Mr. Anderson was not authorized to draw checks on that account.

Appellant contends that the court erred in finding that he was not a partner. He argues to the effect that the finding that he was not a partner was contrary to admissions in defendants' pleadings that he was a partner. He argues further that even if there is not such an admission in the defendants' pleadings the finding that he was not a partner is not supported by the evidence.

The complaint alleged that plaintiff was a partner. As above stated, the answer denied generally and specifically the allegations of the complaint, except that plaintiff was an attorney; and the answer alleged that: "In the latter part of 1946, Mr. Brady * * * invited Mr. Paulston and Mr. Anderson to become partners in the law firm of Brady and Nossaman, commencing January 1, 1947 under the following special conditions, restrictions, and limitations[1] * * *." The cross-complaint alleged that: "On November 30, 1951, Mr. Brady and Mr. Nossaman, together with Mr. Anderson and John O. Paulston * * * were members of a partnership for the practice of law in the City of Los Angeles * * * under the firm name * * * of Brady and Nossaman. On or before December 4, 1951, Mr. Anderson voluntarily withdrew from said partnership * * *." It was also alleged in the cross-complaint that plaintiff did not own or possess any interest in the assets, capital investment, or accounts of the partnership, and that plaintiff's only financial interest under the oral partnership agreement was limited to the right to receive from time to time during the year amounts requested by him, as approved by Mr. Brady, plus an additional amount at the close of the year, as determined by Mr. Brady and Mr. Nossaman, in full payment for plaintiff's services as a partner during the year.

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[1] "1. That neither Mr. Paulston nor Mr. Anderson would be permitted to purchase or own or possess any interest in the assets, capital investment, and accounts of said law partnership as of January 1, 1947, or thereafter. 2. That in payment of the respective services of Mr. Paulston and Mr. Anderson as partners during each fiscal year ending November 30, Mr. Paulston and Mr. Anderson would receive amounts as follows: (a) Mr. Paulston and Mr. Anderson would continue to be entitled to receive, as in prior years, and from time to time during the course of said law firm's fiscal year such sums of money as Mr. Paulston and Mr. Anderson, or either of them, might request and need for living or other expenses and in an amount, or amounts, to be approved by Mr. Brady. (b) At the close of each fiscal year on November 30, Mr. Paulston and Mr. Anderson, and each of them, would receive for their respective contributions by way of service as partners during such year an additional amount, if any, as Mr. Brady would fix and determine and which Mr. Nossaman would approve, over and above the sums and amounts received in said year by Mr. Paulston and Mr. Anderson, respectively, during the course of said fiscal year. * * * (c) * * * (d) * * (e) * * * (f) * * * (g) * * * (h) * * * (i) * * * (j) * * *." The allegations in said subdivisions (c) to (j) inclusive, which are omitted in the above quotation, were to the effect that Mr. Brady in determining the amounts to be paid would take into consideration the quality of the services rendered, the time given in performing the services, the importance of the matters, the fees earned, and other factors bearing upon the value of the contributions of Mr. Paulston and Mr. Anderson as partners; that it was in the contemplation of the parties that substantially all the clients of the law firm would be persons or firms that needed the services of those specializing in tax matters and would seek the services of Mr. Brady and Mr. Nossaman, and that Mr. Paulston and Mr. Anderson did not have any established private practice and did not have clients who were seeking their services in tax matters; that it was in the contemplation of the parties

It thus appears that there was a general denial that plaintiff and defendants were partners, and it appears that defendants alleged further that plaintiff was invited to become a partner and that he was a member of a partnership under specifically alleged conditions, restrictions, and limitations.

It is to be noted that at the beginning of the trial, counsel for plaintiff apparently was of the opinion that under the pleadings there was an issue as to whether plaintiff was a partner. When the case was called for trial, counsel for plaintiff said that it had been stipulated as to the order of proof that the first issue to be heard was whether plaintiff was a partner, as that issue is set up, alleged and denied in the pleadings. The trial proceeded about three days before counsel for plaintiff asserted that the existence of a partnership was admitted by defendants' pleadings.

The court found (Finding 29) that: "Excepting for the label of 'partner' and the designations of 'member of the firm' and similar labels, the relationship and status of Mr. Paulston and Mr. Anderson to the partnership of Brady & Nossaman was substantially and in every material respect the same subsequent to January 1, 1947, as it existed prior to that day." The court also found (Finding 29) that there did not exist between Mr. Anderson, on the one hand, and Mr. Brady and Mr. Nossaman, on the other hand, any of the essential elements or any agreement which recognized the relationship of partners between them, or which gave to Mr. Anderson any of the rights which must exist in a partnership relationship such as co-owners of partnership assets, the right to share in the profits, or any of the other factors the law requires must exist to entitle Mr. Anderson to the relief sought by him. Also there was a finding (No. 40) that there was no agreement between Mr. Anderson, on the one hand, and any of the defendants, on the other hand, that Mr. Anderson was or would be a partner with

that the fees received by the firm would continue to be deposited in the Citizens National Bank and that checks on the account would be subject only to the signature of Mr. Brady or Mr. Nossaman; that after the payment to Mr. Paulston and Mr. Anderson of the amounts as above stated, the balance of the fees would be retained by Mr. Brady and Mr. Nossaman to be shared between them as determined by Mr. Brady; that it was in the contemplation of the parties that no accounting or statement would be prepared for the information of Mr. Paulston or Mr. Anderson or that there would be prepared for the information of Mr. Paulston or Mr. Anderson or that there would be submitted to either of them any statement of the fees received or disbursements made in connection with the affairs of the firm; that it was agreed by the parties that the accounts then being serviced by the firm as it existed on December 31, 1946, and any fees paid by said clients would be the sole property of Mr. Brady and Mr. Nossaman; that Mr. Brady in determining, subject to Mr. Nossaman's approval, the amounts to be paid to Mr. Paulston and Mr. Anderson in any year would give careful consideration to every factor which had a bearing upon the amounts to be paid for their contributions, and that such determination would be fair and reasonable.

any of the defendants or a member of the partnership of Brady and Nossaman.

It seems that appellant is proceeding upon the basis that if the finding to the effect that he was not a partner is contrary to defendants' pleadings or is not supported by the evidence the judgment should be reversed. It is to be noted that the judgment does not rest solely upon that finding. There were many additional findings pertaining to the terms of the oral agreement under which plaintiff was to render legal services in the office of Brady and Nossaman, and pertaining to the conduct of the parties in the matter of the agreement after the agreement was made. As above stated, there were detailed allegations in defendants' pleadings relative to the terms of the agreement and the conduct of the parties after the agreement. Plaintiff does not challenge those additional findings. The substance of several of those findings is stated in the following three paragraphs.

The court also found that about November, 1946, Mr. Brady, with the concurrence of Mr. Nossaman, extended an invitation to plaintiff to become a member of the firm of Brady and Nossaman, and that the terms, conditions, and limitations of the invitation were evidenced by conversations, and by the acts, conduct and relationship of all parties. Those terms, conditions, and limitations were as follows: The relationship would be effective as of January 1, 1947. Plaintiff would not be permitted to purchase or own any interest in the assets of the firm or to make any capital investment therein. Plaintiff would receive from the firm payment for services as follows: He would continue to receive for his services as in the years prior to January 1, 1947, such sums of money as he might request from time to time during the fiscal year, in amounts to be approved by Brady and Nossaman. At the close of each fiscal year he would be paid such additional sum, over and above the payments made during the year, as Brady and Nossaman would fix and determine would be reasonable to be paid to him for services rendered during the year. The fees received by the firm, including fees for services of plaintiff, would continue to be deposited as in previous years in the Citizens National Bank in the name of Brady and Nossaman, and that plaintiff would have no ownership in said fees so deposited and would not be permitted to withdraw money from the account. Each year, after paying plaintiff (and Mr. Paulston and Mr. Shaw), Mr. Brady and Mr. Nossaman would determine between themselves, pursuant to their agreement, the distribution of the residue of the net earnings of the firm, and such distribution would be made without consultation with or consent of plaintiff. The firm would not make any accounting or report to plaintiff of income, disbursements, assets or liabilities of the firm. Mr. Brady and Mr. Nossaman were to be the sole judges of the division and distribution of said residue of the income. Plaintiff would not have any authority to enter into contracts on behalf of Brady and Nossaman without the consent of Brady and Nossaman. Plaintiff would have no authority to make any arrangements respecting the employment or compensation of the office staff, or junior or associate attorneys. On law business originated by plaintiff any fees paid by those clients would be the property of the Brady and Nossaman firm, and plaintiff would have no claim or interest in said fees. Plaintiff (or Mr. Paulston or Mr. Shaw) would not carry on any private practice for his own account. At the end of each fiscal year the sum determined by Brady and Nossaman to be paid to plaintiff was to include full payment for all services rendered by him during the year irrespective of whether the matter upon which he had performed services was completed or incompleted or whether the clients for whom the services were rendered had paid the firm for such services rendered by plaintiff. Plaintiff was not to have access to the books of account.

The court also found that: Plaintiff did not own any interest in the assets of the firm and did not make any capital investment therein. At the end of each fiscal year, after plaintiff (and others) had been paid reasonable sums for services, Mr. Brady and Mr. Nossaman determined the distribution of the residue of the net earnings of the firm, without consulting plaintiff. None of said residue of income was paid to plaintiff and no request was made by him that any part thereof be paid to him. The firm did not make any accounting or report of income or other financial matters to plaintiff. As of December 31, 1946, the bank balance, subject to check by Brady and Nossaman, was approximately $30,000, and the value of other assets of the firm, including uncollected fees, was between $150,000 and $200,000. Mr. Brady and Mr. Nossaman employed the office staff without consulting plaintiff. Plaintiff did not make any claim to title or ownership of any part of the assets. The sum determined and paid by Brady and Nossaman during and at the end of each fiscal year to plaintiff included full payment for all services rendered by him during the year, irrespective of whether any matter upon which he had been working was completed or whether the clients had paid for the services. Plaintiff had no right of access to the books of account, and prior to November 30, 1951, plaintiff never sought access to or information respecting the books. On December 4, 1951, when plaintiff severed his connection with Brady and Nossaman he requested information respecting the financial affairs of the firm for the year 1951. The aggregate amounts paid to plaintiff by the firm for each of the fiscal years from 1947 to 1951, inclusive, was a fair and reasonable sum for all services rendered by him to the firm during all of said years including any legal business originated by him for the firm. With the exception of the year ending November 30, 1951, plaintiff accepted said sums so paid to him in full satisfaction for all sums due or to become due to plaintiff from the firm for all services rendered in said years. After January 1, 1947, financial affairs, records, and accounts continued as they had been carried on prior to that date. Prior to December 4, 1951, when plaintiff severed his connection with the firm, plaintiff had not asked Mr. Brady or Mr. Nossaman for information regarding the financial affairs of the firm. On said November 4 plaintiff did not express any dissatisfaction with respect to the sums he received for the prior years. About November 30, 1951, when plaintiff and Mr. Brady were discussing the amount which would be equitable to be paid to plaintiff for 1951, plaintiff's sole complaint was that he was entitled to more than $16,750 because his services produced about $42,000 for the firm that year. The $42,000 received by the firm during that year was for services performed by plaintiff in years prior to 1951 and for which he had been fully paid.

The court also found that at the time of the trial Brady and Nossaman made a fair, accurate and complete accounting upon all dealings and transactions between plaintiff and the firm, including the matters put in issue in the cross-complaint and the answer thereto.

[1, 2] It thus appears, according to said additional findings, that there was a complete agreement as to the basis of plaintiff's compensation, that the agreement was mutually performed, and that plaintiff was paid the full compensation he earned and agreed to accept. Those findings are supported by the evidence. Plaintiff's right to compensation depended upon the agreement which he made. The conversation which was the basis for plaintiff's claim that he is entitled to additional compensation was brief. According to plaintiff, Mr. Brady said that he and Mr. Nossaman had decided that it would be a good idea for plaintiff to become a member of the firm. According to Mr. Brady, he told plaintiff that he had talked to Mr. Nossaman about asking plaintiff if he would like to become a partner of a very restricted type; that plaintiff replied that he would like to; that Mr. Brady said the financial arrangement in the future would be the same as it had been in the past, and that he thought that plaintiff's being called a partner would lend to plaintiff's prestige. There was nothing in the conversation to indicate that

plaintiff would be entitled to share in any specified portion of the profits, or that he acquired any interest in the assets of the firm, or that he assumed any additional responsibility. It could be concluded from the conversation that there would be no change in the financial arrangement that had existed during the preceding three years. With the exception of the year 1951 (when the relationship ended), plaintiff did not object to the manner in which his compensation was determined. Whether or not plaintiff be regarded as a partner, his compensation was to be determined in the same manner, that is, it was to be determined by Mr. Brady with the approval of Mr. Nossaman, as it had been determined prior to January 1, 1947. In view of the agreement regarding plaintiff's compensation, as found by the court, it is not necessary to determine whether the court erred in finding that he was not a partner, In Coward v. Clanton, 122 Cal. 451, at pages 454–455, 55 P. 147 at page 149, wherein there was a question whether a partnership existed, it was said that often it is not necessary to determine whether a partnership exists; that a contract of partnership is, as to the parties, like any other contract, and the duties and liabilities imposed are to be deduced by its terms; and that, "This idea was expressed by Mr. Justice Lindley in Walker v. Hirsch, 27 Ch.Div. 260. He said: 'Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words. Their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered.'" Irrespective of whether the court erred in finding that plaintiff was not a partner, the additional findings support the judgment insofar as it determines that plaintiff was not entitled to additional compensation. "If one or more of the findings, supported by substantial evidence sustains the judgment, * * * questions relative to other findings are immaterial." Luckhardt v. Mooradian, 92 Cal.App.2d 501, 520, 207 P.2d 579, 590. See also Mershon Co. v. Pachmayr, 88 Cal. App.2d 901, 904, 199 P.2d 687.

Appellant also contends that the court erred in determining the amount due under the cross-complaint. After Mr. Anderson said he was withdrawing from the firm, Mr. Brady requested him to complete certain matters on which Mr. Anderson had been working. Mr. Anderson agreed to complete the matters. While he was rendering services in those matters, he occupied an office of the firm about three and one-half months (until March 14, 1952). Then he moved to his own office and thereafter completed the matters. During the time he was completing those matters he received fees from the clients in the amount of $20,397.91, which amount he held pending a final accounting under the alleged partnership agreement. The cross-complaint pertained to the money received under those circumstances.

The court found that plaintiff had received $20,397.91; there was no agreement regarding the compensation to be paid for those services of plaintiff; the plaintiff devoted 590½ hours in performing the services—that 355 of those hours were spent in performing services in the firm's office, and 235½ hours were spent in performing services in plaintiff's office; the reasonable compensation for services rendered in the firm's office was $15 an hour, and the reasonable compensation for services rendered in his office was $20 an hour; the reasonable value of his services in completing the work was $12,038, which included $695 for services in three cases originated by him, and also included $702.50 paid by him to assistants in his office; it was equitable that the $12,038 be applied as an offset against the $20,397.01, and that the difference between those amounts, namely, $8,359.91 was due from plaintiff to the firm.

[3] Appellant argues that the amount of compensation as found by the court, was not reasonable; that compensation based on $15 to $20 an hour gives no consideration "to the worth of the cases worked on" by him. Mr. Brady testified that in his opinion $15 an hour was the reason-

able value of the services rendered in the firm's office, and $20 an hour was the reasonable value of the services rendered in plaintiff's office. The trial judge asked plaintiff his opinion as to the reasonable value of the services performed by him after November 30, 1951 (in completing the cases). He replied that he could not answer the question. The question as to the reasonable value of the services was a question of fact for the trial court. The evidence was sufficient to support the finding as to the amount due under the cross-complaint.

[4] Appellant also contends that the court abused its discretion in denying plaintiff's motion to amend his pleadings. The motion to amend appears on pages 914 and 915 of the reporter's transcript. As above shown, the issue as to whether there was a partnership was tried first. The trial proceeded approximately five days as to that issue, and then the court announced its decision thereon. Then, after an adjournment of the trial for approximately three weeks, the trial proceeded on the cross-complaint. During the fifth day of the trial on the cross-complaint, plaintiff made the motion to amend. In making the motion counsel for plaintiff said: "[B]y reason of the ruling * * * with regard to the issue of partnership * * * I am surprised by the ruling and I ask leave at this time to amend our pleadings by way of answer and counterclaim * * * to include any and all matters which, except for the finding * * * that the plaintiff Anderson was not a partner, would have been his personal law business during the entire period from January 1, 1947, down to the present time, and ask for affirmative relief in his behalf for moneys received by the law firm of Brady and Nossaman * * * upon the basis that he was induced to believe * * * that he was a bona fide partner * * * or upon the principle of moneys had and received which were taken by them and retained upon the mistaken fact by Mr. Anderson that he was a partner." Prior to the trial plaintiff made a motion for an order permitting him to inspect the books of the firm. Affidavits were filed in support of and in opposition to that motion. The motion was denied. Plaintiff took the deposition of Mr. Brady. In view of those affidavits, the deposition, and the extended trial that preceded the motion to amend, it is apparent that the issues were well defined, that it was known that defendants were asserting that plaintiff had been fully paid each year, and that plaintiff had ample opportunity prior to the tenth day of trial to make a motion to include an additional issue. It does not appear that the motion was based upon any facts which were not known to plaintiff for a considerable time prior to the time the motion was made. The court did not abuse its discretion in denying the motion to amend.

The judgment is affirmed.

SHINN, Presiding Justice.

I concur. The court found that plaintiff made a certain agreement with defendants as to his interest in the firm, operated under it for five years, and was paid in full. That was his entire case against the defendants. I cannot understand why the court made forty (40) findings of evidentiary facts and conclusions, comprising forty-nine (49) full, closely typed pages of the clerk's transcript, which added nothing but confusion to the findings of the ultimate facts. It is always presumed on appeal that the trial court gave effect to the evidence which logically tended to establish the ultimate facts found. When this rule can be properly applied evidentiary findings can serve no good purpose.

On appeal, plaintiff does not even mention the findings respecting the terms of the partnership agreement and its full performance, which, alone, defeat his claims against the defendants under that agreement. This seems to me to be a clear concession that, as to his claims as a partner, the evidence supports the findings and the findings support the judgment.

VALLÉE, J., deeming himself disqualified, did not participate.

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Rosario Joseph BOUCHARD, Defendant and Respondent. *

Cr. 5927.

District Court of Appeal, Second District, Division 1, California.

June 12, 1957.

Hearing Granted Aug. 6, 1957.

Prosecution charging defendant with possession of brass knuckles. The Superior Court set aside the information and the attorney general for the People appealed. The District Court of Appeal, Drapeau, J. pro tem., held that motion to quash the information was properly granted where attorney on whom papers were served for defendant no longer represented the defendant.

Motion granted.

1. Attorney and Client 🔑76(4)

The authority of an attorney to prosecute or defend an action ordinarily terminates after the entry of a final judgment.

2. Criminal Law 🔑1131(4)

In prosecution charging defendant with possession of brass knuckles, motion to quash was properly sustained where papers on appeal were served upon the attorney who represented defendant in the Superior Court, and attorney stated that he no longer represented the defendant, and that defendant could not be found. West's Ann.Pen.Code, § 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for appellant.

Gladys Towles Root, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

In accordance with the provisions of section 995 of the Penal Code, the Superior Court set aside an information charging defendant with possession of brass knuckles, a felony. The Attorney General, for the People, appeals from the order.

Papers on appeal were served upon the attorney who represented defendant in the Superior Court. This attorney now moves to quash the service of these papers upon the ground that she no longer represents defendant, that he is a transient, has left for parts unknown, and cannot be found.

[1, 2] The authority of an attorney to prosecute or defend an action ordinarily terminates after the entry of a final judgment. Reynolds v. Reynolds, 21 Cal.2d 580, 584, 134 P.2d 251; 6 Cal.Jur.2d 354. This rule has a number of exceptions, none of which, however, seem to apply in this case.

Therefore, the motion to quash is well taken and is granted.

WHITE, P. J., and DORAN, J., concur.

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* Opinion vacated 317 P.2d 971.

151 Cal.App.2d 594

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel Reyes MERINO, Defendant and Appellant.

Cr. 5752.

District Court of Appeal, Second District, Division 1, California.

June 10, 1957.

Prosecution on information charging defendant with possession of narcotics and a prior conviction. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fourt, J., held that where arresting officers had specific, positive and definite information regarding the name of defendant, his employer, source of narcotics, the amount of narcotics and address of defendant from a confidential informant, and officers had arrested defendant and had found narcotics on bathroom window sill, narcotics seized, after arrest without warrant, were not result of an unlawful search and seizure and were properly admitted into evidence.

Judgment affirmed.

1. Arrest ⚷63(4), 71

Criminal Law ⚷395

Where arresting officers had specific, positive and definite information regarding the name of defendant, his employer, source of narcotics, the amount of narcotics and address of defendant from a confidential informant, and officers had arrested defendant and had found narcotics on bathroom window sill, narcotics seized, after arrest without warrant were not obtained as the result of an unlawful search and seizure and were properly admitted into evidence. West's Ann.Health & Safety Code, § 11500. West's Ann.Pen.Code, § 836, subd. 3.

2. Arrest ⚷63(4)

In making arrest without warrant police officers were not limited to evidence that necessarily would be admitted at the trial on the issue of guilt, and there was no requirement that the name of the informant, who had given arresting officers specific information concerning defendant and his possession of narcotics, be disclosed. West's Ann.Health & Safety Code, § 11500.

3. Arrest ⚷63(4)

Where arresting police officers, acting upon specific information supplied by confidential informant as to defendant's possession of narcotics, had entered defendant's house, and defendant had attempted to prevent officer's entry into bathroom, where narcotics were found, defendant's resistance was ample corroboration of confidential information and gave officers reasonable cause to believe that a felony was being committed in their immediate presence justifying arrest without warrant. West's Ann.Pen.Code, § 836, subd. 3.

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Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur L. Martin, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction for violation of the provisions of section 11500 of the Health and Safety Code (possession of narcotics).

In an information filed April 10, 1956, in Los Angeles county, the defendant was charged with a violation of the provisions of section 11500, Health and Safety Code, and further, it was charged that before the commission of the offense charged, namely in 1950, he was convicted of the crime of robbery and served a term in the state prison therefor. The defendant pleaded not guilty and denied the prior conviction. A trial by jury was waived by the defendant, his attorney and the district attorney. By stipulation, the case of the People was submitted on the transcript of the testimony taken at the preliminary hearing and the exhibits referred to therein. The defendant did not testify in his own behalf, nor did he present any witnesses or other evidence. The defendant was found guilty as charged, and it was further found that the charge of the prior conviction was true and the defendant was thereupon sentenced to the state prison, the sentence to run concurrently with the sentence on which he was then on parole.

A résumé of the facts is as follows: Between 11:30 o'clock a. m. and noon, on March 21, 1956, Frank Batelle, a police officer of the Los Angeles Police Department, met a "confidential informer", whom the officer had known for ten years and had been in direct contact with on and off for the past three or four years, when the informant was not in jail. On previous occasions the officer had received information from the informant. The informant told the officer that "he would take [Batelle] and point out a house in which a known narcotic pusher was living and also that he [the narcotic pusher] had approximately two ounces of heroin in the house at that time"; that defendant Merino worked for Armando Mendoza and that the narcotics had been brought from Tijuana two or three days before the date of the conversation, and some of which were the narcotics the defendant had in his possession at the house in question. The officer had known the defendant previously by nickname from a source other than the informant. The officer drove with the informant to a stated address, which the informant pointed out as the house where the narcotics were. The informant also told the officer that the black Oldsmobile '98 automobile, parked in front of the house, was the car owned by the defendant. Following the pointing out of the house, the officer drove the car in which they were riding four or five blocks away and let the informant out. The officer who had been given the information, and another officer named Frias, returned at once to the house in question. Batelle entered the front door and Frias entered the side or rear door of the house. The front screen door was closed, but the wooden door was open, as was the door through which Frias entered. Upon entering, the officers were met by the defendant's wife, who screamed and wanted to know who they were. The officers identified themselves as police officers and asked for "Largo", the defendant's nickname. She stated that he was in the bathroom taking a shower but the officers heard no sound of running water. At about this time the defendant opened the bathroom door and started to come out, and when Batelle identified himself, the defendant attempted to slam the bathroom door. Batelle put his foot in a position to the end that the door could not be shut, and a struggle ensued between the officer and the defendant. The defendant was then handcuffed and Batelle found a metal tray containing thirty-seven capsules of heroin on the window sill directly above the toilet bowl in the bathroom. Shortly after the arrest the officer and the defendant, in the presence of the defendant's wife, had a conversation in which the defendant freely and voluntarily stated that he had no more "stuff", and that the narcotics which had been found belonged to him, and that his wife knew nothing about it.

[1] The defendant contends that the narcotics in question were obtained as the result of an unlawful search and seizure, and were erroneously admitted into evidence in violation of his constitutional rights.

This is not a case where the officer received information from an anonymous person, or just a mere "tip", nor is it the situation where the officer was told that "maybe" or "pershaps" the defendant might have some heroin in his possession. The officer had specific, positive and definite information regarding the name of the defendant, his employer, the source of the narcotics, the amount of the narcotics and the address of the defendant. Further, there is some evidence that the officer had some knowledge of the defendant from another source.

Penal Code section 836 provides, among other things:

> "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
>
> * * * * * *
>
> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it * * * ."

In People v. King, 140 Cal.App.2d 1, at pages 5 and 6, 294 P.2d 972, at page 975, it is said:

> "It is settled that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admissible at the trial on the issue of guilt. [Citing cases.]
>
> " 'The term, reasonable or probable cause, has been defined: "By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.
>
> " 'The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal. App. 420, 421, 97 P. 77.' People v. Novell, 54 Cal.App.2d 621, 623–624, 129 P.2d 453, 454.
>
> "It was stated in People v. Brite, 9 Cal.2d 666, at page 687, 72 P.2d 122, at page 133: ' "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." (Citing cases.) Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. (Citing cases.)'
>
> "Appellant also contends that the confidential informant had ample time to secure a search warrant and that such course should have been followed. It is immaterial whether the informant had time to secure a warrant. The arrest, search and seizure were effected by the officers and not by the informant. The question is whether the officers had probable cause to arrest the appellant and incidentally search the immediate premises."

[2] Under the facts of this case, we are of the opinion that the officer had reasonable cause to justify the arrest. The officers were not limited to evidence that would necessarily be admitted at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. There was no requirement here that the name of the informant be disclosed. See, People v. Gonzales, 141 Cal.App.2d 604, 607, 608, 297 P.2d 50.

It is apparent, further, that had the officers not acted with the alertness with which they did act, the evidence might well have been flushed down the toilet.

[3] After the officers were in the house the defendant's action in attempting to prevent their entry into the bathroom, where the narcotics were found, was ample corroboration of the information the officers had from the informant to give them reasonable cause to believe that a felony was being committed in their immediate presence. People v. Martin, 45 Cal.2d 755, 762, 763, 290 P.2d 855.

The judgment of conviction is affirmed.

WHITE, P. J., and DORAN, J., concur.

Edna S. VOORHEIS, Donald S. Voorheis, Liesel A. Voorheis, and Irving S. Voorheis, by their Guardian ad litem, Edna S. Voorheis, Plaintiffs and Respondents,

v.

HAWTHORNE-MICHAELS COMPANY and Hyman-Michaels Company, Defendants and Appellants.

Civ. 22062.

District Court of Appeal, Second District, Division 3, California.

June 12, 1957.

Rehearing Denied July 2, 1957.

Hearing Denied Aug. 6, 1957.

Action was brought for death of construction company's grade checker, who was struck by defendants' tractor trailer, which was being used to carry earth from river channel where grade checker was measuring the grade. The Superior Court of Los Angeles County, Morton L. Barker, J., entered judgment adverse to defendants and an order granting a new trial on issue of damages, and defendants appealed. The District Court of Appeal, Vallée, J., held that questions of negligence and contributory negligence were for jury.

Order and judgment reversed, and cause remanded for a new trial on all issues.

1. Depositions 🔑1

The term "deposition" is confined in meaning to testimony delivered in writing. West's Ann.Code Civ.Proc., §§ 2006, 2022, 2032.

See publication Words and Phrases, for other judicial constructions and definitions of "Deposition".

2. Depositions 🔑69

Since there is always an inherent possibility of error in the transcription of a deposition, a final opportunity for correction of the writing as completed should be given by the reading to or by the witness. West's Ann.Code Civ.Proc., §§ 2006, 2022, 2032.

3. Depositions 🔑2

Sections of the Code of Civil Procedure providing the method of taking depositions and the manner in which depositions must be prepared are mandatory. West's Ann.Code Civ.Proc., §§ 2006, 2032.

4. Depositions 🔑88

The only authority for the use of depositions in civil cases lies in the provisions of the Code of Civil Procedure, and unless a deposition is taken in the manner prescribed, it may not be admitted in evidence. West's Ann.Code Civ.Proc., §§ 2006, 2032.

5. Depositions 🔑69

Where witness died without having read and subscribed his deposition, it was error to admit the deposition in evidence. West's Ann.Code Civ.Proc., §§ 2006, 2022, 2032.

6. Depositions 🔑69

Plaintiffs, who negligently failed to get witness to read and subscribe his deposition, which was taken by plaintiffs as part of their evidence, could not shift their negligence to the shoulders of defendants' counsel, who had the deposition in their possession for six months. West's Ann. Code Civ.Proc., §§ 2006, 2022, 2032.

7. Trial 🔑139(1)

A directed verdict can be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict were rendered.

8. Automobiles 🔑242(1)

In action for death of deceased, who was run over by defendant's tractor trailer driven by driver who was dead at time of trial, there was a rebuttable presumption that the driver was exercising ordinary care when deceased was run over, and such presumption was available to defendants. West's Ann.Code Civ.Proc., §§ 1957, 1963, subd. 4.

9. Automobiles 🔑242(1)

In action for death of one run over by defendants' tractor trailer driven by driver who was dead at time of trial, the presumption that the driver exercised ordinary care when deceased was run over was sufficient to create a conflict with the testimony produced at the trial. West's Ann. Code Civ.Proc., §§ 1957, 1963, subd. 4.

10. Automobiles 🔑245(6)

In action for death of construction company's grade checker, who was struck by defendants' tractor trailer, which was being used to carry earth from river channel, where grade checker was measuring the grade, question whether testimony of grade checker's fellow employee and reasonable inferences to be drawn therefrom overcame presumption of due care on part of driver of tractor trailer, who was dead at the time of the trial, was for jury. West's Ann.Code Civ.Proc., §§ 1957, 1963, subd. 4.

11. Death 🔑58(1)

In action for death of deceased, who was run over by defendants' tractor trailer driven by driver who was dead at time of trial, there was a presumption that deceased was exercising due care at time when he was run over. West's Ann.Code Civ.Proc., §§ 1957, 1963, subd. 4.

12. Automobiles 🔑242(1)

In action for death of deceased, who was run over by defendants' tractor trailer driven by driver who was dead at time of trial, presumption of due care which existed in favor of deceased, who was run over by the tractor trailer, did not carry with it a presumption of negligence on the part of the deceased driver. West's Ann. Code Civ.Proc., §§ 1957, 1963, subd. 4.

13. Automobiles 🔑245(72)

In action for death of construction company's grade checker, who was struck by defendants' tractor trailer, which was being used to carry earth from river channel where grade checker was measuring the grade, question whether deceased grade checker was contributorily negligent was for jury.

14. Judgment 🔑199(3.9)

The rules governing the determining of a motion for a judgment notwithstanding a verdict are the same as those applicable to a motion for a directed verdict.

◆

Schell, Delamer & Loring and Lee A. Solomon, Los Angeles, for appellants.

David Sokol and Arthur M. Reilly, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiffs, the widow and children of Donald C. Voorheis, brought this action for his alleged wrongful death. The accident occurred on August 5, 1954. Voorheis was working as a grade checker for MacDonald & Kruse Construction Company in the Los Angeles River channel. Defendants were the owners of equipment being used in removing earth from the river channel. Benjamin Kirk, an employee of defendants and a truck driver of long experience, was driving a tractor and trailer, called a Euclid, carrying earth from the channel. The complaint alleged Kirk so negligently operated the Euclid that it struck Voorheis, causing his death. Kirk was not named as a defendant. Defendants denied negligence and pleaded contributory negligence.

The complaint was filed November 17, 1954. On February 21, 1955 plaintiffs took Kirk's deposition. Kirk was not at that time in the employ of defendants. The deposition was transcribed on March 24, 1955. Kirk died in October 1955. The trial began April 9, 1956. Kirk's deposition had not been read to or by him, nor had it been subscribed by him. Over defendants' objection the court permitted plaintiffs to read Kirk's unread and unsubscribed deposition in evidence.

After the parties had rested, each party moved for a directed verdict. Plaintiffs' motion was granted and the court directed the jury to render a verdict for plaintiffs against defendants for $40,000.[1] Defendants' motion was denied. The jury returned a verdict as directed and a judgment for plaintiffs against defendants for $40,000 was entered. Defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion for judgment notwithstanding the verdict was denied. The motion for a new trial was granted, limited to the issue of damages only on the ground of insufficiency of the evidence. Defendants appeal from the judgment and from the order granting a new trial on the issue of damages.

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[1] The court arrived at the figure $40,000 by using mortality tables.

The specifications of error are: 1. The court erred in admitting the unread and unsubscribed deposition of Kirk in evidence. 2. The court erred in directing a verdict on the question of liability in favor of plaintiffs, and consequently erred in denying defendants' motion for a new trial on that question. 3. The court erred in denying defendants' motion for a directed verdict, and consequently erred in denying their motion for judgment notwithstanding the verdict.

Only two persons testified on the question of liability—Kirk, by way of the unread and unsubscribed deposition; and Raymond Dollar, a coemployee of Voorheis.

Dollar testified that for about two months he had worked on the job as an oiler on a dragline, a type of crane on caterpillar tracks with a bucket hanging from its boom. As the dragline would draw the bucket towards the machine the bucket would scoop up earth in the channel, the dirt would then be lifted and unloaded into a string of Euclids lined up on the river bed. A "Euclid" consists of a relatively small cab on a tractor and a large semitrailer coupled together in such manner that the trailer does not track, that is, follow the wheels of the tractor when the Euclid is being turned. A Euclid is about 50 feet long. Until the day of the accident, the Euclids went up the river bed, pulled up alongside the dragline, were loaded, and then proceeded up the river to the nearest ramp cut out of the side of the channel. Some time before 1 p. m. on the day of the accident, the dragline had been moved about 150 feet down the river and the method of operation changed. The Euclids went up the river bed, made a complete turn of 180 degrees, were loaded, and immediately proceeded up the nearest ramp. There were about 30 feet in which to make the swing and reach the ramp.

The afternoon shift started at 1:30 p. m. About an hour later Dollar saw Voorheis' body lying between the place where the Euclids were loaded and the ramp, about 40 feet from him. Just a few seconds before he saw the body, a Euclid had been loaded bearing "No. 2." The Euclid driven by Kirk had "No. 2" on it. Dollar was "spotting" the Euclids at the time; that is, stopping them in the correct position to be loaded. He had spotted Euclid No. 2, and after it was loaded he saw it start up and leave. He then turned his back and watched the next Euclid pull into position. The Euclids were coming in an almost continuous procession, as fast as one left another was loaded. He did not see Euclid No. 2 hit Voorheis. He did not recall seeing Voorheis on August 5 before the accident.

Dollar further testified Voorheis was with him on the job every day and was working around the Euclids all the time he was there. He stated that a grade checker establishes and measures the grade. As a grade checker, Voorheis had set stakes down in the cut of the river that was made or to be made by the dragline. Occasionally the banks of the river had to be graded and Voorheis had set stakes on the upper surface. From time to time he had placed stakes around the Euclids.

The substance of Kirk's testimony, by way of the unread and unsubscribed deposition, was that when he started to pull out after his Euclid had been loaded he saw Voorheis standing about 4 or 6 feet from the right hand of his cab. He waved at Voorheis and Voorheis waved back. When he made the turn up the ramp he did not notice whether he had struck something; he never felt anything. He knew that the trailer part of the Euclid did not track. On his return trip to the river bed, about an hour later, detectives told him that he had hit a man. He remembered pulling out of the river bed about 2:30.

As stated, the first specification of error is that the court erred in admitting the unread and unsubscribed deposition of Kirk in evidence.

[1, 2] The term "deposition" is now confined in meaning to testimony delivered in writing; testimony which in legal contemplation does not exist apart from a writing made or adopted by the witness. In practice the witness usually does not write out the statements but testifies before a commissioner authorized by the court to receive and transmit it and to act as the transcriber of the oral utterance. Since it is an intermediary who makes the writing which becomes the testimony, it is specially necessary to be certain that this writing shall represent precisely the statements for which the witness stands responsible. Professor Wigmore gives three elements which may be source of error and must be guarded by special rules; they are: the personality of the official writer, the verbal accuracy of his transcription of the witness' utterance, and the witness' deliberate and knowing indorsement of the transcription as completed. III Wigmore on Evidence, 211, § 802. Because the writing is to stand as the witness' own words and there is always an inherent possibility of error in the transcription, a final opportunity for correction of the writing as completed should be given by the reading to or by the witness. The witness' signature may be regarded either as necessary to constitute the writing his by adoption, or as symbolically equivalent to a knowing assent to its tenor, or as an additional means of identifying the person of the witness. Wigmore states that whatever the legal theory it is usually treated as a requirement indispensable under the statutes. Id., 217 § 805. He continues by saying that if the writing is not read and signed it does not become the testimony of the witness.

[3, 4] Section 2022 of the Code of Civil Procedure reads: "A deposition taken and returned, as provided in this chapter [chapter 3], may * * * be read in evidence * * *." Section 2006 which provides the method of taking depositions, and section 2032 which provides for the manner in which depositions must be prepared, are found in chapter 3 and say that after the deposition is completed it *must* be carefully read to or by the witness, and it "*must* then be subscribed by the witness." (Italics supplied.) Section 2032 ends with the provision: "The deposition thus taken may be also read in case of the death of the witness." The verb "must" is used in sections 2006 and 2032 in stating the procedure to be followed. It is mandatory. Board of Supervisors of Los Angeles County v. Simpson, 36 Cal.2d 671, 676, 227 P.2d 14; People v. Gotto, 138 Cal.App.2d 165, 168, 291 P.2d 41. The only authority for the use of depositions in civil cases lies in the provisions of the Code of Civil Procedure, Bank of Orland v. Finnell, 133 Cal. 475, 477, 65 P. 976, and unless a deposition is taken in the manner prescribed it may not be admitted in evidence. 15 Cal.Jur.2d 681, § 6.

In the early case of Thomas v. Black, 84 Cal. 221, 23 P. 1037, 1038, two witnesses testified in court at the time of the granting of a continuance. The testimony was taken down by a shorthand reporter in the presence of the court but was not read to the witnesses, or corrected or subscribed by them, nor was it certified by the reporter or by any other person. It was held that the transcript lacked the essential elements of a deposition and therefore was inadmissible on the trial. The court said: "The jury before whom the case was afterwards tried did not see the witnesses, and could have no assurance that the document presented contained a true statement of their testimony." Bennett v. Superior Court, 99 Cal.App.2d 585, 222 P.2d 276, held that certain documents not having been signed by the witness were inadmissible in evidence as depositions. The rule that depositions must be taken in rigid conformity with section 2032 was followed in Beckman v. Waters, 161 Cal. 581, 119 P. 922, 925. In that case the clause that a deposition "must be 'certified by the judge or officer taking' it" was strictly construed. The court held that a sealed but unsigned certificate did not comply with the requirement and therefore the deposition was not admissible in evidence.

[5] It was error to admit Kirk's unread and unsubscribed deposition in evidence.

[6] Plaintiffs contend defendants should be estopped from relying on their objection to reception of Kirk's deposition. They argue that defendants' counsel had the completed deposition in their possession for six months and should have obtained Kirk's signature. They do not argue that defendants' counsel sought to suppress the testimony, only that they should have been more active in securing Kirk's subscription. The reporter delivered the deposition to counsel for defendants after it was transcribed. The record shows that counsel for defendants exerted all reasonable efforts to locate Kirk after they received the deposition from the reporter. Kirk was not a party to the action. Counsel for defendants had no control over him. Plaintiffs overlook the fact that the deposition was taken by them as part of their evidence and that they had the burden to get Kirk to read and subscribe it. Plaintiffs' negligence cannot be shifted to the shoulders of defendants' counsel. As said by Mr. Justice Dooling in Gunner v. Van Ness Garage, 150 Cal. App.2d 345, 310 P.2d 32, 33:

> "Certain principles in this field of the law are well settled: 1. That the burden is at all times on the plaintiff to use diligence at every step of the proceeding to expedite his case to final determination, and no affirmative duty to do more than meet the plaintiff step by step is cast on the defendant. Oberkotter v. Spreckels, 64 Cal.App. 470, 473, 221 P. 698; Steinbauer v. Bondesen, 125 Cal.App. 419, 426–427, 14 P.2d 106; Continental Pac. Lines v. Superior Court, 142 Cal.App.2d 744, 753, 299 P.2d 417."

Defendants urge that the court erred in directing a verdict in favor of plaintiffs on the question of liability. Since the deposition of Kirk was improperly admitted in evidence this question must be decided by eliminating his testimony from consideration. Dollar's testimony is therefore the only evidence on the question of liability.

[7] A directed verdict may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said there is no evidence of sufficient substantiality to support a verdict in favor of such party if such a verdict were rendered. In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579. "The power of the court in passing upon such a motion is strictly limited. It has no power to weigh the evidence, but must view it in the light most favorable to the party against whom the direction is asked and accept every inference and presumption in his favor that may legitimately be drawn therefrom, and the motion can be granted only when, on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given." Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 181, 140 P.2d 467, 470; Crosat v. Paige, 147 Cal. App.2d 385, 305 P.2d 121.

A directed verdict in favor of plaintiffs was proper only: (a) if the testimony of Dollar permitted but one reasonable conclusion, i. e., that Kirk was negligent as a matter of law; and (b) if his testimony compelled the conclusion that Voorheis was, as a matter of law, free from negligence.

[8–10] The evidence was not such that it can be said Kirk was negligent as a matter of law. Since he died before the trial it is to be presumed that at the time in question he exercised ordinary care in driving the Euclid. Tarasco v. Moyers, 81 Cal.App. 2d 804, 808, 185 P.2d 86; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 156–157, 219 P.2d 506. The presumption is available to defendants, Kirk's employers. Tarasco v. Moyers, supra; Wells Truckways, Ltd. v. Cebrian, 122 Cal.App.2d 666, 679, 265 P.2d 557. The presumption is of course rebuttable. Code Civ.Proc. § 1963, subd. 4. The presumption is evidence and is sufficient to create a conflict with the testimony produced at the trial. Code Civ.Proc. § 1957; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 156, 219 P.2d 506. Whether the testimony of Dollar and the reasonable inferences to be drawn therefrom overcame the presumption of due care on the part of Kirk was a question for the jury. Scott v. Burke, 39 Cal.2d 388, 397–398, 247 P.2d 313; Duvall v. T. W. A., 98 Cal.App.2d 106, 110–111, 219 P.2d 463.

[11, 12] It is presumed also that Voorheis exercised due care at the time in question. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809; Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 306 P.2d 432. But the presumption of due care which exists in favor of Voorheis did not carry with it a presumption of negligence on the part of Kirk. Gigliotti v. Nunes, supra, 45 Cal.2d 93–94, 286 P.2d 813; Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 683, 80 P.2d 185, 1016.

There is evidence from which the jury could have concluded that Kirk was not negligent. The presumption that he exercised due care is in itself evidence he was not negligent. Aside from the presumption, there is evidence from which the jury could have inferred he was not negligent.

There was no direct evidence as to how Voorheis came to his death. If he was struck by the Euclid, no one saw it. There was no evidence as to how far the wheels of the trailer would go beyond the track of the wheels of the tractor when the Euclid was turning. Nor was there any evidence that Voorheis was standing within the arc of the turn of the Euclid when Kirk started up the ramp. The jury was not compelled to infer that the Euclid crossed the path of Voorheis. There was no testimony that there were any marks on the Euclid; and there was no testimony as to the condition of Voorheis' body—as to whether it bore the mark of being struck, run over, or some other bodily mark from which the jury might have drawn inferences as to how the body and the truck came together, if in fact they did. The Euclid followed the tracks of the trucks ahead of it. Kirk could assume that fellow workers were aware of that pattern and that they would not get into its path.

[13] On the entire evidence the question of contributory negligence was one of fact for the jury. We cannot say as a matter of law that Kirk was not negligent or that Voorheis was free from negligence. These questions should have been submitted to the jury. It is obvious the court erred in granting plaintiffs' motion for a directed verdict.

[14] Defendants contend their motion for a directed verdict should have been granted. The rules governing the determination of a motion for a judgment notwithstanding a verdict are the same as those applicable to a motion for a directed verdict. Jaehne v. Pacific Tel. & Tel. Co., 105 Cal.App.2d 683, 685, 234 P.2d 165. There was evidence from which the jury could have found that Kirk was negligent. The jury could have inferred that when Kirk made the turn up the ramp he knew Voorheis was in a perilous position and that Voorheis did not realize it. Kirk had been driving Euclids and knew the trailer did not track. Although Voorheis had been setting stakes around where the Euclids loaded on straight and level ground, the jury could have inferred that he did not know how they acted on turns and grades. It was only a matter of seconds after Kirk's Euclid was loaded and left that Voorheis' body was found in the path where the Euclids traveled. The court did not err in denying defendants' motion for judgment notwithstanding the verdict.

The order granting a new trial limited to the issue of damages and the judgment are reversed. The cause is remanded for a new trial on all issues.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

151 Cal.App.2d 728

Ingegerd UPPMAN, Plaintiff and Appellant,

v.

Ruth Asbury EYRAUD, Administratrix with the Will Annexed of the Estate of Kathryn Ruth Wilson, deceased, substituted for Kathryn Ruth Wilson, et al., Defendants and Respondents.

No. 17296.

District Court of Appeal, First District, Division 1, California.

June 17, 1957.

Partition action. The Superior Court, San Mateo County, Aylett R. Cotton, J., entered an order denying plaintiff's motion to vacate judgment and plaintiff appealed. The District Court of Appeal, Bray, J., held that where, according to stipulation of the parties made in open court, a municipal court action was to be dismissed with prejudice, but due to a mistake in a minute order, the Superior Court action was directed to be dismissed with prejudice, such minute order would be deemed of no effect, and corrected under court's power to correct inadvertent clerical errors by its entry of formal judgment dismissing the municipal court action.

Order affirmed.

1. Courts ⇨189(15)

Where, according to stipulation of the parties made in open court, a municipal court action was to be dismissed with prejudice, but due to a mistake in a minute order, the Superior Court action was directed to be dismissed with prejudice, such minute order would be deemed of no effect, and corrected under court's power to correct inadvertent clerical errors by its entry of formal judgment dismissing the municipal court action.

2. Abatement and Revival ⇨68

Where a minute order in a partition action was entered prior to death of one of the parties, there was no necessity for substituting administratrix for such party, and court's power to correct such minute order for inadvertence was not affected by the death of such party. West's Ann.Code Civ. Proc., § 669.

3. Judgment ⇨357

Entering of a judgment where a party to a suit has died and no substitution or a personal representative has been made does not make the judgment void but merely voidable, subject to attack by appeal, but not by the collateral attack of a motion to vacate the judgment.

4. Appeal and Error ⇨863

The correctness of a judgment cannot be reviewed on an appeal from an order refusing to vacate a judgment where a judgment was appealable and the grounds upon which vacation was sought existed before entry of judgment.

Charles Reagh, San Francisco, for appellant.

Kessler & Kessler, Oakland, for respondent.

BRAY, Justice.

Plaintiff appeals from an order denying her motion to vacate judgment in a partition action.

Questions Presented.

1. Was this action dismissed with prejudice by the minute order?

2. Did defendant Wilson's death affect the judgment?

3. Can plaintiff question judgment on appeal from denial of motion to vacate judgment?

Record.

December 20, 1954, a minute order recites (among other matters): "By stipulation of counsel, who advised the court that the within case has been settled, it is ordered that the plaintiff pay to defendant Kathryn Ruth Wilson the sum of $1,500 cash, that deeds be executed and that the within action be dismissed with prejudice."

October 7, 1955, "Judgment for Partition" entered. This stated that the parties had stipulated that plaintiff pay defendant

Wilson $1,500 for the latter's interest in described real property; that defendant Wilson dismiss a certain action then pending in the municipal court; that defendant execute a deed to plaintiff of her interest in said real property. It then awarded the real property to plaintiff, ordered defendant to execute to plaintiff a deed of her interest in said real property, and gave defendant Wilson judgment against plaintiff for $1,500. It ordered defendant Wilson to dismiss the municipal court action with prejudice. Each party was to bear his own costs.[1]

December 30, 1954, defendant Wilson died.

January 27, 1956, the administratrix with the will annexed of defendant Wilson's estate was substituted as party defendant.

February 23, 1956, plaintiff's motion to vacate the formal judgment denied.

1. Dismissal.

[1] Plaintiff is clearly attempting to take advantage of an inadvertent error in the minute order. According to the stipulation of the parties as made in open court, the action which was to be dismissed with prejudice was not this action but the municipal court action. The minute order on its face shows at least that this action was not intended to be dismissed until after the payment of the $1,500 and the execution of deeds, because the court ordered the payment of the money and the execution of deeds. Such order would be an idle act and of no effect if the action were dismissed. A court always has power to correct an inadvertent clerical error. (See 29 Cal. Jur.2d 13.) This the court did by its formal judgment. Both counsel devote considerable of their briefs to the question of whether the minute order or the formal judgment is the final judgment in the case. We are not concerned with this question for the reason that no appeal was taken from either one. If the minute order was the final judgment, the portion of the formal judgment would be effective as correcting the clerical error. If the formal order was the final judgment, then in addition to correcting the minute order error which inadvertently dismissed the action it provided the terms of the judgment.

2. Defendant Wilson's Death.

[2, 3] Plaintiff contends that because of the death of defendant Wilson, the court had no power under any theory to enter the judgment. This, also, is a technical point in which there is no merit. If the minute order is the final judgment, it was entered prior to her death, so there would be no necessity for substituting the administratrix. The court's power to correct its order for inadvertence would not be affected by the death of a party. If the formal judgment is the final one, nevertheless the court, having prior to the death announced its decision, had the power (where, as here, because of the stipulation, no findings were required) to enter judgment after the death and its decision prior thereto. "If a party die after a verdict or decision upon any issue of fact, and before judgment, the Court may nevertheless render judgment thereon." Code Civ.Proc. § 669; see also 28 Cal.Jur.2d 696–697. Boyd v. Lancaster, 1939, 32 Cal.App.2d 574, 90 P.2d 317, and Maxon v. Avery, 1939, 32 Cal.App.2d 300, 89 P.2d 684 are not in point. In the Boyd case the plaintiff died pending compliance with an interlocutory decree in an action to cancel a deed executed by him. A final decree is a different decree than the interlocutory, and hence could not be made until a personal representative of the decedent was appointed. In the Maxon case the plaintiff died before the filing of findings of fact. The findings would be the decision on the issues of fact and could be entered only if the personal representative of the decedent had been substituted. See also Machado v. Flores, 1946, 75 Cal.App.2d 759, 762, 171 P.2d 440, which holds that the entering of a judgment where a party to a suit has died and no substitution of a per-

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[1] The notice of motion to vacate judgment refers to "the judgment dated October 24th, 1955." It actually was dated and filed October 7th. The notice of motion to vacate sets forth no grounds upon which the motion would be made.

sonal representative made does not make the judgment void but merely voidable. Therefore, at most, plaintiff's remedy to attack the judgment was by appeal, not by the collateral attack of a motion to vacate the judgment.

3. Appeal From Denial of Motion To Vacate.

[4] If the judgment was appealable and the grounds upon which vacation is sought existed before entry of judgment, the correctness of the judgment cannot be reviewed on an appeal from the order refusing to vacate the judgment.[2] To permit an appeal from such order "would give the aggrieved party two appeals from the same decision, or, if he failed to take a timely appeal from the judgment, an unwarranted extension of time starting from the subsequent order." (3 Witkin, California Procedure, pp. 2170–2171.)

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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151 Cal.App.2d 791

Martin J. MULLIGAN and Luke Morley, Plaintiffs and Appellants,

v.

WEST COAST FAST FREIGHT, Inc., a corporation, and Charles Leon Murrell, Defendants and Respondents.

Civ. 17288.

District Court of Appeal, First District, Division 2, California.

June 19, 1957.

Hearing Denied Aug. 13, 1957.

State highway patrolmen brought action against owner and driver of truck for injuries sustained by patrolmen when highway patrol automobile, which was an emergency vehicle responding to an emergency call, collided with oncoming truck in center lane on bridge. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment on the verdict in favor of the owner and driver of the truck, and the patrolmen appealed. The District Court of Appeal, Kaufman, P. J., held that question whether alleged negligence of driver of truck was the sole proximate cause of the collision was for the jury.

Judgment affirmed.

1. Automobiles 🔑175(5)

Driver of emergency vehicle, in order to enjoy exemption from speed and traffic law requirements, must, in addition to displaying red light, give audible signal by siren, as a warning to others using highway, when, under all circumstances, it is reasonably necessary to do so, and in such case he must sound siren in such manner, with such audibility, as will afford others reasonable opportunity to yield right of way. West's Ann.Vehicle Code, §§ 454(a, b), 554(2).

2. Automobiles 🔑245(19, 79)

In action by state highway patrolmen against owner and driver of truck for injuries sustained by patrolmen when highway patrol automobile, which was an emergency vehicle responding to an emergency call, collided with oncoming truck in center lane on bridge, question whether highway patrol automobile was being operated in such a manner as to accord to patrolmen the emergency vehicle privileges of the Vehicle Code and to impose on truck driver the duties defined in the Vehicle Code was for jury. West's Ann.Vehicle Code, §§ 454(a, b), 526, 554(2).

3. Automobiles 🔑245(51)

In action by state highway patrolmen against owner and driver of truck for injuries sustained by patrolmen when highway patrol automobile, which was an emergency vehicle responding to an emergency call, collided with oncoming truck in center lane on bridge, question whether alleged negligence of truck driver in violating his duties under the Vehicle Code to yield right of way to emergency vehicle was the proximate cause of the collision was for the jury. West's Ann.Vehicle Code, §§ 454(a, b), 526, 554(2).

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[2] For this reason we see no necessity of considering the claimed lack of authority of plaintiff's counsel to make the stipulation upon which the judgment is based. That would be a question which could and should have been considered on an appeal from the judgment had one been made.

4. Appeal and Error ⚿1064(1)

In action by state highway patrolmen against owner and driver of truck for injuries sustained by patrolmen when highway patrol automobile, which was an emergency vehicle responding to an emergency call, collided with oncoming truck in center lane on bridge, trial court did not commit prejudicial error as to patrolmen in its instruction that a person exercising ordinary care has a right to assume that others will obey the law, by not adding qualifications that one may not continue to assume that the law is being observed after knowing or having an opportunity by use of reasonable care to ascertain that the law is not being observed, where patrolmen proceeded on theory that they were obeying the law by sounding siren. West's Ann.Vehicle Code, §§ 454(a, b), 526, 554(2).

5. Automobiles ⚿245(79)

In action by state highway patrolmen against owner and driver of truck for injuries sustained by patrolmen when highway patrol automobile, which was an emergency vehicle responding to an emergency call, collided with oncoming truck in center lane on bridge, question whether patrolman driving highway patrol automobile was contributorily negligent was for jury. West's Ann.Vehicle Code, §§ 454(a, b), 526, 554(2).

6. Appeal and Error ⚿792

Where respondents did not file motion to dismiss appeal, on ground that appellants were guilty of unreasonable delay, because opening brief was not filed until three years after filing notice of appeal and completion of transcript, and no explanation was offered by appellants for the delay, and respondents chose instead to file a reply brief on the merits, District Court of Appeal would not exercise its inherent power to dismiss the appeal on its own motion as suggested in reply brief of respondents.

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Leslie C. Gillen, San Francisco, Herbert Chamberlin, San Francisco, of counsel, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, R. S. Cathcart, San Francisco, of counsel, for respondents.

KAUFMAN, Presiding Justice.

The complaint herein seeks damages for personal injuries to plaintiffs, Martin J. Mulligan and Luke Morley, passenger and driver respectively, of a California State Highway Patrol car which was involved in an accident on the lower deck of the San Francisco-Oakland Bay Bridge on October 26, 1950. A trial before a jury resulted in a verdict against both plaintiffs, in favor of the defendant, West Coast Fast Freight, Inc., and its truck driver, the defendant, Charles Leon Murrell. Plaintiffs appeal from the judgment entered on the verdict on the grounds that the evidence established as a matter of law that the defendants' negligence was the sole proximate cause of the accident and various alleged errors in the lower court's instructions to the jury.

The facts as disclosed by the record are as follows: The afternoon on which the accident occurred was a rather stormy one, with hard rain and a whipping south wind. There was no fog, however, and visibility was good, for about one mile. Shortly before the accident two barges had broken loose from their moorings south of the Bay Bridge, drifted to the north and had become lodged against one of the piers of the bridge, about one mile west of the toll plaza. Two bridge officials, Murphy and Marsh, in two separate state owned vehicles had driven west from the toll plaza on the lower deck of the bridge, to investigate the barge incident. Their vehicles were parked in the westbound lane, one behind the other, with the Murphy vehicle just west of the Marsh vehicle, blocking westbound traffic for about 40 feet. Both of these vehicles were displaying red flashing lights in their rear windows. The defendant, Murrell, a truck driver and employee of the defendant, West Coast Fast Freight, Inc. was driving west on the lower deck of the bridge on the afternoon of the accident. The westbound lower deck highway is one big wide lane where it comes off the main road and divides into two lanes just east of the scene of the accident, where the white lines demark three lanes, each about eleven feet wide; one on the north side of the bridge for westbound traffic, one on the south side of the bridge for eastbound traffic, and one in the center for passing. The highway from the toll plaza area to the portion of the bridge which is over water jogs to the left before going west into a slight down hill straightway about two-thirds of a mile in length, so that the straightway is not visible from the section immediately west of the toll plaza. Murrell was traveling at about 20–25 miles per hour when he left the toll plaza; just as the highway squared around into the straightway, he noticed the Marsh vehicle parked 200–300 feet in front of him in the west bound lane. When he was about 75 feet to the rear of the Marsh vehicle, Murrell slowed to 15 to 18 miles an hour, and without first stopping swung into the center lane for the purpose of passing. At this time he noticed the Murphy vehicle parked immediately in front of the Marsh vehicle. Immediately after he had pulled into the center lane, Murrell observed a flashing red light mounted on a California State Highway Patrol car, which was headed east in the center lane about 200–300 feet away. Murrell testified that he did not hear a siren at this or any other time. However, immediately after the accident he told the investigating officer that just as he was changing into the center lane he noticed the patrol car coming with the red light on and siren going. Traffic in the eastbound lane was exceedingly heavy consisting of a long line of trucks closely following one another. Murrell first increased his speed by a mile or two an hour in order to get past the parked cars, but then he noticed the patrol car skidding and immediately brought his truck to a stop. The Highway Patrol Officer who subsequently made the accident report testified that the truck was stopped two feet to the east of the rear bumper of the Murphy vehicle. The truck driven by Murrell was 20 feet long and carrying a medium heavy load; the headlights were on and the windshield wipers operating. Murrell testified that a passing maneuver required about 40 feet. The day of the accident was appellant Mulligan's first day on duty after the completion of his Highway Patrol training course. Appellant Morley was the senior officer assigned to instruct him on that day. The two officers were in the vicinity of Eighth and Townsend Streets in San Francisco in the patrol car driven by Morley, when they received a radio message to investigate an accident of unknown nature in which some high voltage wires were down at the foot of University Avenue in Berkeley. The code message ordered them to "expedite" which meant to get there as fast as possible without delay and permitted the use of the siren and red lights on the way. However, they first drove east on the upper deck of the bridge with the red light but without sounding the siren. Because of the heavy traffic conditions on the upper deck they turned off at Treasure Island after the tunnel and swung around onto the lower deck. Both of the appellants testified that at this time the siren was going and the lights flashing. The eastbound lane was full of trucks, so the patrol car entered the passing lane, but was forced back into the eastbound lane by a westbound Key System bus. At this time the patrol car was traveling at a speed of 40 to 45 miles and continued at that speed until the accident. After the bus had passed, Morley again moved into the center passing lane and immediately observed Murrell's truck at a distance of about 300 feet just as it was pulling into the passing lane. Morley testified that at that time he could not estimate the speed of the truck, or determine whether or not the two state vehicles in the westbound lane were moving. When he was about 250 feet west of the truck Morley applied his brakes lightly. At 200 feet he applied the brakes hard, which caused the patrol car to skid sideways for 169 feet before colliding broadside with the Murphy vehicle. Appellant Mulligan was thrown from the patrol car and remained unconscious. After the accident the patrol car was facing north at an angle across the center and westbound lane. The rear of the patrol car was about eight feet from the respondent truck, and the front of the patrol car about six feet from the front of the Murphy vehicle. Although none of the eyewitnesses saw the actual impact between the truck and the patrol car, it was assumed from the position of the various vehicles after the accident.

Appellant's main contentions on appeal are that the evidence established as a matter of law that the negligence of the respondents was the sole and proximate cause of the accident, and that the jury was improperly instructed as to the operation of the emergency vehicle statute, so as to impose upon the driver of the patrol car the duty of sounding the siren at all times and in a certain manner.

It is not disputed that the patrol car was an emergency vehicle responding to an emergency call and displaying the required red and blue lamp, or that Morrell was operating a truck belonging to West Coast Fast Freight within the scope of his agency. The issues all bear upon the question of whether or not the police car was being operated in such a manner as to accord to its driver and passenger, the appellants herein, the emergency vehicle privileges of Vehicle Code Section 454 and to impose upon the respondent's truck driver the duties defined in Vehicle Code Section 554. Among the duties imposed on a driver apart from Vehicle Code Section 554 and included in the matters from which emergency vehicles may be exempted under Vehicle Code Section 454, are the provisions of Vehicle Code Section 526 which prescribes rules for passing on three lane roadways. In 1950, sections 454 and 554, so far as relevant, of the Vehicle Code read as follows:

> "454. Exemptions to Authorized Emergency Vehicles. The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions:
>
> "(a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.
>
> "(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in Chapter 3 or in Chapters 6 to and including Chapter 13 of Division 9 of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."
>
> "554. Conduct of Drivers, Motormen and Pedestrians on Approach of Authorized Emergency Vehicles. Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren and having at least one lighted lamp exhibiting red light visible under normal atmospher-

ic conditions from a distance of 500 feet to the front of such vehicle:

> "(1) The driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and thereupon stop and remain in such position until such authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer.
>
> "(2) * * *"

[1] As pointed out by this court in Washington v. City & County of San Francisco, 111 Cal.App.2d 368, at pages 371 and 372, 244 P.2d 774, at page 776:

> "We conclude that sections 454 and 554, read together, mean that (to enjoy exemption from the speed and traffic law requirements) the driver of an emergency vehicle (in addition to displaying the red light) must give audible signal by siren, as a warning to others using the highway, when under all the circumstances it is reasonably necessary to do so, and in such a case he must sound the siren in such a manner, with such audibility, as will afford the others a reasonable opportunity to yield the right of way. 'Others,' of course, means persons of reasonably good hearing who are giving attention to their surroundings in observance of their duties as users of the public highways.
>
> "This requirement presents in each case these questions of fact: (1) Was it reasonably necessary, under all the circumstances, to give audible signal by siren, as a warning to others? (2) If so, did this driver give signal by siren? (3) If so, did he give audible signal by siren?"

The instruction on the dual obligation of shining the light and blowing the siren was one requested by the appellants. A similar instruction has been approved by this court in Davidson v. County of Marin, 147 Cal.App.2d 54, 304 P.2d 743. The appellants and the two eyewitnesses testified that they heard the siren; the siren button was on after the accident. The respondent, however, in contradiction to his statement made immediately after the accident, testified that he did not hear the siren at any time. It is not clear how soon before the impact the siren was heard by the eyewitnesses; there is also evidence that the weather and traffic conditions were such that Murrell could not hear the siren at all or until too late. Appellants point out that the law does not require the continuous sounding of the siren, but only a fair reasonable warning, and that the light alone could suffice as such warning. We agree with the appellants, but as indicated above these are questions of fact for the jury to consider under proper instruction. We do not think the instruction complained of here was erroneous or prejudicial. The jury was also instructed that where there is evidence that a person did not see or hear that which was in plain sight or clearly audible, there is either a conflict in the evidence or negligent inattention. Appellants rely on Reed v. Simpson, 32 Cal.2d 444, 196 P.2d 895. However, in that case, the verdict for the defendants was reversed as the lower court had erroneously instructed the jury that the officer was not entitled to the exemption of section 454 as a matter of law. The court pointed out that the issue was for the jury to determine.

[2, 3] Appellants base their argument on their contention that in the instant case, the evidence as a matter of law established that the negligence of the respondents was the sole and proximate cause of the accident. They cite Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, 836, in which it was held that the defendant who violated a pedestrian's right of way was guilty of negligence as a matter of law in the absence of reasonable explanation for his conduct. The very portion of Gray v.

Brinkerhoff quoted in the appellant's brief defeats their argument as the court points out that negligence is a matter of law only if "reasonable men following the law can draw but one conclusion from the evidence presented." The instant case is not one in which only one conclusion can be so drawn. Here, the jury could well have believed that the respondent was not negligent as there is evidence that he did not see the patrol car until he was in the center lane, that he was driving at a safe speed and it is admitted that he brought the truck to a stop before the point of impact. While other witnesses testified that they heard the siren, the respondent denied hearing the siren. There is evidence that the weather and traffic conditions might have made it difficult for Murrell to hear the siren. Whether or not the driver of an emergency vehicle is entitled to the exemptions provided by section 454 is a question of fact for the jury. Washington v. City & County of San Francisco, 111 Cal.App.2d 368, 244 P.2d 774; Davidson v. County of Marin, supra; Reed v. Simpson, supra; Pagels v. City & County of San Francisco, 135 Cal.App.2d 152, 286 P.2d 877. One of the eyewitnesses to the accident, the driver of a truck in the eastbound lane, testified that because of the weather conditions he was traveling at a speed of twenty miles an hour; the respondent was traveling at this speed; the officer who investigated the accident testified that in his opinion a safe and proper speed under the circumstances was 30 to 35 miles per hour; both of the appellants testified that the patrol car was traveling at a speed of 40 to 45 miles an hour. The jury might have concluded from the evidence that the patrol car was not entitled to the exemption of Vehicle Code Section 454 because the speed maintained under the circumstances constituted an arbitrary exercise of the privileges extended by the section, or that it was not being driven with due regard for the safety of all persons using the highway, as the respondent had not been given the opportunity to yield the right of way. Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599; Goldstein v. Rogers, 93 Cal.App.2d 201, 208 P.2d 719; Washington v. City & County of San Francisco, supra; Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App.2d 655, 283 P.2d 91. Even assuming that the appellants were properly operating the siren so as to be entitled under Vehicle Code Section 454 to travel at a speed of 40–45 miles and to disregard the provisions of Vehicle Code Section 526, and that respondent violated his duties under Vehicle Code Section 526 and 554, it is still for the jury to determine whether the violation of the statute proximately contributed to the cause of the accident and whether such violation was justifiable under the circumstances. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531. The jury could also have concluded that Murrell was not negligent and did the only reasonably possible thing by bringing the truck to a stop. From the evidence, the jury could also have concluded that the accident was proximately caused by the presence of the two parked cars on the bridge; or that the accident occurred without fault on the part of any person. The matter of negligence here, therefore, was properly left to the jury.

[4] Appellants, relying on Carlson v. Shewalter, 110 Cal.App.2d 655, 243 P.2d 549, further contend that the trial court committed prejudicial error in its instruction that a person exercising ordinary care has a right to assume that others will obey the law, by not adding the qualification that one may not continue to assume that the law is being observed after knowing or having an opportunity by use of reasonable care to ascertain that the law is not being observed. In the Carlson case, the court pointed out that the failure to so qualify a similar instruction was under the facts of that case, prejudicial error, the jury had also been instructed that the law had been violated. Whether or not instructions are

proper must be decided on the facts of each case. In the instant case, appellants have proceeded on the theory that they were obeying the law. Here, the qualification could apply only if the appellants were not obeying the law and Murrell knew or should have known that they were not obeying the law. Therefore, we agree with respondents that the instant case falls under the rule of Vernon v. Owl Truck & Construction Co., 137 Cal.App.2d 437, 290 P.2d 603, as there was not sufficient evidence to make the qualification applicable.

[5] Appellants also contend that it was prejudicial error to submit the issue of contributory negligence as to appellant Morley to the jury. We think that under the facts, the issue was properly left to the jury. Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; Pinello v. Taylor, 128 Cal.App. 508, 17 P.2d 1039. The jury was also correctly instructed that any negligence on the part of Morley could not be imputed to Mulligan. As the jury also denied relief to Mulligan, it would appear that the jury found no negligence on the part of Murrell and did not even reach the issue of contributory negligence.

[6] Respondents in their brief suggest that the court dismiss this appeal on its own motion for unreasonable delay, as the opening brief was not filed until three years after the filing of notice of appeal and the completion of the transcript, and as no explanation has been offered by the appellants. However, as respondents have not seen fit to file a motion to dismiss, and chose instead to file a reply brief on the merits, this is not a proper case for this court to exercise its inherent power.

We conclude that this cause was fully and fairly tried and that no prejudicial error appears in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; CARTER and TRAYMOR, JJ., dissenting.

151 Cal.App.2d 830

William GOODMAN, a minor, by his Guardian ad litem, Alberta Goodman; Woodrow Goodman and Alberta Goodman, Plaintiffs and Respondents,

v.

Arthur William RAPOSA, James Domingo Garcia, and Joseph R. Cecchini, Charles Giovannoni, Angelo Cecchini, Henry Cecchini and Nello Cecchini, individually and as copartners doing business under the firm name and style of Cecchini Trucking Company, Defendants,

City of Stockton, a municipal corporation Appellant.

Civ. 9026.

District Court of Appeal, Third District, California.

June 19, 1957.

Hearing Denied Aug. 13, 1957.

Action against a city and others for injuries to a minor and special damages suffered by his mother as result of his being struck by an automobile while crossing a street in a pedestrian crosswalk at an intersection. From a judgment of the Superior Court, Sonoma County, George F. Buck, M. G. Woodward and Thomas B. Quinn, JJ., against the city on a jury's verdict for plaintiffs, the city appealed. The District Court of Appeal, Warne, J. pro tem., held that the city was not liable under Public Liability Act on ground of its failure to remedy or take action reasonably necessary to protect public against dangerous or defective condition of public property within reasonable time after acquiring knowledge or receiving notice thereof, where it turned off traffic lights, which were not operating properly, at such intersection, before accident nor because of its failure to direct traffic at intersection while lights were being repaired.

Judgment reversed, and trial court ordered to enter judgment for city.

1. Municipal Corporations ⟹766

Automatic traffic signals are included in term "property," as used in statute declaring local agency liable for injuries to persons and property resulting from dangerous or defective condition of public property, as defined therein, if legislative body, board or person authorized to remedy condition fails to do so or take action reasonably necessary to protect public against condition within reasonable time after acquiring knowledge or receiving notice thereof. West's Ann.Gov.Code, §§ 53050, 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

2. Municipal Corporations ⚷847

The statute declaring local agency liable for injuries to persons and property resulting from dangerous or defective condition of public property, if legislative body, board, or person authorized to remedy condition fails to do so or take action reasonably necessary to protect public against condition within reasonable time after acquiring knowledge or receiving notice thereof, is in derogation of common law rule of no liability for malperformance of governmental function and must be strictly construed. West's Ann.Gov. Code, § 53051.

3. Municipal Corporations ⚷756

The Public Liability Act was not enacted for purpose of protecting persons coming on city streets, but only for benefit of persons injured by reason of dangerous or defective condition thereof. West's Ann.Gov.Code, §§ 53050, 53051.

4. Municipal Corporations ⚷755(1), 763(1)

A city is not an insurer of safety of travelers on its streets, but is required only to exercise ordinary care to maintain streets in reasonably safe condition for those using them.

5. Municipal Corporations ⚷733(2), 766

A city was not liable for injuries to boy, struck by automobile while crossing street in pedestrian crosswalk at intersection, because of city's failure to direct traffic at intersection while traffic lights, turned off by city before accident because they were not operating properly, were being repaired, as such nonfeasance was in exercise of governmental function and gave rise to no muncipal liability under Public Liability Act because it did not consist of use of defective property. West's Ann.Gov.Code, §§ 53050, 53051.

6. Municipal Corporations ⚷766

A city was not liable for injuries to boy, struck by automobile while crossing street in pedestrian crosswalk at intersection, on ground of violation of Public Liability Act by failure to remedy or take action reasonably necessary to protect public against dangerous or defective condition of public property because traffic lights at intersection were not operating at time of accident, where city turned off lights before accident because they were not operating properly. West's Ann.Gov. Code, §§ 53050, 53051.

◆

Monroe N. Langdon, Stockton City Atty., Stockton, Carlisle C. Crosby, Oakland, of counsel, for appellant.

Keith, Creede & Sedgwick, San Francisco, for defendants. Garcia, Cecchini Trucking Co., etc.

A. Brooks Berlin and Alvin Lobree, San Francisco, Neumiller, Ditz & Beardslee, Stockton, for plaintiffs-respondents.

Honey, Mayall & Hurley, Stockton, for defendant Raposa.

Russell A. Harris, Sacramento, for defendant-appellant.

WARNE, Justice pro tem.

The city of Stockton appeals from a judgment entered against it on a jury verdict in favor of William Goodman, a minor, for personal injuries suffered by said minor and special damages suffered by his mother as the result of said minor being struck by an automobile while in a pedestrian crosswalk at the intersection of East Charter Way and South San Joaquin street within the city of Stockton.

The cause against the appellant was prosecuted under the Public Liability Act of 1923, now sections 53050 and 53051 of the Government Code.

The accident occurred at approximately 3:45 p. m. on April 7, 1953, at the easterly crosswalk or pedestrian lane located at the intersection of East Charter Way and South San Joaquin street, in the city of Stockton. It was "broad daylight" at the time, and visibility was good. East Charter Way was and is an arterial thoroughfare, duly posted with stop signs. It is approximately 80 feet wide and runs in a general easterly and westerly direction. South San Joaquin street intersects at right angles and runs in a general northerly and southerly direction. It is approximately 40 feet wide. East Charter Way is part of State Highway number 4 as it crosses this particular intersection, and at this point it is in a 35-mile-per-hour speed zone for traffic moving east and west. An electric traffic signal light is located at each of the four corners of the intersection, the lights controlling traffic by the usual red and green colors to indicate whether traffic is to "stop" or "go". These traffic lights were installed and have been in use by the city of Stockton since World War II. They are part of a general and agreed plan of operation and control of traffic along State Highway number 4, as it passes through the city. There are similar signals two blocks to the west and to the east of the intersection in question and every other block both to the west and to the east thereof for some distance. The maintenance of these signals at all times was the duty of the city of Stockton by joint agreement of the city with the State of California.

Four days prior to the occurrence of the accident, on the morning of April 3, 1953, it was observed that the electric traffic lights at the intersection in question were not working properly. Several hours before noon of that day notice was given to the city, and upon investigation it was discovered that water had seeped into the underground conduit housing the cables that operated the light circuit, and as a result the wires had grounded, and this in turn was causing the traffic lights to flash the colors, or stop and go signals, at the same and improper time. About noontime of the same day the city electrician told the assistant traffic engineer that the lights were in such condition that he felt they should be turned off. The power was then turned off and the light signals put out of operation entirely.

It was ascertained that the short in the wiring occurred at a point somewhat near the center of the street about 35 feet from the signal stand and at the southwest corner of the intersection. From the morning of April 3, 1953, to the time of the accident in the late afternoon of April 7, 1953, a period of four and one-half days, the job of repairing the defective condition and putting the electric traffic signals in operation had not been completed. The job was finally finished on April 9, 1953, and the lights restored to service.

There was testimony to show that the job of repairing the defective signals could have been completed within 20 to 24 man hours of working time.

While the traffic lights were out of order, no substitute measures were taken for the direction of traffic at this intersection.

Defendant James Garcia, an employee of the Cecchini Trucking Company, was driving a truck and trailer loaded with crates of produce in an easterly direction within the inner of the two eastbound lanes of traffic on East Charter Way. He knew that the traffic signals were not working. As he approached this intersection he saw three boys at the northeast corner, and shortly after seeing them, observed that two of them had started to go southerly across East Charter Way in the marked pedestrian crosswalk immediately to the east of the intersection. He also saw plaintiff, William Goodman follow the other two boys into the pedestrian lane. Upon observing this, he brought his truck and trailer to a complete stop about twelve feet west of the westerly crosswalk. At this point the three boys were continuing in a southerly direction along the easterly crosswalk.

When he started into the intersection the two boys were about halfway across the street with William Goodman immediately behind. When he was about 20 feet from the easterly crosswalk, he saw plaintiff, William Goodman, walk in front of his truck, glance at it for a second and then continue on for five or six steps. At that point William Goodman was struck by a Ford automobile driven by defendant Raposa.

Raposa was also driving easterly on East Charter Way. He was in the outer of the two eastbound traffic lanes. He testified that when he was a block west of the intersection he saw and knew that the traffic lights were not working, and when he had approached within a half block he observed that the traffic standard on the southeast corner had been taken down, and that all the lights were turned off; that at the time he entered the intersection and until the time of the collision, the Garcia truck was on his left side; that it obstructed his view to his left, and that the first time he saw William Goodman was when he was right there "in the center of my car." At the time his speed was between 25 and 30 miles per hour.

On these facts the jury returned a verdict against the city.

Appellant contends that, as a matter of law, there is no evidence from which the jury could have found any dangerous or defective condition of public property existed at this intersection at the time of the accident, and that the absence of electric traffic signals did not in any way contribute to the occurrence of the accident.

Section 53050, Government Code, defines "public property" as meaning public street, highway, building, park, grounds, works, or property; and "local agency" as including a city. Section 53051 provides:

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
>
> "(a) Had knowledge or notice of the defective or dangerous condition.
>
> "(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[1] It is now settled law that automatic traffic signals are included in the term property as used in the statute. Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 288 P.2d 989, citing Bady v. Detwiler, 127 Cal.App.2d 321, 330, 273 P.2d 941.

[2] It is stated in the Hoel case: "In the first place, the statute is in derogation of the common law rule of no liability for malperformance of a governmental function and is to be strictly construed. [Citing cases.] The statute itself draws a distinction between remedying and affording protection against an existing defect. The knowledge or notice must reach a body, board or person authorized to remedy the condition, and that body or person must within a reasonable time 'remedy the condition or * * * take action reasonably necessary to protect the public against the condition.' In other words, make a permanent correction or supply temporary protection against an uncorrected defect." 136 Cal.App.2d at pages 303–304, 288 P.2d at page 994.

[3, 4] In the instant case when the traffic lights failed and notice was given, or acquired, actually or constructively of the defective condition of the traffic lights, i. e., that from some cause they were not operating properly and were misdirecting instead of directing traffic, thereby creating a dangerous condition by reason of faulty action, a duty arose to do one of two things within a reasonable time; either to correct the defective condition of the traffic lights or to take action to protect the public against the condition caused by the faulty operation of the lights. This

the city did when it turned them off. The dangerous or defective condition so far as the traffic lights were concerned was simply that they confused traffic. This was remedied by turning them off. There is no evidence that there was any other dangerous or defective condition of public property at this intersection. There were no traffic lights at the intersections immediately to the east and to the west. In fact, the evidence shows that for several blocks to the east and to the west of the intersection at East Charter Way and South San Joaquin street traffic lights were only installed and operated on East Charter Way at every other cross street. As before noted, East Charter Way was an arterial thoroughfare duly posted with stop signs as required by the Vehicle Code. These stop signs were installed at the intersection in question, and when the traffic lights were turned off due to faulty operation, its condition became comparable, in so far as the regulation of the flow of traffic was concerned, with those intersections without traffic lights. The Public Liability Act was not enacted for the purpose of protecting those who come upon city streets but only those who sustain injury by reason of a "dangerous or defective condition." Shipley v. City of Arroyo Grande, 92 Cal.App.2d 748–750, 208 P.2d 51. A city is not an insurer of the safety of travelers; it is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them. George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723.

In order to avoid an entrapment situation such as existed in Bady v. Detwiler, supra, the city authorities in the case before us did the very thing that the court held they should do in the case of Hoel v. City of Los Angeles, supra; that is, they eliminated the potentially dangerous condition by turning the traffic lights off in order to protect the public against it. No trap such as existed in the case of Irvin v. Padelford, 127 Cal.App.2d 135, 273 P.2d 539, was actually created by the city of Stockton when it turned off the traffic lights. When the lights were turned off, their defective condition could no longer mislead or misdirect the injured party.

[5] Nor could the city be held liable in failing to direct traffic while the lights were being repaired. Such nonfeasance is within the exercise of a governmental function and could give rise to no municipal liability because it did not consist of the use of defective property. Hoel v. City of Los Angeles, supra, 136 Cal.App.2d at page 303, 288 P.2d at page 994; Stang v. City of Mill Valley, 38 Cal.2d 486, 488, 240 P.2d 980; Douglass v. City of Los Angeles, 5 Cal.2d 123, 127–128, 53 P.2d 353; Bauman v. City and County of San Francisco, 42 Cal.App.2d 144–158, 108 P.2d 989.

In view of what we have said above, we deem it unnecessary to discuss the second contention of appellant based on lack of proximate cause.

[6] We conclude that there was no evidence of a violation of the Public Liability Act by the city of Stockton.

The judgment is reversed, and the trial court is ordered to enter judgment in favor of the appellant.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

151 Cal.App.2d 660

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Paul ROBARGE, Defendant and Appellant.

Cr. 5797.

District Court of Appeal, Second District, Division 1, California.

June 11, 1957.

Prosecution on information charging defendant with possession of flowering tops and leaves of Indian Hemp, commonly referred to as marijuana, and alleging two prior convictions. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, White, P. J., held where defendant had been on parole, and parole conditions had been that he notify parole officer of change of address and that he not have any marijuana or any narcotic in his possession, and defendant's ex-wife had informed parole officer that defendant had changed his address after sister-in-law had found paper sack containing marijuana in his room, parole officer was justified in making search of defendant's abode at his new address and seizing a narcotic cigarette found in blue shirt hanging in closet of abode.

Judgment affirmed.

1. Arrest ⚷63(4)

Reasonable cause to justify an arrest may consist of information obtained from others, and is not limited to evidence that would necessarily be admitted at trial on the issue of guilt.

2. Searches and Seizures ⚷3(1)

Where defendant had been on parole, and parole conditions had been that he notify parole officer of change of address and that he not have any marijuana or any narcotic in his possession, and defendant's ex-wife had informed parole officer that defendant had changed his address after sister-in-law had found paper sack containing marijuana in his room, parole officer was justified in making search of defendant's abode at his new address and seizing a narcotic cigarette found in blue shirt hanging in closet of abode. West's Ann.Health & Safety Code, § 11500.

3. Poisons ⚷9

In order to sustain conviction on narcotic charge, prosecution must prove possession of a narcotic and knowledge of the presence and narcotic character of the article allegedly possessed; however, essential facts may be established by circumstantial evidence and reasonable inferences that may be drawn therefrom. West's Ann.Health & Safety Code, § 11500.

4. Poisons ⚷9

Evidence justified finding of guilty knowledge on part of defendant in prosecution charging possession of narcotics. West's Ann.Health & Safety Code, § 11500.

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Eugene V. McPherson, Joseph A. Armstrong, Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

An information filed by the District Attorney of Los Angeles County charged defendant with a violation of Section 11500 of the Health and Safety Code, in that on or about February 20, 1956, he unlawfully had in his possession flowering tops and leaves of Indian Hemp (cannabis sativa), commonly referred to as marijuana. The information further alleged a prior conviction of the crime of robbery and a prior conviction of Section 11500 of the Health and Safety Code. Following denial of a motion to set aside the information pursuant to Section 995 of the Penal Code, defendant entered a plea of not guilty. The prior convictions alleged were subsequently admitted. When the cause was called for trial a jury was duly waived and it was stipulated that "the People's case may be submitted on the testimony taken at the preliminary examination as it is contained in the transcript of that proceeding, subject to any objections that counsel made there, or any additional objections that he wishes to make here; and that either side may offer additional testimony if desired." Defendant was found guilty of the offense charged against him and sentenced to State Prison. From the judgment of conviction he prosecutes this appeal.

Concerning the factual background surrounding this prosecution the record reflects that defendant had previously been convicted of the crime of Robbery on December 2, 1947 and on July 23, 1952, was found guilty of a violation of Section 11500 of the Health and Safety Code. He was released on parole from the State Prison on March 2, 1955. Two of the conditions of his parole were that he notify the parole officer of any change in his address, and that he not have marijuana or any narcotic in his possession.

On February 20, 1956, Frank Robert Haydis, parole officer, Adult Authority of the State of California, was the defendant's parole officer. On that date Officer Haydis had a conversation with the defendant's ex-wife. Mrs. Robarge told him that the defendant had moved from his address at Norwalk (which address his parole officer had), approximately two to three weeks before, and had established residence in Carl's Motel at 12124 Atlantic Boulevard in Compton. Mrs. Robarge told Officer Haydis that she had talked to the defendant at about the time of the move, that the defendant had informed her that while he was living with his sister or sister-in-law in Norwalk, the sister-in-law had discovered a paper sack with marijuana in his room. She had requested him to move because of the presence of her children. The parole officer, accompanied by Officer Lyons, went to Carl's Motel at about 6:00 p. m. They went to Room 7, which was registered to defendant, and knocked on the door, but received no answer. They then contacted the owner of the motel who opened the room and let them enter. Both officers thereupon searched the room. Officer Haydis found a white paper-wrapped cigarette (People's Exhibit 1) in a pocket of a semi-dress blue shirt which was hanging in a closet of the apartment. The shirt was admittedly owned by the defendant. Four or five minutes after the discovery of the cigarette, Officer Lyons found some cigarette papers which he showed to Officer Haydis. Immediately after the discovery of these items, Officers Lyons and Haydis went to the manager's office and telephoned the Firestone Sheriff's Office. They then returned to the apartment. Officer Haydis took the cigarette with him and turned possession over to Mr. Erven and Mr. Bailey, Sheriff's Officers from the Firestone Station.

Clifford Erven, a Deputy Sheriff assigned to Firestone Park Sheriff's Station, placed the cigarette given to him by Officer Haydis in a small envelope and put the envelope into his pocket. The cigarette paper was either given to him by Officer Haydis or picked up by the witness after Officer Lyons called his attention to it in the motel apartment.

The Deputy Sheriff had Officers Lyons and Haydis initial the envelope.

The defendant was arrested on February 20 as he got out of a borrowed car at the apartment at 12124 South Atlantic in the East Compton area. He was wearing a suede jacket (People's Exhibit 2) at that time. Deputy Sheriff Erven folded the jacket inside out in a newspaper and turned it over to Patrol Sergeant Sewards of the Firestone Park Sheriff's Station, along with the blue shirt from the apartment and the small envelope which he sealed and stapled, containing the cigarette to be placed in the Evidence Locker.

Los Angeles County Deputy Sheriff Frank Vacio who was assigned to the Narcotic Detail, had a conversation with the defendant on February 22, 1956. The latter's statements were free and voluntary. Deputy Sheriff Vacio asked defendant if the marijuana cigarette was his. The defendant denied this. He was then asked if the blue shirt in which the marijuana cigarette had been found belonged to him. The defendant stated, "Yes".

Deputy Sheriff Vacio inquired as to the usage of marijuana on the part of the defendant and the latter stated that he had used marijuana a few times since his release from prison. The defendant, when asked if anyone else had worn the shirt said no, it had been a Christmas present and he had been the only person to wear it.

Martin Kline, forensic chemist in the Los Angeles County Sheriff's Criminological Laboratory, examined the cigarette (People's Exhibit 1) and testified that it contained a green leafy material which were portions of cannabis sativa (marijuana). The chemist also examined the aforesaid brown suede jacket which defendant admitted was his, and in the pockets thereof found debris and several marijuana leaf fragments.

Sworn as a witness for the defendant, Patricia Robarge testified she was the wife of defendant's brother, LeRoy Robarge. That she lived at 9609 Adoree Street, Downey, in Los Angeles County, and was acquainted with defendant. That she was also acquainted with defendant's ex-wife. That defendant lived at her home for about a year following his parole in early 1955. That at no time while defendant was residing at her home did she ever see him in possession of marijuana. The witness further denied that she ever told defendant's ex-wife that she (the witness) "* * * had found marijuana in his (defendant's) possession, and had to force him to leave the place."

As a witness in his own behalf, defendant testified that the aforesaid jacket and shirt belonged to him. He denied any knowledge of the cigarette found in his shirt or of the debris and several marijuana leaf fragments found in the pockets of his jacket. He testified that at no time did he violate the terms of his parole by the use or possession of narcotics.

As his first ground for reversal of the judgment, appellant contends that the search of his room and the seizure of the incriminatory evidence therein contained was without reasonable or probable cause; therefore in violation of his constitutional rights and should have been excluded at the trial.

Appellant concedes that because he was on parole, thereby being in *custodia legis* the question whether the search by the parole officer was illegal is largely governed by the special character of the relation between such officer and his parolee, analyzed ably and with great clarity by Mr. Justice Fox, speaking for the court in People v. Denne, 141 Cal.App.2d 499, 507–510, and wherein it is said, at page 510, 297 P.2d 451, at page 458, "* * * By accepting the privilege of parole a prisoner consents to the broad supervisory and visitorial powers which his parole officer must exercise over his person and property until the term of his sentence shall have expired or been terminated. * * * Having constructive custody of his prisoner at all times, there is nothing unreasonable in a parole officer's search of the prisoner's premises where, as here, he has reasonable cause to believe the parole has been breached. * * *" See also People v. Triche, 148 Cal.App.2d 198, 306 P.2d 616.

However, in the case now engaging our attention, appellant contends that notwithstanding the constructive custody which the parole officer had over him at all times as his prisoner, the officer in the instant case did not have reasonable cause to believe that appellant had breached his parole. With this we cannot agree.

"The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77." People v. Novell, 54 Cal.App.2d 621, 623, 624, 129 P.2d 453, 454.

With the foregoing rules in mind, we find that the record discloses that the two conditions imposed upon appellant when he was granted parole were that:

(1) He notify his parole officer of any change of address; (2) He not have marijuana or any narcotic in his possession.

Parole Officer Haydis was informed by appellant's ex-wife that the former had violated both conditions of his parole. That he had moved from his sister-in-law's home, his address of record with the parole authorities, two to three weeks before. He had told her at about the time of the move that the move was requested by his sister-in-law after she found a sack containing marijuana in his room. The officer also knew that appellant was on parole after conviction of a violation of the narcotics statute (Health and Safety Code, Section 11500).

[1] That reasonable cause to justify an arrest may consist of information obtained from others, and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt is now well settled (Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222.

[2] Appellant earnestly contends that no attempt was made to prove the reliability, if such there was, which should be attached to the hearsay testimony of the informant. We are satisfied that while this might go to the weight to be given the testimony it does not entirely destroy the probative value thereof when it is remembered that the information received by the parole officer was not mere surmise but a direct statement that the informant had talked with appellant who told her of his change of address and the reason therefor. With this information, coupled with the officer's knowledge that appellant was on parole for a narcotics conviction, together with confirmation of his violation of parole when the officer found appellant had changed his address without notification to the parole authorities, we are persuaded that the parole officer, under the facts of the instant case, was justified in making the search of appellant's abode and seizing the contraband found therein.

Appellant's claim that there was no showing that the officers went to the motel to look for him nor that they had in mind apprehending him before the search is answered by the fact that the record is silent as to whether this is the only information received from Mrs. Robarge (ex-wife of appellant), or, if other information had been received, whether or not it had been reliable. Similarly the record is silent as to the officers' motive in going to the motel. We are satisfied that the evidence presented to the court justified the conclusion that reliance thereon was reasonable and would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the appellant had breached his parole. Credence to this information is added by the fact that the appellant had previously been convicted of possessing marijuana.

In support of the proposition that information must come from an informer who had previously proved reliable, appellant relies on the cases of People v. Thymiakas, 140 Cal.App.2d 940, 296 P.2d 4; People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50 and Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36. However, in each of these cases the informer was anonymous. His name was not revealed at the trial. In the Willson case, supra, the informer was unknown even to the police. He was an individual who, unsolicited, gave the information acted upon to the chief of police. The court stated that information from an anonymous informer may not be the sole basis of an arrest. In such cases, additional factors such as identity of, or past experience with, the informer; other similar information; or observation of the police, must buttress the anonymous information. In the recent case of People v.

Goodo, 147 Cal.App.2d 7, 304 P.2d 776, while volunteered information was given by an identified informant, the police had no previous dealings with the informer. In the cited case, the court said, 147 Cal.App. 2d at page 9, 304 P.2d at page 777, "It appears that the officers had not previously known Bruce or had any contact with him and that they did not know his reputation or any other fact which would assist in evaluating his reliability. * * * "Manifestly, in the instant case there were present "other facts" namely the source of the information, as distinguishable from an unknown voluntary informant as well as knowledge of appellant's prior narcotics conviction.

[3] Finally, appellant contends that there is no evidence of possession by appellant of any marijuana in that there is no probative showing that he lived in Room 7 at 12124 Atlantic, where the contraband was discovered. The law is now well settled that to sustain a conviction in the instant case, the prosecution must prove possession of the narcotic and knowledge of the presence and narcotic character of the article allegedly possessed (People v. Gory, 28 Cal.2d 450, 456, 457, 170 P.2d 433; People v. Winston, 46 Cal.2d 151, 161, 293 P.2d 40; People v. Denne, supra, 141 Cal.App. 2d at page 510, 297 P.2d at page 458). These essential facts may however, be established by circumstantial evidence and reasonable inferences that may be drawn therefrom (People v. Lunbeck, 146 Cal. App.2d 539, 303 P.2d 1082). And, "In regard to the question of possession, the cases hold that the narcotics need not be found on the person of the defendant, it being sufficient if such articles are deposited in a place under the possession and control of the accused. [Citing cases.]" People v. Vice, 147 Cal.App.2d 269, 305 P.2d 270, 273.

[4] With regard to guilty knowledge on the part of the appellant, this case is strikingly similar to the case of People v. Denne, supra. Appellant herein had previously been convicted of possession of narcotics, in 1952. He was released on parole on March 2, 1955. The appellant admitted he had used marijuana several times since his release from the state prison. The suede jacket, worn by the appellant at the time of his arrest contained marijuana leaf fragments in both the left and right pockets of the jacket. The marijuana cigarette was found in the pocket of the appellant's blue shirt. All of these circumstances and the inferences reasonably to be drawn therefrom impress us that the finding of the trier of facts based thereon cannot be strictured as unreasonable and without justification.

We are further satisfied that the possession and custody of the room here in question by the appellant was sufficiently established by the testimony of Parole Officer Haydis that it was appellant's room, the finding of the blue shirt containing the marijuana in a closet of that room, when the shirt was admittedly owned by the appellant, and worn by no one else; and the arrest of the appellant as he got out of a car at the apartment.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

151 Cal.App.2d 800

Irvin Max RADNER, Plaintiff and Appellant,

v.

Oliver Roger EIDE et al., Defendants and Respondent.

Civ. 17328.

District Court of Appeal, First District, Division 2, California.

June 19, 1957.

Hearing Denied Aug. 13, 1957.

Action for personal injuries sustained by plaintiff in an accident wherein defendant's automobile driven by him was involved. From an order of the Superior Court, San Mateo County, A. R. Cotton, J., granting defendant's motion to quash service of summons on him in a State to which he moved from California after the accident, plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that the statute providing that acceptance of certificate of ownership or registration of motor vehicle or operator's license by resident of State shall constitute consent by him to personal service of summons on him wherever he may be found, whether or not he is then a resident of State, in any action brought in State courts on cause arising in State out of his ownership or operation of vehicle, is inapplicable to former residents of State residing in other jurisdictions when statute became effective.

Order affirmed.

Automobiles 🔑235

The statute providing that acceptance of certificate of ownership or registration of motor vehicle or operator's license by resident of State shall constitute consent to personal service of summons on him wherever he may be found, whether or not he is then a resident of State, in any action brought in State courts on cause arising in State out of his ownership or operation of vehicle, applies only to persons residing in State when statute became effective and not to former residents of State residing in other jurisdictions at such time. West's Ann.Vehicle Code, §§ 404.1–404.4.

Philander Brooks Beadle, John T. Tully, San Francisco, for appellant.

Ropers & Majeski, Robert F. Kane, Redwood City, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from an order granting the respondent's motion to quash service of summons in an action brought by the appellant, Irvin Max Radner in the Superior Court of the County of San Mateo. Such an order is appealable under Code of Civil Procedure, Section 963(4).

The facts which are not disputed are as follows: In February 1954, the respondent was a resident of the City of Mountain View, in Santa Clara County. On February 22, 1954, while driving an automobile owned by him on a public highway in said county he was involved in an accident in which the appellant was injured. On March 1, 1954, the respondent moved to the State of Washington and has since that date at all times been a resident and domiciliary of the State of Washington. The complaint in this action was filed on February 21, 1955. The summons was issued on the same date, and personal service of the summons and a copy of the complaint was made on the respondent on March 12, 1956, in the State of Washington by Deputy Sheriff L. R. Williams, a public officer of the County of Kitsap, State of Washington, duly authorized to serve process. On April 3, 1953, the respondent was issued a California vehicle operator's license, No. Z1002701 which expired on April 3, 1957.

The only issue on appeal is whether personal jurisdiction of the respondent was obtained by service of the summons and copy of the complaint in the State of Washington on March 12, 1956.

Appellant contends that the trial court erred in granting the respondent's motion to quash the service of the summons, because the respondent consented to the service, under Vehicle Code Sections 404.1 to section 404.3 which are as follows:

> "§ *404.1. Service of Process on Resident Accepting Certificate of Ownership or Registration.* The acceptance by a resident of this State of a certificate of ownership or a certificate of registration of any motor vehicle or any renewal thereof, issued under the provisions of this code, shall constitute the consent by such person that personal service of summons may be made upon him at any place where he may be found, whether or not he is then a resident of this State, with the same force and effect as though served within this State, in any action brought

in the courts of this State upon a cause of action arising in this State out of the ownership or operation of said vehicle. (Added Stats.1955, c. 796, p. 1397, § 1.)

"§ 404.2. *Service of Process on Person Accepting or Retaining Operator's or Chauffeur's License.* The acceptance by a resident of this State, after the effective date of this section, of an operator's or chauffeur's license issued pursuant to the provisions of this code, shall constitute the consent of such person that personal service of summons may be made upon him at any place where he may be found and whether or not he is then a resident of this State, with the same force and effect as if served within the State in any action brought in the courts of this State upon a cause of action arising in this State out of his driving a motor vehicle upon any public road or highway in this State.

"The retention of an operator's or chauffeur's license issued under the provisions of this code by a resident of this State for more than 180 days after the effective date of this section shall likewise operate as a consent of the licensed holder to the service of summons as hereinbefore provided for as to a person accepting an operator's or chauffeur's license after said effective date. (Added Stats.1955, c. 796, p. 1397, § 2.)

"§ 404.3. *Manner of Serving Process; Time to Appear.* In the event summons is served outside of this State, pursuant to the provisions of Sections 404.1 and 404.2, it may only be served by a public officer of the State in which service is made, qualified by the laws of that state to serve process, or by an elisor appointed for that purpose by the court out of which the summons is issued. In the event of such service outside the State, the person so served shall have 60 days in which to appear in the action in which the summons is issued. (Added Stats. 1955, c. 796, p. 1398, § 3.)

"§ 404.4. *When Statutes of Limitation Are Not Tolled.* Notwithstanding any provisions of Section 351 of the Code of Civil Procedure to the contrary, when summons may be personally served upon a person as provided in Sections 404.1 and 404.2, the time of his absence from this State is part of the time limited for the commencement of the action described in said sections, except when he is out of this State and cannot be located through the exercise of reasonable diligence; provided, this Section 404.4 in no event shall be applicable in any action or proceeding commenced on or before September 7, 1956. (Added Stats.1955, c. 796, p. 1398, § 4.)"

This statute became effective on September 7, 1955, at which time the respondent was no longer a resident of this state. It is appellant's argument that the controlling date is not the effective date of the statute but the date of service, which was March 12, 1956. Appellant relies on Smith v. Finley, 112 Cal.App.2d 599, 246 P.2d 989 and Lebkicker v. Crosby, 123 Cal.App.2d 631, 267 P.2d 361, which were concerned with the interpretation of Civil Code Section 956, which provides for the survival of actions for personal injury, and which held that the code section could apply to an accident which occurred before the effective date of the statute, provided, the death of the tort-feasor occurred after the effective date of the statute. These cases are not relevant here.

The statute in question here has recently been construed in the case of Chesin v. Superior Court, 142 Cal.App.2d 360, 298 P.2d 593, in which, on identical facts, the court granted a writ of mandamus to stay further proceedings in a wrongful death action to a petitioner who had been a resident of California at the time of the accident, but who on the effective date of the statute, and the date of filing of the complaint and service of summons was a resident and domiciliary of Arizona. The court said at page 366 of 142 Cal.App.2d at page 597 of 298 P.2d: "By their very terms, sections 404.1 through 404.4 of the Vehicle Code apply only to persons who were residents of the state at the time the statutes became effective. They do not apply, and cannot be interpreted so as to apply, to former residents of the state who, at the time the statute became effective, were domiciled in and residents of other jurisdictions." The court also concluded that the statute was not intended to operate retrospectively because of the language of section 404.2, and thus did not reach the question of the constitutionality of the retrospective application of section 404.1, which is worded differently than section 404.2. Supra, 142 Cal.App.2d at pages 365, 366, 298 P.2d at page 596. The court rejected the argument that the Legislature had power to provide for service of summons outside the state on any person domiciled within the state at the time the cause of action arose against him, as the Legislature rejected an amendment to Section 417 of the Code of Civil Procedure which would have added residence at the time the cause of action arose as another basis for personal jurisdiction. Final Calendar Legislative Business, California Legislature, 1955 Regular Session, Assembly Final History, A.B. 2612, p. 857. The Chesin case was followed on identical facts in House v. Tucker, 150 Cal.App.2d 580, 310 P.2d 53.

Vehicle Code Sections 404.1 to 404.4 were made necessary by the fact that the California non-resident motorist statute, Vehicle Code Section 404, applies only to persons who were not residents of this state at the time of the accident, and under the limitations placed on sections 412 and 413 of the Code of Civil Procedure by section 417, personal jurisdiction is obtained only over persons who are residents of this state at the time of the commencement of the action or at the time of service. Allen v. Superior Court, 41 Cal.2d 306, 308, at page 312, 259 P.2d 905, 906, at page 908. Non-resident motorist statutes in other jurisdictions made residence at the time of the accident controlling, with regard to persons who are residents at the time of the accident and subsequently become non-residents. McKinney's Consolidated Laws of New York, c. 71, Vehicle and Traffic Law, § 52–a; Purdon's Penn.Statutes, Title 75, § 1201; Wis.Stat.1955, 85.05(6), (7), W.S.A.; Ariz.Rev.Stat.Ann. § 28–502(C); Ill.Rev.Stat.1951, Ch. 95½, § 23. The retroactive application of the Illinois statute was upheld in Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686, as being a statute in aid of jurisdiction, a similar ground as that used by our Supreme Court in upholding the retroactive application of section 417 of the Code of Civil Procedure in the Allen case, supra. The same cannot be said of section 404.1 here as the very purpose of sections 404.1 to section 404.4 of the Vehicle Code was to put persons who were residents at the time of the accident in the same position as non-residents. Senate Interim Judiciary Committee, Report of March 1955, pp. 31–32. Therefore, the statute in the Chesin case was properly construed.

In view of the holding in Chesin v. Superior Court, supra, the question here involved is no longer open unless and until changed by our State Supreme Court.

Accordingly, the order of the trial court finds support in the law and must be affirmed.

Order affirmed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

151 Cal.App.2d 606

SUBSEQUENT INJURIES FUND OF THE STATE OF CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Louis J. Pranzitelli, Fair Manufacturing Company, and California Casualty Indemnity Exchange, Respondents.

Civ. 17580.

District Court of Appeal, First District, Division 1, California.

June 11, 1957.

Hearing Denied Aug. 6, 1957.

Workmen's compensation proceeding for review and annulment of order of Industrial Accident Commission. The District Court of Appeal, Bray, J., held that where employee who suffered industrial injury on November 11, 1949 for which he was awarded 72% disability against insurance carrier by award which denied him recovery against Subsequent Injuries Fund filed petition on October 11, 1954 to reopen against Subsequent Injuries Fund, Industrial Accident Commission had continuing jurisdiction to change its award and had the power to award recovery against Subsequent Injuries Fund after five year period from date of accident had expired.

Order affirmed.

Workmen's Compensation ⚷1030

Where employee who suffered industrial injury on November 11, 1949, for which he was awarded 72% disability against insurance carrier by award which denied him recovery against Subsequent Injuries Fund filed petition on October 11, 1954, to reopen against Subsequent Injuries Fund, Industrial Accident Commission had continuing jurisdiction to change its award and had the power to award recovery against the fund after five year period from date of accident had expired. West's Ann.Labor Code, §§ 3202, 5410, 5803, 5804.

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Edmund G. Brown, Atty. Gen., Gerald F. Carreras, Deputy Atty. Gen., Albert W. Harris, Jr., Deputy Atty. Gen., San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Comm.

Tobriner, Lazarus, Brundage & Neyhart, Ridgeway P. Harrison, San Francisco, for Pranzitelli.

BRAY, Justice.

Petitioner seeks review and annulment of an order of the commission (by decision after reconsideration) amending as against petitioner an award made more than 5 years after the date of the industrial injury.

Question Presented.

Power of commission to act under section 5410, Labor Code, after having previously denied an application for an award against the Subsequent Injuries Fund.

Record.

November 11, 1949, applicant suffered an industrial injury to his back and legs. October 8, 1953, findings and award, awarded applicant 72 per cent permanent disability against defendant carrier, but, on the ground that applicant was already totally disabled, it was held that applicant was not entitled to any benefits from the Subsequent Injuries Fund and his application was dismissed.

Thereafter in Smith v. Industrial Acc. Comm., Cal.App., 272 P.2d 895, the District Court of Appeal held that an employee with a 100 per cent permanent disability before the industrial injury could be entitled to benefits from the Fund.

October 11, 1954 (within the 5 year period) applicant filed petition to reopen against Subsequent Injuries Fund.

November 1, 1954, due to the fact that a hearing of Smith v. Industrial Acc. Comm., supra, had been granted by the Supreme Court and not yet determined, an order was made taking the case off the commission's calendar to be reset upon request of any of the parties.

November 5, 1954, defendant carrier filed petition to reopen.

April 9, 1956 (beyond the 5 year period). By this time Smith v. Industrial Acc. Comm., 44 Cal.2d 364, 282 P.2d 64, had been decided similarly to the decision in the District Court of Appeal. Orders were entered granting applicant's and carrier's petitions to reopen. Supplemental findings and award were filed reducing the permanent disability award against defendant carrier and imposing 46 per cent award against petitioner.

April 30, 1956, petitioner's petition for reconsideration filed, raising question of commission's jurisdiction.

December 4, 1956, decision after reconsideration was filed. This denied a motion by petitioner for leave to submit additional points and authorities, set aside the orders granting petitions to reopen and supplemental findings and award of April 9, 1956. The commission found that since on April 9, 1956, more than 5 years had elapsed since the injury, it was without jurisdiction to reduce the permanent disability awarded against defendant carrier and hence could not grant defendant carrier's petition to reopen. It found, however, that good cause existed to reopen against petitioner, and amended the findings and award of October 8, 1953 (which had denied applicant any relief against petitioner) to impose an award against petitioner of 28 per cent permanent disability awarding him $2,739.52 and thereafter a lifetime pension of $12.92 per week. Petition for reconsideration was thereafter denied.

1. Jurisdiction.

Petitioner concedes that where an application for an award against the Fund is filed within the 5 year period stated in section 5410 the commission has jurisdiction to continue the hearing of such application and make the award after the expiration of that period.[1] Petitioner contends, however, that the employee having made application previously to the commission for an award against petitioner, and the commission having acted thereon dismissing the employee's application, the commission had no power to consider another application against the fund even within the 5 year period unless the application showed a new and further disability than the one considered by the commission on its previous action. Thus, says petitioner, the commission having on October 8, 1953, dismissed the employee's petition for an award from the Fund, even though the commission then acted upon an erroneous view of the law, the employee's only right to ask the commission to rescind, alter or amend that order would be under sections 5803 and 5804, Labor Code, and the courts have held that even though relief under said section is asked for within the 5 year period, the commission loses jurisdiction to act at the expiration of the 5 year period. See Westvaco Chlorine Products Corp. v. Industrial Acc. Comm., supra, 136 Cal.App.2d 60, 63, 288 P.2d 300; Broadway-Locust Co. v. Industrial Acc. Comm., 92 Cal.App.2d 287, 206 P.2d 856. Admittedly the employee through the erroneous interpretation of the law by the commission was denied an award against the Fund to which award he was legally entitled. So in determining whether that action of the commission barred him from again asserting his rights, we must have in mind the requirement of the Workmen's Compensation Act that it be given a liberal construction with the purpose of extending its benefits for the protection of injured workmen. Labor Code, § 3202.

Section 5410 provides: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. *The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period.* * * *" (Emphasis added.) The emphasized portion of section 5410 is important. The preceding portion of the section gives the employee the right to apply to the commission for the relief provided any time within 5 years from the injury. If the section means that once that application is acted upon the commission may not (as it may under section 5803 as to actions coming within the purview of that section) rescind, amend or alter its decision as to actions coming within its purview, then the sentence "The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period" has no meaning. To give that sentence meaning it must be construed to mean that, as in our case, when the protection of the workman requires it the commission's jurisdiction is such that it may change its previous action, provided only that the application for the change is made within the 5 year period.

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[1] Subsequent Injuries Fund v. Industrial Acc. Comm., 39 Cal.2d 83, 91, 244 P.2d 889, held that section 5410 applied to proceedings against the Subsequent Injuries Fund. Westvaco Chlorine Products Corp. v. Industrial Acc. Comm., 136 Cal.App.2d 60, 288 P.2d 300, points out that it is well settled that where applications are made under section 5410 within the 5 year period the commission has power to continue its jurisdiction beyond that period.

The decision in Subsequent Injuries Fund v. Industrial Acc. Comm. (Patterson), supra, 39 Cal.2d 83, 244 P.2d 889, 894, holds in effect that proceedings against the fund are not brought under section 5803 but under section 5410, even though the injury was the same as the one for which a disability rating against the employer and his carrier had been awarded. The employer and carrier are not concerned with the award against the fund. In the last mentioned case the court did not consider whether the disability for which the applicant was seeking an award against the fund was one which as against the employer and carrier would have constituted a "new and further disability." It may have considered that as to the fund the applicant's disability was new and further because no award against it had been made. In any event, the case definitely holds that applications against the Fund are under section 5410, which provides "continuing jurisdiction at all times." Therefore the commission has continuing jurisdiction to grant, change or otherwise deal with an award against the fund, provided only that the application for such change or action is filed within the 5 year period. As before stated, it is well settled that the commission has power to continue its jurisdiction to act under section 5410 beyond the 5 year period, where application is made within that period. Sutton v. Industrial Acc. Comm., 46 Cal.2d 791, 794, 298 P.2d 857; Westvaco Chlorine Products Corp. v. Industrial Acc. Comm., supra, 136 Cal.App.2d 60, 64, 288 P.2d 300.

Section 5410 is a more liberal section than sections 5803 and 5804. As pointed out in the Sutton case, the latter sections do not deal with the time when applications thereunder *shall be made* but with the time within which they *must be acted upon.* Section 5410, on the contrary, deals with the time when an employee may "institute" proceedings to which the section applies. To apply the limited effect of sections 5803 and 5804 to proceedings as to which section 5410 applies would be to deny that liberality of interpretation which the policy of Workmen's Compensation Law requires. "The policy of the law, enjoined by both statute and precedent, directs that workmen's compensation laws shall be liberally construed in favor of extending their benefits. (Lab.Code, § 3202; Aetna Life Ins. Co. v. Industrial Acc. Comm., (1952), 38 Cal.2d 599 [604], 241 P.2d 530)." Subsequent Injuries Fund v. Industrial Acc. Comm., supra, 39 Cal.2d at page 91, 244 P.2d at page 894.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

152 Cal.App.2d 1

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Parsegh John PARSEGHIAN, Defendant and Appellant.

Cr. 1154.

District Court of Appeal, Fourth District, California.

June 19, 1957.

Defendant was convicted of possession of marijuana. Judgment was entered, and no appeal was taken from the judgment. Thereafter the defendant filed a motion to vacate the judgment. The Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., entered an order denying the motion, and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that motion to vacate judgment is in the nature of a writ of error coram nobis, and that on such motion the Superior Court could not review the allegedly improper admission of evidence, or contention that defendant was induced to enter plea of guilty by promises made by his counsel without the concurrence of responsible officials, or contention of defendant that he was denied effective aid of counsel.

Order affirmed.

1. Criminal Law ⚿997(1)

Motion to vacate judgment of conviction is in the nature of writ of error coram nobis.

2. Criminal Law ⚿997(4), 998

Alleged fact that evidence was improperly admitted in prosecution for possession of marijuana would be merely an error of law which could not be reviewed on a petition to vacate the judgment of conviction or for a writ of error coram nobis. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⚿997(9)

Contention that defendant was induced to enter a plea of guilty by promises made by his counsel without the concurrence of responsible officials did not constitute a valid ground for relief in a coram nobis proceeding.

4. Criminal Law ⚿998

Contention that defendant was denied effective aid of counsel could not be asserted on motion to vacate judgment of conviction.

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Lionel Richman, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 11500 of the Health & Safety Code (Possession of a narcotic, marijuana) and with three prior convictions. Counsel was appointed by the court and the defendant entered a plea of not guilty and stood mute as to the allegations of the prior convictions, whereupon the court ordered a denial entered as to such allegations. Thereafter, by leave of court, the defendant personally and through his counsel withdrew his plea of not guilty, entered a plea of guilty and admitted the prior convictions as alleged in the information. The defendant then applied for probation and the court appointed a psychiatrist to examine the defendant as to his present sanity, and set that matter and the time for pronouncement of judgment for November 10, 1955. On that day a report was filed by the court-appointed psychiatrist reporting his finding that the defendant was same and capable of cooperating with his attorney in the preparation of his defense. The application for probation was denied and the defendant was sentenced to prison for the term prescribed by law. No appeal was taken from that judgment.

On September 28, 1956, the defendant filed a "motion to set aside judgment and withdraw plea" based on the sole ground that the plea of guilty entered by him "was obtained from him by false promises, duress and extrinsic fraud, because the evidence was obtained by an unlawful search and seizure and was inadmissible evidence," citing People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. This was accompanied by an argument to the effect that when he was apprehended his automobile was unlawfully searched when the arresting officers had no warrant and no reason to believe that he was committing a felony or an offense in their presence; that the evidence obtained in this unlawful search and seizure was inadmissible; and that his court-appointed attorney failed to employ his knowledge of the technicalities of the law in his behalf. A different attorney was appointed by the court to represent the defendant on this motion. The motion was heard on November 5, 1956, and submitted upon the file and record before the court. The court denied the motion and the defendant, in propria persona, appealed from that order.

At the request of appellant for the appointment of counsel this court appointed a third attorney to represent him on this appeal. This attorney has filed a report in which he states that he personally interviewed the appellant; that he has reviewed the testimony contained in the transcript of the preliminary examination, from which it appears that the appellant was under the influence of marijuana when he was arrested and that he assisted the officer in opening a box in the glove compartment of his car, which contained more marijuana; and that he is unable to find any meritorious ground of appeal.

[1, 2] After examining the record, we are in accord with this conclusion. There is no merit in the contention that any evidence was inadmissible because it was obtained by an illegal search and seizure. The appellant pleaded guilty and no evidence of any kind was admitted in connection with the commission of the crime charged. Moreover, the motion to vacate the judgment is in the nature of a writ of error coram nobis. People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657. The fact that evidence was improperly admitted, if such were the case, would be merely an error of law which could not be reviewed on a petition to vacate the judgment or for a writ of coram nobis. People v. Cahan, 135 Cal.App.2d 287, 287 P.2d 6; People v. Gamboa, 144 Cal.App.2d 588, 301 P.2d 390.

[3, 4] Some contention was made that the appellant was induced to plead guilty by false promises made to him. No allegation was made as to what these supposed promises were, but the record indicates that this refers to his claim that his counsel failed to effectively represent him. There is no allegation of any fact showing or tending to show any action by the district attorney or any other official which had anything to do with inducing him to change his plea. It is well settled that the claim that a defendant was induced to enter a plea of guilty by promises made by his counsel without the concurrence of responsible officials, does not constitute a valid ground for relief in a coram nobis proceeding. People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Adamson, 33 Cal.2d 286, 201 P.2d 537; In re Hough, 24 Cal.2d 522, 150 P.2d 448. Also, that a claim that a defendant was denied effective aid of counsel may not be asserted in such a proceeding as this. People v. James, 99 Cal.App.2d 476, 222 P.2d 117; People v. Krout, 90 Cal.App.2d 205, 202 P.2d 635. No valid ground for relief having been presented the court properly denied the application here in question.

We have preferred to decide this case on its merits, although counsel for the appellant states that when he interviewed the appellant the appellant said he did not desire to have the appeal "prosecuted further", because he expected to be paroled in November.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

48 Cal.2d 720

Elizabeth R. COHEN, Plaintiff and Respondent,

v.

The PENN MUTUAL LIFE INSURANCE COMPANY, a corporation, Defendant and Appellant.

S. F. 19647.

Supreme Court of California,
In Bank.

June 21, 1957.

As Modified on Denial of Rehearing
July 16, 1957.

Beneficiary's suit on life policy, resisted on grounds of knowing misrepresentations in medical history in application. From judgment rendered for plaintiff by the Superior Court, Marin County, Jordan L. Martinelli, J., the insurer appealed. The Supreme Court, Spence, J., held that where insured, a physician, who subsequently died from heart condition, in medical history, falsely denied that he had had electrocardiograms and that he had been treated for heart or circulatory disturbances and stated that he had last received treatment from physician 10 years previously, though he had been treated two years previously for abdominal pain, though he knew that his admission to the Army had been under waiver for unstable blood pressure, tachycardia and murmur and that he had, at other times, circulatory troubles, he made material false statements which vitiated coverage, regardless of whether he considered his heart condition serious.

Reversed with directions.

Schauer, J., Gibson, C. J., and Carter, J., dissented.

Opinions, 301 P.2d 253 and 302 P.2d 46, vacated.

1. Insurance ⚷292

Where applicant for insurance is asked generally whether he has been treated for disease or ailment, failure to mention minor or temporary indisposition is not material to risk and will not avoid the policy, but where he gives false answers to specific questions as to his medical history, he vitiates the contract. West's Ann. Insurance Code, §§ 332, 334.

2. Insurance ⚷292

Where false representations as to material matters in medical history in application for life insurance have been made, the contract is thereby vitiated, regardless of whether applicant had a fraudulent intent to deceive. West's Ann.Insurance Code, §§ 332, 334.

3. Insurance ⚷665(3)

In determining whether questions to which applicant for life coverage gave false answers in medical history were material so that the false answers would vitiate coverage, fact that insurer put questions in writing and asked for written answers was proof that it deemed answers material. West's Ann.Insurance Code, §§ 332, 334.

4. Insurance ⚷291(3)

Failure of applicant for life coverage to disclose a physical condition of which he is ignorant will not affect coverage. West's Ann.Insurance Code, §§ 332, 334.

5. Insurance ⚷291(4)

Insurer, in passing on application for life coverage, had right to know all that applicant knew relating to specific questions as to health, contained in the application and to determine insurability for itself, relying on such information, and the fact that applicant, a physician, might personally have believed that his heart condition was not of substantial character did not prevent his coverage from being vitiated by reason of his false answers to questions relating thereto. West's Ann.Insurance Code, §§ 331, 332, 334, 336.

6. Insurance ⚷389(9)

Statements by insured, in medical history in application for life coverage, that he had been last examined by a physician 10 years previously and had been examined at Army induction, where he stated that he was in good health and had no serious medical conditions, did not distinctly imply other facts so as to put insurer on notice that he had been examined for heart condition or require insurer to search out Army records, and its failure to do such things did not constitute a waiver of insured's asserted fraudulent failure to disclose that he had circulatory ailments. West's Ann.Insurance Code, §§ 331, 332, 334, 336.

7. Pleading 🔑35

In suit on life policy, insurer's defense of actual fraud and direct deception did not militate against its right to prevail on its other claim of concealment of material fact, intentional or unintentional, and allegations of actual intent to deceive were mere surplusage. West's Ann.Insurance Code, §§ 331, 332, 334, 336; West's Ann.Civ.Code, § 1572.

8. Insurance 🔑292

Where insured, a physician, who subsequently died from heart condition, in medical history in application for life coverage, falsely denied that he had had electrocardiograms and that he had been treated for heart or circulatory disturbances and stated that he had last received treatment from physician 10 years previously, though he had been treated two years previously for abdominal pain, though he knew that his admission to the Army had been under waiver for unstable blood pressure, tachycardia and murmur and that he had, at other times, circulatory troubles, he made material false statements which vitiated coverage, regardless of whether he considered his heart condition serious. West's Ann.Insurance Code, §§ 331, 332, 334, 336.

Henry C. Clausen, Henry C. Clausen, Jr., Walker Lowry and McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for appellant.

Rockwell & Fulkerson and John L. Rockwell, San Rafael, for respondent.

SPENCE, Justice.

Plaintiff sued as beneficiary to recover on a policy of insurance issued by defendant on the life of her deceased husband. After a verdict in plaintiff's favor, defendant unsuccessfully moved for a judgment notwithstanding the verdict and judgment was entered on the verdict. Defendant appeals, claiming principally that its motion should have been granted because of the deceased's misrepresentations and concealment of material facts in stating his medical history. Since the record sustains defendant's position on this point, other alleged errors need not be considered.

There is no conflict as to the material facts. On September 10, 1949, the deceased, a 32-year-old physician, applied to defendant for the insurance policy. He answered the following questions, among others, in his application:

> "4. (a) When did you last consult or receive treatment for your health from any physician, surgeon or practitioner? 10 years ago.
>
> "4. (d) State name of every other physician, surgeon or practitioner who has attended or treated you or whom you have consulted for any reason or ailment, serious or not serious, within the past 5 years. (Give all dates and details.) None.
>
> "4. (e) Are you in good health? Yes.
>
> "5. Have you ever had a health or physical examination? (Give dates, reasons, and names and addresses of persons who made examinations.) U. S. Army induction 1944.
>
> "6. (c) Have you ever had a special heart study or an electrocardiogram? No.
>
> "6. (d) Have you ever been in a clinic, hospital, sanatorium or asylum for observation, treatment or diagnosis? No.
>
> "8. Has there been any suspicion of, or have you ever had or been treated for any of the following diseases or ailments:
>
> "(d) Palpitation of heart, shortness of breath, pain in chest, abnormal

pulse, any disease of the heart or blood vessels or a high blood pressure? No.

"11. Have you ever had any illness, disease, operation or injury other than as stated by you above? (If so, give full particulars, date, duration, severity, etc. of each. Use reverse side if necessary.) See Details. Nothing other than usual childhood diseases."

Deceased certified that these answers were full, complete and true, and he agreed that they should form a part of the contract of insurance. Thereafter a doctor selected by defendant examined the deceased and reported his condition as satisfactory. The policy was issued September 19, 1949; the application therefor was attached thereto; and together, they constituted the entire contract between the parties. The insured died of a heart attack while giving a lecture on June 1, 1950. The autopsy established the cause of death as "coronary arteriosclerosis, severe," with "old occlusion of left circumflex coronary artery. Subtotal occlusion of left anterior coronary artery. Anterior myocardial scar. Visceral congestion, moderate."

Proofs of death were filed with defendant and upon investigating the claim, defendant discovered the following facts relating to the deceased's induction into, and discharge from, the Army: That following application for a commission with the Army Medical Corps in 1943, the deceased was examined by Army doctors on seven separate occasions between October 1 and October 20 of that year, and that these examinations showed that he had a heart murmur, unstable blood pressure or intermittent hypertension and tachycardia or rapid pulse; that during this same period of 1943, the deceased had also had a special heart study by X-ray and an electrocardiogram—the latter being "definitely abnormal," in the opinion of one expert pointing to the coronary arteriosclerosis found at the autopsy, and according to another expert "suggestive of heart disease"; that in January, 1944, the deceased accepted a commission stating "Waiver is granted for unstable blood pressure, tachycardia, systolic apical murmur on physical examination report dated October 1, 20, 1943"; that following an examination of the deceased in the fall of 1944, the Army report stated: "Blood pressure this examination is of same order as previously"; that thereafter on October 12, 1944, and preliminary to entering on active duty, the deceased executed a waiver acknowledging under oath that he had hypertension; and that in January, 1947, the deceased was relieved from active duty following a discharge in November, 1946, stating that he was "incapacitated for general or limited service" because of "hypertension." Defendant further discovered that in late 1947 or early 1948, the deceased, while an intern at the Michael Reese Hospital in Chicago, had been examined at the hospital because of abdominal pain.

It indisputably appeared from defendant's witnesses that the policy to the deceased was issued in reliance on the truth of his representations in his application for insurance; that had the facts disclosed by the Army examinations been known to defendant the policy would not have issued; that under defendant's standard practice, electrocardiograms, abnormal pulse records, and abnormal blood pressure readings are referred to home office doctors for review; that if the deceased had truthfully stated his medical history, a full investigation would have been made, and that defendant does not insure applicants with pulse and blood pressure readings such as those of the deceased at the time of his Army examinations. All the expert witnesses, both plaintiff's and defendant's, agreed that in order to determine the physical condition of a person under examination, it is essential that he tell the truth about his medical history.

[1, 2] Where an applicant for insurance is asked generally whether he has had or been treated for any disease or ailment, the failure to mention minor or temporary

indispositions is not material to the risk and will not avoid the policy. Ransom v. Penn Mutual Life Ins. Co., 43 Cal.2d 420, 427, 274 P.2d 633; Pierre v. Metropolitan Life Ins. Co., 22 Cal.App.2d 346, 349, 70 P.2d 985. But the rule is otherwise when the applicant is asked specific questions as to his medical history, and false answers thereto will vitiate the contract. McEwen v. New York Life Ins. Co., 187 Cal. 144, 146–147, 201 P. 577; Iverson v. Metropolitan Life etc. Co., 151 Cal. 746, 749, 91 P. 609, 13 L.R.A.,N.S., 866; San Francisco Lathing Co. v. Penn M. L. Ins. Co., 144 Cal.App.2d 181, 300 P.2d 715; Pierre v. Metropolitan Life Ins. Co., supra, 22 Cal. App.2d 346, 349, 70 P.2d 985. It has been specifically held that misrepresentations as to heart symptoms render an insurance policy unenforceable. California Western States Life Ins. Co. v. Feinsten, 15 Cal.2d 413, 423–424, 101 P.2d 696, 131 A.L.R. 608; Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 80–81, 169 P. 997; Robinson v. Occidental Life Ins. Co., 131 Cal.App.2d 581, 585–586, 281 P.2d 39; Parrish v. Acacia Mut. Life Ins. Co., D.C.Cal., 92 F. Supp. 300, 302–303, affirmed 9 Cir., 184 F. 2d 185. Where false representations as to material matters have been made, the existence of a fraudulent intent to deceive is not essential. Telford v. New York Life Ins. Co., 9 Cal.2d 103, 105, 69 P.2d 835.

[3] Section 334 of the Insurance Code provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Within the purport of this rule, the deceased was bound in good faith to communicate the material facts in the application for insurance. Ins. Code, § 332. The fact that defendant put the questions in writing and asked for written answers was itself proof that it deemed the answers material. O'Connor v. Grand Lodge A.O.U.W., 146 Cal. 484, 494–495, 80 P. 688; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 475–476, 29 P.2d 263; McEwen v. New York Life Ins. Co., 23 Cal.App. 694, 697–698, 139 P. 242. While the misrepresentations need not have any causal connection with the death of the insured, the nature of the misrepresentations here strikingly reflects the materiality of the information withheld.

[4] Although failure of an applicant to disclose a physical condition of which he is ignorant will not affect the policy (Travelers Ins. Co. v. Byers, 123 Cal.App. 473, 481, 11 P.2d 444) and a layman might reasonably be excused if, in disclosing information, he failed to understand the meaning of certain medical terms and for that reason omitted some fact in his medical history (Ransom v. Penn Mutual Life Ins. Co., supra, 43 Cal.2d 420, 426, 274 P. 2d 633), this is not such a case. Here the deceased was himself a doctor, he knew his medical history with regard to his heart condition, and he concededly must have understood the terms used in the insurance application and the significance of his answers. He knew that within two years of making his application with defendant, he had been in the hospital for the purpose of diagnosis of abdominal pain and had consulted doctors in connection therewith; he knew that while in the Army he had had a special heart study by X-ray; he knew what an electrocardiogram was and that while in the Army, one had been made of his heart action; he knew that tachycardia meant rapid pulse and that hypertension meant high blood pressure; and he knew beyond any possible dispute that the Army had concluded that he suffered from tachycardia and high blood pressure, for his Army commission so stated and he had acknowledged the hypertension under oath. Yet in his application, the deceased denied all of these specific facts. While in Ransom v. Penn Mutual Life Ins. Co., supra, 43 Cal.2d 420, 427, 274 P.2d 633, it was indicated that the failure to disclose a *normal* electrocardiogram could be excused because obviously it did not effect the risk, here the electrocardiogram whose existence the deceased concealed was not normal but

"suggestive of heart disease." In short, the medical history which the deceased submitted pictured a risk entirely different from that in fact involved. Parrish **v.** Acacia Mut. Life Ins. Co., supra, D.C., 92 F.Supp. 300, 303.

[5] Plaintiff argues that the Army findings of hypertension and rapid pulse as part of the deceased's heart symptoms might be regarded as isolated instances which had completely disappeared by the time of his examination by the doctor selected by defendant upon deceased's application for insurance, in view of said doctor's failure to report any findings of heart trouble as of September, 1949, and the fact that prior to death in 1950, there was evidence that the deceased was apparently in good health and was then leading an active life. She further cites certain medical testimony in the record indicatng that certan heart damage to the deceased could have occurred within the last three months of the deceased's life. In refuting plaintiff's arguments, defendant refers to the testimony of its expert witnesses that the autopsy examination indicated that the decedent had been suffering from arteriosclerosis "for many years," and the concession of plaintiff's cardiologist that he was unable to say how long the deceased might have had heart disease before his death. However, these considerations are not of controlling importance. Rather, the issue was whether the deceased had concealed his medical history concerning his heart and circulatory condition in making his application to defendant. Defendant had a right to know all that the deceased knew relating to the specific questions contained in the insurance application. Robinson v. Occidental Life Ins. Co., supra, 131 Cal.App.2d 581, 585, 281 P.2d 39. The importance which defendant attached to these answers, from both the appraisal of risk and the inquiry aspects (Ins.Code, § 334), was emphasized by its inquiry not only as to whether the applicant had the particular disease but whether he had "any suspicion of * * * abnormal pulse, any disease of the heart or blood vessels or a high blood pressure." This was plain warning that defendant would investigate any suspicious or doubtful circumstances which the answers might indicate. Nor does it matter what the deceased might personally have believed about his heart condition and its lack of substantial character. Defendant did not ask on the application for merely his evaluation of his physical condition, but also for a truthful statement of his medical history. California-Western States Life Ins. Co. v. Feinsten, supra, 15 Cal.2d 413, 423, 101 P.2d 696, 131 A.L.R. 608; Telford v. New York Life Ins. Co., supra, 9 Cal.2d 103, 108, 69 P.2d 835. Defendant was entitled to determine for itself the matter of the deceased's insurability, and to rely on him for such information as it desired "as a basis for its determination to the end that a wise discrimination may be exercised in selecting its risks." Robinson v. Occidental Life Ins. Co., supra, 131 Cal.App.2d 581, 586, 281 P.2d 39, 42.

[6] Plaintiff claims that defendant waived the fraud in the deceased's answers. To this point she first argues that the right to information may be waived by a failure to inquire as to facts which "are distinctly implied in other facts of which information is communicated." Ins.Code, § 336. This argument is untenable for it cannot be said that the fact that the deceased consulted doctors and was diagnosed in a hospital for abdominal pain within two years of his insurance application is "distinctly implied" in his answer that his last consultation with doctors was "10 years ago"; or that the fact that he had been examined repeatedly by Army doctors is "distinctly implied" in his answer that he was examined only once, "U. S. Army induction 1944"; or that the fact that he had had an electrocardiogram is "distinctly implied" in his answer that he had not had one; or that the fact that he had stated under oath that he had hypertension is "distinctly implied" in his answer that there had never "been any suspicion of * * * high blood pressure."

Plaintiff next argues that defendant waived the fraud by failing to search out the Army records when it was on notice that deceased had taken an Army induction examination. Because of the difficulty and the time consumed in obtaining military records, defendant customarily did not endeavor to obtain them unless the applicant's answers provided a reason for so doing. If the applicant's answers indicated a service connected disability or an examination which showed defects, defendant would request the applicant to produce his health record from the Army before processing the application. Specifically, the deceased's denial of an electrocardiogram, abnormal pulse records, and high blood pressure readings indicated that there was no need for defendant's search of the Army's findings. This is not like the situation involved in Turner v. Redwood Mutual Life Ass'n, 13 Cal.App.2d 573, 57 P.2d 222, cited by plaintiff, where the insured disclosed an illness but failed, in good faith, to describe it with complete accuracy. It was held that since the illness was disclosed and the attending doctor identified as the source of any further information wanted, the insurance company waived the misstatement in its issuance of a policy and could not claim fraud. But here the deceased denied any medical history at all bearing on the specific questions relating to his heart condition. In short, the deceased, like the insured in Parrish v. Acacia Mutual Life Ins. Co., supra, 92 F.Supp. 300, 302, "denied having the very symptoms that might have, if properly followed up and known to the defendant, indicated an unfavorable heart condition." It was not incumbent upon defendant to assume the falsity of the statements in deceased's application. Robinson v. Occidental Life Ins. Co., supra, 131 Cal.App.2d 581, 585, 281 P.2d 39.

[7, 8] Plaintiff finally contends that since defendant framed its pleadings on the basis of actual fraud—listing the deceased's false representations, claiming that they were made by the deceased for the purpose of deceiving defendant, and that defendant, without knowledge of their falsity, relied thereon in issuance of the policy (Civ.Code, § 1572)—the issue of the deceased's actual intent was tendered as a question of fact for the jury's determination. In this connection, plaintiff also refers to defendant's admission in the course of the trial that it was claiming "actual fraud," a "direct deception upon the contract." But such added factor in defendant's alleged ground for avoiding the insurance policy does not militate against its right to prevail, as a matter of law, on its claim that concealment of a material fact, whether intentional or unintentional, vitiates an insurance policy. Ins.Code, § 331. In line with this latter proposition, defendant at the outset of the case submitted an instruction stating that the "presence of an intent to deceive is not essential," which is a correct statement of the law. Telford v. New York Life Ins. Co., supra, 9 Cal.2d 103, 105, 69 P.2d 835. The allegation of an actual intent to deceive may be regarded as mere surplusage, unnecessary to prove and unessential to defendant's right to refuse payment on the insurance policy. It in nowise prejudiced or misled plaintiff in the presentation of her case. Gates v. General Casualty Co. of America, 9 Cir., 120 F.2d 925, 927; see also Pigeon v. W. P. Fuller & Co., 156 Cal. 691, 699, 105 P. 976; Demetris v. Demetris, 125 Cal.App.2d 440, 443, 270 P.2d 891; Karsh v. Haiden, 120 Cal.App.2d 75, 83, 260 P.2d 633; Alonso v. Hills, 95 Cal.App.2d 778, 784, 214 P.2d 50. Suffice it to say here that the uncontradicted evidence shows that, as a matter of law, the deceased, by false answers, misrepresented and concealed material facts, and that defendant in its dealings with him did not waive such deception in issuing its insurance policy to him. Under such circumstances, defendant's motion for a judgment notwithstanding the verdict should have been granted. McEwen v. New York Life Ins. Co., supra, 187 Cal. 144, 147, 201 P. 577; Whitney v. West Coast Life Ins. Co., supra, 177 Cal. 74, 81, 169 P. 997; Pierre v. Metropolitan Life Ins. Co., supra, 22 Cal.App.2d 346,

349, 70 P.2d 985; Maggini v. West Coast Life Ins. Co., supra, 136 Cal.App. 472, 479–480, 29 P.2d 263; Parrish v. Acacia Mut. Life Ins. Co., supra, 92 F.Supp. 300, 303.

The judgment and the order denying the motion for judgment notwithstanding the verdict are reversed with directions to enter judgment for defendant.

SHENK, TRAYNOR, and McCOMB, JJ., concur.

Opinion of SCHAUER, Justice (dissenting).

The majority opinion, in reversing the judgment for plaintiff with directions "to enter judgment for defendant," appears to me to have violated certain basic principles relative to (a) judgments notwithstanding the verdict and (b) the function of a court of review. As this court stated in Brandenburg v. Pacific Gas & Elec. Co. (1946), 28 Cal.2d 282, 284 [1], 169 P.2d 909: "A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied. [Citations.]" And, "it is the established law that such a motion cannot be granted where there is a conflict in the evidence, although the conflict is such that the trial court is justified in granting a new trial notwithstanding it, as the motion must be based upon such a state of facts as will warrant the court in granting it without trespassing on the province of the jury to be judges of all questions of fact in the case." (Hunt v. United Bank & Trust Co. (1930), 210 Cal. 108, 120–121 [12], 291 P. 184.) The rules traditionally governing a court of review in resolving conflicting evidence are discussed *infra*.

In the case before us, as is hereinafter shown, the evidence was substantially conflicting. To reach its result the majority resolves conflicting inferences in favor of defendant and against sustaining the judgment. The jury was unanimous and required only 28 minutes of deliberation in determining the issues in favor of plaintiff. Analysis of the record discloses adequate support for the jury's verdict.

There was ample evidence to the effect that the abdominal pain for which the decedent was examined at Michael Reese Hospital in 1947 or 1948 was merely a minor and transitory indisposition, unrelated to any prior or subsequent ailments. Plaintiff widow testified that the pain complained of was in the lower right quadrant of the abdomen, and that the decedent thought that it might be appendicitis; that at that time the decedent was working as a resident physician at Michael Reese Hospital and one day while at work he had some other member of the staff check into the complaint; that the findings of the examination were completely negative, and the decedent (a psychiatrist) dismissed the pain as psychosomatic. The decedent did not go to or stay in the hospital for treatment of any disease. As described by his wife "It was just an examination. He felt rather silly afterwards, the way anybody does when they find they don't have anything to back up a pain." The record before us contains medical testimony that a pain in the lower right quadrant of the abdomen is not a sign or symptom of heart disease. From the testimony it was readily inferable (and if we follow the law we must presume that the jury did infer) that the decedent believed that the abdominal pain was of minor and transitory significance, that the examination at that time was confined to the area of the pain and produced no signs of any ailment at all, that such pain was not at all related to the decedent's (later developed or discovered) heart disease, and that the nondisclosure to defendant insurer of the circumstances of that examination was not such a falsification or omission in the application as could invalidate the policy. (See Ransom v. Penn Mutual Life Ins. Co. (1954), 43 Cal.2d 420, 427, 274 P.2d 633.)

Similarly, there is evidence in the record from which the jury could legitimately have inferred that the nondisclosure of the details of the army medical records (even assuming they were known to the insured) was completely inconsequential and could not make the policy void. Resolving conflicts and drawing inferences in favor of the verdict, the following facts directly or inferentially appear:

The decedent, at least until a few months before his death, had "no knowledge" that he was suffering from heart disease; in "ten or fifteen percent" of the cases of arteriosclerosis no symptoms of the disease at all are manifested; the irregularities in the decedent's heart as disclosed by the autopsy, apart from the arteriosclerosis, "could be attributed to development of the disease within the last three months" before death.

The decedent was not in fact suffering from high blood pressure; the army itself did not take the results of the electrocardiogram seriously, and the indications of the army physicals including the electrocardiogram could have been due to functional, as opposed to organic, causes such as "emotion or anxiety" at the time of taking the examinations. Fair statement of the facts before the jury requires also that we note that there was no evidence that the decedent knew the details of the medical reports other than the bare medical conclusions, but there was evidence that the decedent, being a medical man himself, and a psychiatrist, would tend to minimize the results of the tests and attach only psychosomatic or emotional significance to them.

An army practice of granting waivers was prevalent even though the defects waived were not serious and the individual "was qualified and physically fit to serve"; on the basis of an abnormal reading of pulse rate or blood pressure "on one occasion" the army would automatically classify the individual as having tachycardia or hypertension and require a waiver; and the insurance company did not pay a great deal of attention to army waivers or physicals where the individual was inducted, received a nonmedical discharge, and was not drawing disablity benefits. In this connection it is to be noted that the company was informed at the time decedent applied for the insurance that he had been in service, had received a nonmedical discharge, was not drawing disability benefits, and had no service-incurred ailments. The truth of these facts is not disputed. Certainly it is to be inferred that an insurance company knows that a person who is accepted for active duty in the army, who serves in such capacity and is thereafter honorably discharged, has been the subject of various physical examinations.

The company gave great weight to the examination given by their own doctor, and his examination of decedent disclosed no indication of heart disease, high blood pressure, or abnormal pulse; none of the reports of the three independent investigators employed by defendant showed any indication of ill health past or present; and the decedent had been in good health for at least several years prior to his death and carried on activities not consistent with one who had or believed he had heart disease. The jury could infer from these facts that decedent did not in fact have "heart disease" —and certainly was not aware that he did —at the time he applied for insurance, and, assuredly, that he had no ascertainable symptoms of the disease or reason for believing that he had it.

The company had a rule of thumb to check all reports of physical examinations within five years previous to the date of application for insurance and not to check reports of examinations before that time, but even then they did not always consider army physicals within the five year period; the company would not have given consideration to blood pressure or pulse readings taken more than five years prior to the application for insurance; all of the army physicals except the one at decedent's discharge from service (which disclosed no abnormal symptoms) were given approximately five years before the application was made; army medical records are "very,

very difficult to get" and, even if more extended reference had been made to the army physicals by decedent, the company for economic reasons still would not have bothered to try to get those records where no service-connected disability was indicated. In the latter regard it should be noted that in response to question 6(b) of the insurance application, which asked "Have you ever been X-rayed for diagnostic purposes or for treatment of disease?" decedent answered "Yes," and under "details" *referred to his army induction physical.* Despite this disclosure, there is no evidence that the company attempted to determine the reason for or result of the X-rays taken by the army.

From the foregoing evidence the jury could properly have concluded that the symptomatology disclosed in the army medical reports indicated no more than a transitory and inconsequential indisposition caused by nervousness or anxiety, and that such indisposition was not related to the ailment which caused the death of decedent; that decedent did not attach any significance to these medical reports; and that the insurance company also would not have considered the army records of sufficient importance either to examine or, if examined, to influence its decision as to issuing the policy to decedent.

Failure to disclose data which would not affect the risk or the making of the insurance contract is immaterial. Under comparable circumstances we held in Ransom v. Penn Mutual Life Ins. Co. (1954), supra, 43 Cal.2d 420, 427, 274 P.2d 633, that "The fact that [the insured] erroneously answered 'No' to the question whether an electrocardiogram had ever been made of his heart action is immaterial. An incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer." (See also Ins.Code, § 334; Hawley v. Liverpool, London & Globe Ins. Co. (1894), 102 Cal. 651, 653–654, 36 P. 926; Wormington v. Associated Indem. Corp. (1936), 13 Cal.App.2d 321, 324, 56 P.2d 1254; Kleiber M. T. Co. v. International Indem. Co. (1930), 106 Cal.App. 709, 723–724, 289 P. 865.) It cannot seriously be gainsaid that the jury could have concluded from the evidence summarized above that the nondisclosures of the decedent would not have affected the risk to or the action by the company at the time of issuance of the policy.

Specifically relating the above mentioned evidence to the questions which decedent allegedly answered fraudulently, the jury legitimately could, and presumptively did, place the following interpretation on the answers of decedent:

"4. (a) When did you last consult or receive treatment for your health from any physician, surgeon or practitioner? *10 Years ago.*" Disregarding the place-of-employment-fellow-employe examination for the temporary and wholly inconsequential abdominal indisposition hereinabove described, the answer was true. As shown above, the decedent did not go to the hospital for, or receive, treatment; he merely had an examination at his place of employment because of a temporary abdominal pain, and "He felt rather silly afterwards."

"4. (d) State name of every other physician, surgeon or practitioner who has attended you or whom you have consulted for any reason or ailment, serious or not serious, within the past 5 years. (Give all dates and details.) *None.*" Disregarding the above mentioned fellow-employe examination for temporary and inconsequential abdominal indisposition, the answer was accurate.

"4. (e) Are you in good health? *Yes.*" There is abundant evidence to the effect that decedent was, and believed he was, in good health.

"5. Have you ever had a health or physical examination? (Give dates, reasons and names and addresses of persons who made examinations.) *U. S. Army Induction 1944.*" Decedent lumped all of the contemporaneous examinations into one, but the response given adequately answers the question asked insofar as it was in any way material to defendant.

"6. (c) Have you ever had a special heart study or an electrocardiogram? *No.*" It can be argued that in answering this question the decedent should have known and recalled and related that the *army* had had an electrocardiogram made of his heart. But that is not what the question asked. The question "Have *you* ever had a special heart study or an electrocardiogram" is manifestly different in implication from the making by the army of an electrocardiogram during an examination for active military duty. There is no evidence that decedent felt ill and on that account requested this cardiographic examination or even knew the results of the test, and it appears that neither he nor the army doctors attached much significance to it. Obviously *he* did not have the study, if any, or electrocardiogram, made. Furthermore, from the evidence hereinabove related, it is to be presumed that the jury found (as legitimately they could) that the insurance company would not have changed their decision based on the results of this test.

"6. (d) Have you ever been in a clinic, hospital, sanatorium or asylum for observation, treatment or diagnosis? *No.*" As hereinabove related it is true that while decedent was working in a hospital he had a fellow employe examine him and diagnose an abdominal pain. As also above stated the finding was completely negative and the incident was dismissed as a psychosomatic manifestation. Liberally viewed in support of the jury's verdict (and as against an insurer) his answer was not untrue; he was not in the hospital *"for* observation, treatment or diagnosis"; he was there *for work* and as an incident of his presence for that purpose had the examination.

"8. Has there been any suspicion of, or have you ever had or been treated for any of the following diseases or ailments: * * (d) Palpitation of heart, shortness of breath, pain in chest, abnormal pulse, any disease of the heart or blood vessels or a high blood pressure? *No.*" The jury rightfully found this answer to be true. Decedent had never been treated for any of these diseases, and had not had them to his knowledge. Even assuming he had full knowledge of the army medical reports, it is reasonable to assume that, in view of the army's policy as to waivers, the decedent did not attach any significance to the results of his physicals and did not consider that there was even any suspicion of the named diseases.

"11. Have you ever had any illness, disease, operation or injury other than as stated by you above? (If so, give full particulars, date, duration, severity, etc. of each. Use reverse side if necessary.) * * *Nothing other than usual childhood diseases.*" There is nothing in the record to indicate that this question was not answered truthfully, to the best of decedent's knowledge; certainly the evidence supports the jury's determination to this effect.

Since a reasonable construction of the evidence supports the verdict of the jury, and as no prejudicial error is shown, it is the duty of this court to affirm the judgment. In a case such as this, where the ground urged for reversal is that the evidence is insufficient to sustain the judgment, "the power of the appellate court is limited to the determination of whether there is any evidence, contradicted or uncontradicted, which will support the judgment rendered, and all reasonable inferences must be indulged to uphold it, if possible" (Memorial Hospital Ass'n v. Pacific Grape etc. Co. (1955), 45 Cal.2d 634, 635 [1], 290 P.2d 481) and, "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]" (Primm v. Primm (1956), 46 Cal.2d 690, 694 [2], 299 P.2d 231). (See also McCarthy v. Tally (1956), 46 Cal.2d 577, 581 [3, 4], 297 P.2d 981; People v. Baker (1954), 42 Cal.2d 550, 563 [2], 268 P.2d 705; In re Estate of Bristol (1943), 23 Cal.2d 221, 223 [2], 143 P.2d 689; Webster v. Board of Dental Examiners (1941), 17 Cal.2d 534, 539–540 [2], 110 P.2d 992; Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 429 [1], 45 P.2d 183; 4 Cal.

Jur.2d 485, § 606.) If we follow the above quoted law with fidelity to the record which has been epitomized the judgment in this case must be affirmed.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.

48 Cal.2d 689

MARTIN SCHOOL OF AVIATION, Inc. (a Corporation), Plaintiff and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION (a National Banking Association), as Executor of the Estate of Charles E. Rhoades, Deceased, Defendant and Respondent.

No. L. A. 24459.

Supreme Court of California,
In Bank.

June 21, 1957.

Action by bailor against bailee's executor for recovery of value of bailed airplane which crashed killing bailee. The Superior Court, Los Angeles County, Frederick F. Houser, J., entered judgment for defendant, and the plaintiff appealed. The Supreme Court, McComb, J., held that there was a total absence of any evidence that defendant was negligent, or that terms of the bailment were reached, or that there was a conversion.

Affirmed.

Carter, J., dissented.

Opinion, 303 P.2d 1084, vacated.

1. Appeal and Error 🔑989

When findings of fact are attacked on ground that there is not any substantial evidence to sustain them, power of appellate court begins and ends with the termination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support findings of fact.

2. Aviation 🔑247

In bailor's action against bailee's executor for recovery of value of bailed airplane which crashed, killing bailee, evidence supported finding that defendant and his pilot agreed that they would not cause plane to be taken from ground if weather was not good, but that defendant and his pilot did not agree that plane would not be taken from ground "until after daybreak".

3. Appeal and Error 🔑996, 1011(1)

Conflicting evidence and inferences must be disregarded by Supreme Court on appeal.

4. Aviation 🔑247

It is not necessary for visual flight conditions to prevail in order that flying weather be "good", since there is a difference between "good weather" and "clear weather" in such regard.

See publication Words and Phrases, for other judicial constructions and definitions of "Good Weather".

5. Aviation 🔑247

In bailor's action against bailee's executor for recovery of value of bailed airplane which crashed killing bailee, evidence supported finding that when flight started the weather was good, so that bailee did not breach provision in bailment agreement that flight was not to be made unless weather was clear.

6. Aviation 🔑247

In bailor's action against bailee's executor for recovery of value of bailed airplane which crashed, killing bailee, evidence failed to show that bailee was negligent, or that terms of bailment were breached, or that there was a conversion.

7. Trial 🔑404(5)

The findings of fact and conclusions of law constitute the decision, which is the final deliberate expression of trial court, and expressions of a judge during the trial cannot be considered for purpose of contradicting deliberate findings of fact and conclusions of law that he subsequently makes and files.

8. New Trial ⚷96

Trial court did not abuse its discretion in denying plaintiff's motion for a new trial on ground that it was surprised and misled by court into not introducing certain evidence, where record showed that plaintiff had ample opportunity to introduce its evidence prior to submission of the case, and the case had been twice continued for further evidence.

◆

Winthrop O. Gordon and Nathan W. Tarr, Santa Ana, for appellant.

William J. Cusack, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court in an action to recover damages for the destruction of its airplane, plaintiff appeals.

Facts: Plaintiff, Martin School of Aviation, Inc., a corporation, sues as assignee of a partnership consisting of Floyd R. Martin, Joseph G. Hager and J. W. Martin, Jr., which had been doing business under the firm name of Martin School of Aviation. Defendant is sued as executor of the estate of Charles E. Rhoades, deceased. Hereafter the partnership will be referred to as plaintiff and decedent Rhoades as defendant.

Plaintiff owned an instrument-equipped Bonanza airplane which it rented to defendant for a flight to the Imperial Valley. Arrangements were made for defendant by O. A. Kier, an experienced and competent pilot, who acted as pilot of the plane. Within three minutes after the flight commenced the plane crashed. Defendant, the pilot and C. O. Gregg, all occupants of the plane, were killed.

The amended complaint in three counts alleges: (1) that the bailment was made to defendant upon condition that "they would not take, or cause said plane to be taken, off from the ground until after daybreak and unless the weather was clear"; that the plane took off before daybreak and before the weather was clear, and that it was so negligently operated as to cause it to crash to the ground; (2) after incorporating by reference the averments as to the terms of the rental conditions, that defendant "failed to return said airplane to plaintiffs in violation of their said agreement of bailment, and wrongfully breached said agreement of bailment to plaintiffs' damage"; and (3) after incorporating the previous averments of the terms of the bailment, that defendant "promised to return said airplane in good condition and wilfully and negligently failed and refused to return said airplane to plaintiffs and converted the same to his own use."

The trial court found that:

(a) Defendant and Pilot Kier agreed that they would not take or cause said plane to be taken from the ground if the weather was not good;

(b) Defendant and Pilot Kier did not agree that the plane would not be taken from the ground "until after daybreak";

(c) When the flight started "the weather was good at that time";

(d) The plane was not operated negligently;

(e) The terms of the bailment were not breached; and

(f) There was no conversion.

Questions: First. *Was there substantial evidence to support the trial court's findings (a), (b), (c) and (d), supra?*

[1] This question must be answered in the affirmative, and is governed by this rule: When findings of fact are attacked on the ground that there is not any substantial evidence to sustain them, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the findings of fact. (Primm v. Primm, 46 Cal.2d 690, 693 [1], 299 P.2d 231.)

[2, 3] Applying this rule to the present case, a recital of a portion of the evidence with reference to each of the questioned

findings discloses substantial evidence to support them:

Findings (a) and (b). John Martin, a man experienced in aviation matters and in investigating accidents with the Civil Aeronautics Authority, on the day of the accident filed a report with the C.A.A. which was received in evidence. The material portion reads: "Mr. Rhoades and Red Kier made arrangements to use our Bonanza N8632A to go to Brawley, California, on a dove hunting trip and wanted to leave and return early in order to get the hunting over before it got too hot in Brawley. *Kier told me he would check the weather before leaving and wouldn't go if the weather was not good.* I was called at home about 5:45 a. m. by my brother and he said the airport guard called and said that he thought Kier had cracked up. I left at once for the scene of the accident and found it was a complete washout and was not anything left of value. All three persons in the airplane were killed. *It is impossible for me to figure out what could have caused this accident as the ship went in at a great speed and nearly straight in.* The only information I have is what people in the vicinity had to say." (Italics added.)

Clearly, the italicized portion of Mr. Martin's statement and the absence of any other evidence as to weather conditions before the plane was taken into the air constituted substantial evidence to sustain the trial court's questioned findings (a) and (b). Conflicting evidence and inferences must, of course, be disregarded by this court. (See Primm v. Primm, supra, 46 Cal.2d at page 694 [2], 299 P.2d 231.)

[4, 5] *Finding (c).* The evidence established that at the time of takeoff there was a cloud bank above the airfield and surrounding area, with the ceiling being somewhere between 200 and 1,000 feet. The official weather reports placed the ceiling at about 800 feet. Horizontal visibility was estimated at from one to seven miles, and there was no fog. The top of the cloud layer was approximately 2,000 feet, and above that level the skies were clear and visibility unrestricted.

The following Air Traffic Control Regulations (Code of Federal Regulations, Title 14, Part 60) apply to intrastate as well as interstate flights and prescribe, among other things, minimum safe altitudes and rules for visual and instrument flights with respect to ceilings and cloud formations:

Section 60.17 prescribes minimum safe altitudes. So far as pertinent here it reads: *"Minimum safe altitudes.* Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes: * * * (b) *Over congested areas.* Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft * * *. (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure * * *. (d) *IFR operations.* The minimum IFR altitude established by the Administrator for that portion of the route over which the operation is conducted. * * *"

The Visual Flight Rules are prescribed by section 60.30, which read: *"Ceiling and distance from clouds.* Aircraft shall comply with the following requirements as to ceiling and distance from clouds: (a) *Within control zones.* Unless authorized by air traffic control, aircraft shall not be flown when the ceiling is less than 1,000 feet, or less than 500 feet vertically and 2,000 feet horizontally from any cloud formation. (b) *Elsewhere.* When at an altitude of more than 700 feet above the surface aircraft shall not be flown less than 500 feet vertically and 2,000 feet horizontally from any cloud formation; when at an altitude of 700 feet or less aircraft shall not be flown unless clear of clouds."

Ceiling is defined in section 60.72: *"Ceiling.* The distance from the surface of the ground or water to the lowest cloud layer reported as 'broken clouds' or 'overcast.'"

"IFR" means instrument flight rules (§ 60.82), and "IFR conditions" are defined as: "Weather conditions below the minimum prescribed for flights under VFR." (§ 60.83.) "VFR conditions" are defined as: "Weather conditions equal to or above the minimum prescribed for flights under VFR." (§ 60.89.)

Section 60.41 reads: *"IFR flight plan.* Prior to take-off from a point within a control zone or prior to entering a control area or control zone, a flight plan shall be filed with air traffic control * * *."

It is to be noted that there was no evidence that the path of flight was to go through congested areas within the meaning of the Visual Flight Rules. If the ceiling was 800 to 1,000 feet the airplane could fly at an altitude up to 700 feet and still comply with those rules if no control zones or congested areas were involved.

It is not necessary for visual fight conditions to prevail in order that the flying weather be "good." There is a difference between "good" weather and "clear" weather in this regard. "In 'clear weather,' when the pilots can navigate their planes by 'pilotage,' that is, by visual operation from markings and landmarks along the airways, and can clearly see other aircraft or obstructions in time to avoid collision, flights may be governed by the Visual Flight Rules." (Wilson & Bryan, Air Transportation (1949), p. 160.) It may be "good" flight weather even though it is not "clear" within this definition.

In the instant case the sky was clear above 2,000 feet, there was no evidence of any frontal activity or local turbulence in the air, and the only possibly unfavorable weather condition was the cloud bank of about 1,200 foot depth. The pilot was an experienced instrument flyer, and a bank of stratus at such a ceiling is not bad weather for an instrument-rated pilot in an instrument-equipped plane. Thus, even if visual flying conditions did not prevail, there was no showing that the pilot did not comply with the Instrument Flight Rules or that the weather was not "good" for an instrument flight. Under these circumstances it cannot be said as a matter of law that it was not "good" flying weather, and the foregoing evidence fully sustains the trial court's finding (c).

[6] *Finding (d).* There is a total absence of any evidence that defendant was negligent, or that the terms of the bailment were breached, or that there was a conversion. The trial court's finding on these points is sustained by Mr. Martin's report to the C.A.A. set forth above, wherein he said, "It is impossible for me to figure out what could have caused this accident as the ship went in at a great speed and nearly straight in."

[7,8] Second: *Did the trial court abuse its discretion in denying plaintiff's motion for a new trial?*

No. Plaintiff contends that it was surprised and misled by the court into not introducing certain evidence. During the argument at the close of the trial the judge expressed the opinion that the bailment contract contained a condition as to daylight departure and that the condition was violated. The court then, on its own motion, reopened the case for further evidence on the issue of visibility and the meaning of the word "daylight."

The record shows that plaintiff had ample opportunity to introduce its evidence prior to submission of the case, as the judge made clear his willingness to hear any evidence offered, and additional evidence regarding the terms of the bailment contract was actually introduced. The case was twice continued for further evidence, and after submission the trial court made the findings set forth above.

The findings of fact and conclusions of law constitute the decision, which is the final deliberate expression of the court. Expressions of a judge during the trial cannot be considered for the purpose of contradicting deliberate findings of fact and conclusions of law that he subsequently makes and files. (Strudthoff v. Yates, 28 Cal.2d 602, 615 [5], 170 P.2d 873; DeCou v. Howell, 190 Cal. 741, 751 [7], 214

P. 444; People v. Driggs, 111 Cal.App. 42, 44 [1], 295 P. 51.)

It thus appears that there was no ground for granting a new trial and that the trial judge's action in denying the motion was correct.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I adopt herewith as my dissenting opinion in the above entitled case the able and learned opinion written by Mr. Justice Ashburn of the District Court of Appeal, Second Appellate District, Division Two, and which is reported in 303 P.2d 1084.

For the reasons stated therein, I would reverse the judgment.

48 Cal.2d 763

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Keith BASHOR, Defendant and Appellant.

Cr. 6004.

Supreme Court of California,
In Bank.

June 21, 1957.

Prosecution for murder and burglary. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment of conviction and defendant appealed. The Supreme Court, Gibson, C. J., held that evidence sustained conviction.

Judgment and order denying new trial affirmed.

1. Burglary 🔑41(1)

Homicide 🔑250

Evidence sustained conviction on two counts of murder, and two counts of burglary.

2. Criminal Law 🔑519(8)

A confession obtained during a period of illegal detention is admissible, if voluntarily made.

3. Criminal Law 🔑519(8)

In murder and burglary prosecution, where it was established by uncontradicted evidence that defendant's confession was free and voluntary, it was admissible, notwithstanding the fact that it was made four days after defendant's arrest, at a time when he had not been brought before a magistrate.

4. Criminal Law 🔑1213

Imposition of the death penalty in a case of first degree murder does not violate constitutional provisions prohibiting cruel and unusual punishment.

Terrence W. Cooney, Van Nuys, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was indicted on two counts of murder and two of burglary. He initially entered pleas of not guilty and not guilty by reason of insanity but later pleaded guilty to all counts. A jury trial was waived by defendant, and evidence was received for the purpose of determining the issue of sanity, the degree of the offenses and the penalty to be imposed. The court found that all of the offenses were of the first degree and that the defendant was sane at the time they were committed. Defendant's motion for a new trial was denied, and he was sentenced to death on each of the murder counts. This appeal comes before us automatically. Pen. Code, § 1239, subd. (b).

[1] On the night of February 18, 1955, an apartment occupied by three women at 215 South Carondelet Street in Los Angeles was entered while they slept, and the sum of $87 was taken from their purses. On the same night, in an apartment at 271 South Carondelet, Karil Graham was beaten to death. The contents of her purse were found scattered on the floor when her body was discovered, and drawers in the kitchen and living room were open. In the opinion of the doctor who performed an autopsy, the multiple head injuries which the victim suffered were caused by repeated blows with a hard object which could have been a piece of lead pipe.

In May of 1956, Laura Lindsay was slain in her home, which was located about two blocks from the site of the previous killing. Her body, which was found at 8:30 a.m., was partially clothed, and there were various articles strewn over the floor. A palm print was discovered on a firewood box which was open, permitting entry from outside, and it was subsequently determined that the print was made by defendant. An autopsy surgeon found that the victim had sustained several head wounds which, in his opinion, could have been produced by a ball peen hammer.

About two weeks later, the apartment of Lester Olson was entered at night, and his wallet, which contained a $50 bill and other money, was taken while he slept. Shortly after 2 a.m. on that night, two police officers on "stake-out duty" in the vicinity of Olson's apartment saw defendant, who was barefooted and was wearing gloves, standing in the courtyard of an apartment house. Defendant was arrested, and a considerable amount of money was found on his person, including a $50 bill.

In response to questioning by the police, defendant, who at first claimed to be innocent, confessed that he had committed all of the crimes described above. He admitted that the two burglaries were committed in the nighttime and that he was armed with a piece of lead pipe when he entered the apartment at 215 South Carondelet Street. With respect to the killing of Karil Graham, defendant said that he entered the apartment through an unlocked door, and the victim who was sleeping awoke and screamed while he was looking for her purse. Defendant took a piece of lead pipe from his pocket and struck her on the head, and, when she continued to scream, he struck her several more times until she was quiet. He found her purse after a further search and took $20 from it. In confessing the killing of Laura Lindsay, defendant stated that, armed with a ball peen hammer, he entered her home at night through the wood storage box in the living room. He walked through the house, looking for a purse or a wallet, and came to the bedroom, where he saw a woman lying on the bed. When she awoke and started to rise, he took the hammer from his pocket and struck her on the head. She "didn't go down immediately," and he struck her several more times. She followed him across the room and fell after a struggle in which a table was knocked down. Continuing his search, defendant found a purse from which he removed $25. Before leaving, he washed his hands in the bathroom and wiped the faucets with a towel.

Four psychiatrists who were appointed by the court familiarized themselves with the circumstances of the crimes and examined defendant. They testified that, in their opinion, he was sane when the offenses were committed.

The evidence is clearly sufficient to support the judgment.

[2, 3] Defendant argues that, without his confession, the record would not support the findings of first degree murder and that his confession was inadmissible because it was made four days after his arrest, at a time when he had not been brought before a magistrate. A confession obtained during a period of illegal detention is admissible if voluntarily made (Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929), and there is no dispute that, as was established by uncontradicted evidence at the trial, defendant's confession was free and voluntary.

[4] There is no merit in defendant's argument that imposition of the death penalty in a case of first degree murder violates the constitutional provisions prohibiting cruel and unusual punishment. People v. Lazarus, 207 Cal. 507, 514–515, 279 P. 145; cf. In re Wells, 35 Cal.2d 889, 895, 221 P.2d 947.

The judgment and the order denying a new trial are affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance.

While I unequivocally adhere to the salutary principles stated in my dissenting opinion in Rogers v. Superior Court, 46 Cal.2d 3, 11, 291 P.2d 929, in view of the uncontradicted evidence as disclosed by the record in this case that the confession which was obtained from defendant during a period of illegal detention was freely and voluntarily given and that no coercion was exerted on defendant by the prosecuting officers, I am of the opinion that the admission of the confession did not constitute prejudicial error.

151 Cal.App.2d 836

A. MADONNA, an Individual, doing business as Madonna Construction Company, Plaintiff and Appellant,

v.

STATE of California, Department of Public Works of the State of California, Frank B. Durkee, Director of Public Works, State of California, Defendants and Respondents.

Civ. 9088.

District Court of Appeal, Third District, California.

June 19, 1957.

Hearing Denied Aug. 13, 1957.

Action by contractor against State, Department of Public Works, and its Director to recover sum withheld as penalties from final payment due contractor for work performed under highway construction contract. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment dismissing the complaint and contractor appealed. The District Court of Appeal, Warne, J. pro tem., held that where all work under contract had been completed in accordance with plans and specifications, State Highway Engineer had recommended that work be accepted, and Director of Public Works approved Engineer's recommendation by endorsing an interdepartmental communication on May 3, 1955, there was formal acceptance of work on May 3, and contractor's action brought on August 2, 1955 to recover sum withheld from contractor for alleged violations of Labor Code could not be maintained, in view of statute requiring that action to recover penalties be brought within 90 days after completion of contract and formal acceptance of job.

Affirmed.

1. Labor Relations ⚷1473

Where all work under highway construction contract had been completed in accordance with plans, state highway engineer had recommended that contract be accepted, director of public works approved recommendation by endorsement on interdepartmental communication on May 3, and director stated that contract was formally accepted on that date, there was formal acceptance of work on that date, and contractor's action, brought on August 2, to recover sum withheld for alleged violation, of Labor Code could not be maintained in view of statute requiring that action to recover penalties must be brought within 90 days after completion of contract and formal acceptance of job. West's Ann.Labor Code, §§ 1727, 1730–1733, 1774, 1775.

2. Labor Relations ⚷1473

Where highway construction contract was formally accepted on May 3, and Labor Commissioner on June 16 requested that penalty be withheld from payments to contractor because of alleged violations of the Labor Code in performance of contract, 90-day period within which contractor was required to bring action to recover amount withheld began to run on May 3 and not June 16. West's Ann.Labor Code, §§ 1727, 1730–1733, 1774, 1775.

3. Constitutional Law ⚷305
Jury ⚷19(15)
Labor Relations ⚷1473

Proceeding to withhold penalties from final payment due contractor for work performed under highway construction contract was civil proceeding and not criminal proceeding and therefore contractor was not entitled to jury trial or to presumption of innocence, and since Legislature provided for proceeding to be brought within limited period to fully litigate and establish contractor's right to recover penalties there was no violation of due process of law. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 13; West's Ann.Code Civ.Proc., §§ 25, 26; West's Ann.Labor Code, §§ 1720 et seq., 1732, 1733, 1774, 1775.

4. Constitutional Law ⚷43(2)

Where contractor from whom penalties had been withheld from payment in highway construction contract elected to commence his action to recover penalties pursuant to sections to Labor Code, he was estopped from asserting that such sections of code were unconstitutional. West's Ann.Labor Code, §§ 1720 et seq., 1732, 1733, 1774, 1775.

◆

Lionel Richman, Lewis Garrett and Richard Harris, Los Angeles, for appellant.

Robert E. Reed, Harry S. Fenton, Robert F. Carlson, Kingsley T. Hoegstedt, Sacramento, for respondents.

WARNE, Justice pro tem.

On August 2, 1955, appellant brought an action against the State of California, Department of Public Works, and Frank B. Durkee, Director of the Department of Public Works, to recover the sum of $22,400 which was withheld as penalties from the final payment due appellant for work performed under a highway construction contract. The sum was withheld in accordance with the provisions of section 1727 of the Labor Code which provides for the withholding and retaining of all amounts which have been forfeited pursuant to any stipulation in a contract for public work. By section 1775 of the Labor Code, a forfeiture of $10 is imposed for each violation of said section. Section 1774 provides in part that "the contractor to whom the contract is awarded, * * * shall pay not less than the specified prevailing rate of wages to all workmen employed in the execution of the contract." The $22,400 was withheld at the request of the Labor Commissioner pursuant to two letters, dated June 16, 1955, addressed to the Department of Public Works, which charged appellant with 2,240 violations of section 1774 of the Labor Code in the performance of the contract. Respondents made a motion to dismiss the complaint on the ground "that suit on the contract for the alleged breach was not commenced and notice given thereof within ninety (90) days after the completion of the contract and the formal acceptance of the job." The motion was granted, and this appeal followed.

The contract in question was made and entered into between the respondent State of California and the appellant on December 22, 1954, and on May 2, 1955, an interdepartmental communication (letter) was sent from the Division of Highways to the respondent Frank B. Durkee, Director of Public Works, stating in substance that the work under the contract had been completed in accordance with the plans and specifications and that it was recommended that the contract be accepted. On May 3, 1955, this interdepartmental communication was received by the director's office, and on the same day the recommendation of the State Highway Engineer was approved and the job was accepted. The formal acceptance of the work appears on the interdepartmental communication over the signature of

A. H. Henderson, Deputy Director of the Department of Public Works, as follows: "Recommendation Approved: Frank B. Durkee, Director of Public Works, By [signed] A. H. Henderson." There followed the date "May 3, 1955." The State Highway Engineer on May 6, 1955, by letter, informed appellant of the formal acceptance of the contract, and on May 9, 1955, a notice of completion of the contract was recorded in Santa Barbara County. The recorded notice states that the work was completed by the contractor and accepted by the Director of Public Works on May 3, 1955.

Section 1730 of the Labor Code provides that "Every awarding body that withholds any penalty of forfeiture from any contract payment, for failure of a contractor or subcontractor to comply with any provision of this chapter or any of the labor laws on public works, or with any provision of a contract based on such labor laws, shall at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, transfer all penalties and forfeitures, * * * to the State Treasurer * * *." By section 1732 of said code, "The time for action by the contractor * * * for the recovery of penalties or forfeitures is limited to the 90-day period * * *", and section 1733 provides that in case the action is not commenced and actual notice thereof received by the awarding body within the ninety-day period, the action shall be dismissed on motion of the awarding body.

The above sections of the Labor Code clearly provide that recovery must be sought within ninety days after formal acceptance of the job.

[1] In the instant case we are satisfied that there was a formal acceptance of the work on May 3, 1955, and that the action was therefore filed after the ninety-day period. Prior thereto all of the work under the contract had been completed in accordance with the plans and specifications, and the State Highway Engineer had recommended that the contract be accepted. The formal written acceptance took place on May 3, 1955, when the Director of Public Works approved the State Highway Engineer's recommendation indorsement on the interdepartmental communication. Further, Frank B. Durkee, Director of Public Works, in his affidavit in support of respondents' motion to dismiss, states that the contract was "* * * formally accepted on the 3d day of May, 1955." The recorded notice of completion and the letter of May 6, 1955, to appellant from the State Highway Engineer also state May 3, 1955, as the date of completion.

There is no merit in appellant's contention that the interdepartmental communication was not a formal acceptance. Formal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely. Graybar Electric Co. v. Manufacturers Casualty Co., 21 N.J. 517, 122 A.2d 624. It is not necessary that the acceptance be embodied in a formal resolution. There is no claim that the Director of Public Works did not have authority to accept the job. Nor is there any merit in the contention that the interdepartmental memorandum is not an official document.

[2] Neither is there merit in appellant's contention that the ninety days did not begin to run until notice was given of the imposition of the penalties. The statute fixes the beginning and ending of the period within which the contractor may sue. It fixes a limitation of time depending upon the completion and acceptance of the job without relation to when the cause of action arose. That period is limited to ninety days.

[3] Appellant next contends that the proceedings to impose penalties under the provisions of sections 1727, 1730, 1731 and 1733 of the Labor Code are in the nature of criminal proceedings, and, therefore, certain of his constitutional rights have been violated. Such is not the case. Section 1732 of the Labor Code states that the action here involved is a "* * * suit on the contract for alleged breach thereof in

not making the payment * * *." A suit for breach of contract is a civil action. Code of Civil Procedure, §§ 25 and 26. The fact that the statute provides that the penalty shall be recovered by a civil action has been regarded as conclusive of the nature of the action. 70 C.J.S., Penalties § 8 b (2), p. 397.

In Shalz v. Union School Dist., 58 Cal. App.2d 599, 606, 137 P.2d 762, 766 (a suit brought by a contractor for the return of funds previously assessed as a penalty for violation of a public works contract requiring a prescribed wage scale), this court stated: "Here we are presented with a question concerning the power of the state to impose penalties for violation of its statutory functions, the prescription of which is entirely a legislative matter. It is the usual method imposed to compel the performance of duties or conduct required by the state in carrying out its varied sovereign functions. Thus a Legislature may impose any reasonable penalty it sees fit for the violation of valid regulations. There is no inhibition upon the state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations. 23 Am.Jur. 626." That opinion further states, "This is not an action to invoke a penalty, it is an action whereby plaintiff seeks a return of the funds previously assessed as a penalty and withheld from plaintiff by the commissioner's order."

Appellant also contends that he is entitled to a jury trial since violations of the Labor Code sections constitute crimes. As above stated, the Labor Code provides for a statutory penalty which gives rise to a civil action. For the same reason, there has been no violation of the Fourteenth Amendment to the United States Constitution, which deprived appellant of a presumption of innocence. Nor has there been a violation of article I, section 13, of the California Constitution, which pertains primarily to criminal prosecutions. Since the Legislature has provided in section 1733 for a proceeding to fully litigate and establish the contractor's right, if any, to recover the penalties or forfeitures withheld (although within a limited time), there is no violation of due process of law.

In the instant case, appellant was given notice of the date of completion of the contract and acceptance of the job by the State Highway Engineer's letter of May 6, 1955. He had more than ample time in which to have filed his action within the ninety-day period of time allowed by the statute.

The Public Wage Rate Act of 1931 (Stats.1931, p. 910, now codified in the Labor Code, part 7, chapter 1, § 1720 et seq.) has been held not to violate the Constitution. Metropolitan Water Dist. of Southern California v. Whitsett, 215 Cal. 400, 10 P.2d 751.

[4] Lastly, appellant is in no position to challenge the constitutionality of the statute since he commenced his action to recover the penalties pursuant to the Labor Code sections which he now contends are unconstitutional. The election is a waiver and estops such complaint. "It is the general rule of law that when a party invokes the benefit of a statute, he may not, in one and the same breath, claim a right granted by it and reject the terms upon which the right is granted." Foster v. Superior Court, 26 Cal.App.2d 230, 234, 79 P.2d 144, 146, and cases cited; Tracy v. MacIntyre, 29 Cal.App.2d 145, 84 P.2d 526.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leroy CARSKADDON, Defendant and Appellant.*

Cr. 2738.

District Court of Appeal, Third District, California.

June 13, 1957.

Hearing Granted Aug. 6, 1957.

Defendant was convicted under statute providing that every person who annoys or molests a child is a vagrant. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to make out sexual motivation.

Judgment affirmed.

1. Vagrancy ⚿1

In order to justify conviction under statute providing that every person who annoys or molests any child is a vagrant, there must be sexual motivation, but objective obscenity is not necessary. West's Ann.Pen.Code, § 647a(1).

2. Vagrancy ⚿1

If a person, who is motivated by abnormal sexual interest, takes a child in charge and begins its abduction, he is guilty under statute providing that every person who annoys or molests any child is a vagrant. West's Ann.Pen.Code, § 647a(1).

3. Vagrancy ⚿3

In prosecution under statute providing that every person who annoys or molests any child is a vagrant, evidence was sufficient to make out sexual motivation of defendant. West's Ann.Pen.Code, § 647a(1).

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Robert O. Fort, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputies Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was convicted of violating Section 647a of the Penal Code. He appeals from the judgment. The evidence was all testimonial, and a full narrative statement follows. Anthony Bakazan, on April 19, 1956, at Southside Park in Sacramento city, stopped his automobile at a street curb to eat lunch in his car. He saw appellant take a little girl, aged 6, and a little boy, aged 4, underneath a big tree about 30 feet inside the park. He saw them sit there a short while. Then the boy left and the girl remained. While they were under the tree, Bakazan walked back and forth a few times, watching appellant. The latter moved in such a manner as to obscure Bakazan's view, making it difficult for him to see what appellant was doing. Bakazan during all this time, however, was from 10 to 30 feet distant from appellant and the child and had a full view of appellant for all but about a minute of the ten minutes during which appellant and the girl stayed under the tree. He did not see appellant touch the child. At the end of about ten minutes appellant and the child walked from under the tree, circled a small lake or pond that is in the park and approached a concession stand where appellant bought the child an ice cream bar. Bakazan followed. The pair were under his observation at all times. Bakazan never spoke to appellant. Appellant and the girl walked on up the street in a direction away from the park and toward the Sacramento River. Bakazan continued to follow and to watch, until a motorcycle officer came along. Bakazan called his attention to appellant and the girl. The officer made a U turn on his cycle and approached appellant. Appellant saw him and started to walk ahead of the child when the officer stopped him. From an identification tag around the girl's neck the officer ascertained that she lived across the park and in the opposite direction from the direction in which appellant and the child were walking. The officer asked appellant if the child was his, and appellant said no. The officer asked where he was taking the child, and appellant said she was lost and he was taking her home, after which he intended to take a bus to an outlying portion of the city. In appellant's presence, the officer asked the little girl if appellant was taking her home, and she said no, that he was taking her down the river to show her—(The officer's testimony was interrupted at this point. He did not finish relating what the child said.) The officer did not see appellant make any motions with his arms or any other part of his body except that he walked along with the child. They were walking along side by side down the street.

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* Opinion vacated 318 P.2d 4.

Section 647a, subdivision (1), of the Penal Code provides:

> "Every person who annoys or molests any child is a vagrant and is punishable upon first conviction by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction by imprisonment in the state prison not exceeding five years."

[1, 2] It has been held the object of the enactment is the protection of children from interference by sexual offenders and the apprehension, segregation and punishment of the latter; that the words "annoy" and "molest" are synonymously used and mean conduct fitted to disturb or irritate or offend; that these words are used in the section with reference to offenses against children with a connotation of abnormal sexual motivation on the part of the offender; that, although no specific intent is prescribed as an element of the offense, a reading of the section as a whole in the light of the evident purpose indicates that the acts forbidden are those motivated by such unnatural or abnormal sexual interest or intent with respect to children; that the annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child, but that the objectionable acts of defendant constitute the annoyance or molestation contemplated by the statute. People v. Moore, 137 Cal.App.2d 197, 290 P.2d 40. The opinion cited proceeds to state that it is settled the element of annoyance as provided in subdivision 1 of the section is concerned with the objectionable acts of the defendant which complete the offense, and that if the conduct of a defendant is so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would annoy or molest within the purview of Section 647a, subdivision 1, of the Penal Code. In People v. McNair, 130 Cal.App.2d 696, 279 P.2d 800, the court was presented with a case where there was no contact with the child involved who was playing in a yard overlooked by a window of the defendant's room, at which window he lewdly and obscenely displayed his naked body in view of the child. Thus, in both cases cited and in all that we have examined, there has been conduct toward the child involved, lewd, lascivious and obscene in its nature and fully authorizing, if not compelling, the inference of sexual motivation. However. we do not believe that objective obscenity is a necessary element. If, motivated by abnormal sexual interest, a person takes a child in charge and begins its abduction, the crime of annoying and molesting is complete.

[3] We think it could be inferred here that the appellant's conduct toward the child was sexually motivated, although the evidence in that respect is far from satisfactory. Appellant was a stranger to the child. He had no authority or right to interfere with her movements in any way or to take control of her. He exhibited evasive tendencies while Bakazan watched him and the child under the tree. He left the tree with the child, and it is a fair inference that he at least suggested that she accompany him and so took her across the park to an ice cream stand, where he purchased ice cream for her. He then went with the child away from the park and toward the river. From the remark of the child in his presence it may be inferred that he was engaged in enticing her away from the area where he had been observed with her and toward the river where he

might find better opportunity for accomplishing his will. The trier of fact could find appellant lied to the officer both as to why he took charge of the child and as to his intentions toward her. Guilty conduct and intent were here glaringly apparent, and when all this is considered, along with the age and sex of the child, sexual motivation is sufficiently made out.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

151 Cal.App.2d 758

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul SAKELARIS, Defendant and Appellant.

Cr. 5837.

District Court of Appeal, Second District, Division 1, California.

June 18, 1957.

Proceeding by the People of the State of California. An appeal was taken from a judgment of the Superior Court, Los Angeles County, Clement D. Nye, J., and the respondent filed a motion requesting that appellant's brief be returned for correction and subsequent redeposit with Clerk of the District Court of Appeal. The District Court of Appeal held that affidavit with respect to tone of voice of trial judge as improperly in the brief because nothing relating thereto was in the record, and that the brief should be corrected.

Order in accordance with opinion.

1. Criminal Law ⚷1128(2)

Where no affidavit was presented to trial court with respect to tone of judge's voice and no objections were made thereto, the matter could not be presented to reviewing court by affidavit. West's Ann. Rules on Appeal, rule 13.

2. Criminal Law ⚷1110(6)

Where appellant's opening brief included an affidavit concerning a matter not in the record, brief was returned to appellant for correction and subsequent redeposit with clerk of reviewing court. West's Ann.Rules on Appeal, rule 18.

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Ray M. Davidow, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

PER CURIAM.

Respondent moves that pursuant to Rule 18 of the Rules on Appeal, appellant's opening brief "be returned to the appellant for correction by cancellation, revision or replacement in whole or in part and to be redeposited with the Clerk within the time specified in the order."

An examination of the record reflects, as contended by respondent, that, "In Appellant's Opening Brief (pages 8 to 9), he has included an affidavit concerning the tone of voice of the trial judge. Such, we submit, is not included in the record on appeal and therefore cannot be considered on appeal."

[1] On appeal, it is established under Rule 13, Rules on Appeal, that no facts outside the record and no affidavits which were not before the trial court can be considered on appeal. In the instant case no affidavit was presented to the trial court, nor were objections to the tone of voice of the judge made in the court below. Therefore, the so-called tone of voice of the judge is not in the record on appeal, and no reference thereto is contained in such record. It cannot therefore now be presented to this court by affidavit.

[2] It is therefore ordered, pursuant to Rule 18 of Rules on Appeal, that appel-

lant's opening brief be returned to him for correction by cancellation, revision, or replacement in whole or in part, in accordance with the views herein expressed, and said brief to be redeposited with the Clerk of this court within 20 days from and after the date of filing of this order.

151 Cal.App.2d 804

Stephen Cowan HERRICK, Petitioner and Appellant,

v.

The MUNICIPAL COURT, SOUTHERN JUDICIAL DISTRICT, COUNTY OF SAN MATEO, State of California, Respondent.

Civ. 17594.

District Court of Appeal, First District, Division 2, California.

June 19, 1957.

Petition for writ of prohibition to restrain municipal court from taking any further action in misdemeanor case pending against petitioner. The Superior Court, San Mateo County, A. R. Cotton, J., entered an order denying the petition and discharging alternative writ of prohibition, and petitioner appealed. The District Court of Appeal, Kaufman, P. J., held that good cause had not been shown for failure to try petitioner in municipal court on misdemeanor charge within statutory period.

Order reversed with directions to issue writ.

1. Criminal Law ⇨576(1)

Where defendant in a misdemeanor case in an inferior court has not waived time and has not been tried within thirty days after he was arrested and brought within jurisdiction of court, upon his motion, case must be dismissed, unless good cause existed for delay. West's Ann.Pen. Code, § 1382, subd. 3.

2. Criminal Law ⇨576(11)

On motion to dismiss misdemeanor case for failure to bring defendant to trial within thirty days after he was arrested and brought within jurisdiction of court, prosecution has the burden of proving that good cause existed for delay. West's Ann.Pen. Code, § 1382, subd. 3.

3. Criminal Law ⇨576(2)

If good cause is shown for failure to try defendant in misdemeanor case in inferior court within the time provided by statute, defendant is not entitled to dismissal of case for such delay. West's Ann.Pen. Code, § 1382, subd. 3.

4. Criminal Law ⇨576(2)

What constitutes good cause for failure to try defendant in a misdemeanor case in inferior court within the time provided by statute depends on the circumstances of each case. West's Ann.Pen.Code, § 1382, subd. 3.

5. Criminal Law ⇨576(2)

That a large number of civil cases were pending does not excuse failure to assign a sufficient number of judges to handle criminal cases so that such cases may be tried within the time provided by statute. West's Ann.Pen.Code, § 1382, subd. 3.

6. Criminal Law ⇨576(4)

Where defendant prevents misdemeanor case from being heard within the statutory period, he cannot complain of such delay. West's Ann.Pen.Code, § 1382, subd. 3.

7. Criminal Law ⇨576(2)

Congested criminal and civil calendars of municipal court and fact that only one jury box was available did not show "good cause" for failure to try defendant within thirty days after waiver of arraignment and entry of plea of not guilty to charge of violation of statute making it unlawful to operate a vehicle while under influence of intoxicating liquor, though case had previously been continued for arraignment at defendant's request, where defendant informed court that he would not waive time and trial judge could have been made available to hear case in time by setting civil calendar aside for one day. West's Ann. Pen.Code, §§ 1128, 1135, 1381, 1382, subd. 3; West's Ann.Vehicle Code, § 502.

See publication Words and Phrases, for other judicial constructions and definitions of "Good Cause".

8. Criminal Law ⚷848

A formal jury box is not necessary for trial of a jury case. West's Ann.Pen.Code, §§ 1128, 1135.

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Sullivan & West, San Mateo, for appellant.

Edmund G. Brown, Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from an Order denying a petition for a writ of prohibition and discharging an alternative writ of prohibition. A verified petition for the above writ was filed on June 1, 1956, in the Superior Court of San Mateo County alleging that appellant had been denied his right to a speedy trial in a misdemeanor case. The petition was heard by Judge A. R. Cotton.

Appellant, Stephen Cowan Herrick, was arrested April 3, 1956. On April 6th, a complaint was filed charging him with violating Vehicle Code Section 502, with a prior offense also being charged. On April 13th, the case was continued for arraignment at the request of the defendant until April 23rd. On April 18th, appellant waived the arraignment, entered a plea of not guilty, and requested a trial by jury. At this time, appellant advised the court that he was not waiving nor would he waive time. The case was assigned for trial by jury on June 8, 1956. On May 14th, appellant filed an affidavit in support of motion to dismiss on the grounds that defendant had not been brought to trial within 30 days after the date of his arrest, as required by section 1382, subdivision 3 of the Penal Code. On May 21st, this motion was heard in the Municipal Court by Judge Edward I. McAuliffe and after oral arguments by both sides the court denied the motion.

It was shown, at the above hearing, that 48 days had elapsed from the date of arrest to the date of hearing on the motion. The court stated that in fixing the trial date for June 8, 1956, it was aware the trial was being set beyond the 30 day period. The reasons given was that there were 13 criminal cases set for jury trial between April 18 and June 8, 1956; there were two holidays during said period; and, after checking the calendar for said period, it was found that a full day was not available for trial of this case.

The court indicated there were two departments of the Municipal Court, one of which was only concerned with civil cases between April 3 and June 8th. The court further stated: "I doubt whether this matter would have been set for trial regardless of the fact that the civil judge may have been available by setting his own calendar aside. I don't know where the trial would have been heard. There is only one jury box for two courts here."

Appellant then filed a petition for writ of prohibition in the Superior Court of San Mateo County, restraining the trial court from taking any further action in the case. An alternative writ of prohibition was issued. This alternative writ was later discharged and appellant's petition denied. Appellant appeals from this denial.

Appellant contends a showing by the Municipal Court that one of its two departments could not assign the instant case for trial, and did not try said case within a period of 30 days, by reason of the fact that it could not find a full day to devote to the trial of this case because of a full calendar, while the other department of the court was solely concerned with civil matters, during all of said time, does not constitute good cause for failure to try said case, as required by section 1382, subdivision 3 of the Penal Code. The section reads as follows:

> "1382. The court, unless good cause to the contrary is shown, must order the

action to be dismissed in the following cases:

* * * * * *

> "3. Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, unless by his own neglect or failure to appear in court when his presence is lawfully required, his trial must be postponed or in case a new trial is to be had following an appeal from an inferior court, if the defendant is not brought to trial within 30 days after the remittitur is filed in the trial court or within 30 days after the judgment on appeal becomes final if the new trial is to be held in the superior court."

[1, 2] When it has been established that a defendant in a criminal proceeding, who has not waived time, has not been tried within the 30-day period, the action must, upon his motion, be dismissed, unless good cause existed for the delay. The burden of proving that good cause exists is upon the prosecution. People v. Morino, 85 Cal. 515, 24 P. 892.

[3, 4] If good cause is shown for not trying the defendant within the period prescribed by law, the defendant is not entitled to relief. Harris v. Municipal Court, 209 Cal. 55, 64, 285 P. 699. What constitutes good cause depends on the circumstances of each case. People v. Godlewski, 22 Cal. 2d 677, 140 P.2d 381; Muller v. Justice's Court, 129 Cal.App.2d 570, 277 P.2d 866.

[5] Appellant correctly cites In re Vacca, 125 Cal.App.2d 751, 271 P.2d 162; People v. Buckley, 116 Cal. 146, 47 P. 1009; Dearth v. Superior Court, 40 Cal.App.2d 56, 104 P.2d 376; People v. Molinari, 23 Cal. App.Supp.2d 761, 67 P.2d 767 and Sigle v. Superior Court, 125 Cal.App.2d 747, 271 P.2d 526, for the proposition that a showing that a large number of civil cases were pending does not excuse failure to assign a sufficient number of judges to handle criminal cases. No proof was offered that the trial court had advised the Judicial Council of the fact that it could not keep abreast of its criminal cases as required by law.

In Sigle v. Superior Court, supra, the court stated in 125 Cal.App.2d at page 748, 271 P.2d at page 527:

> "To comply with the provision contained in section 1050 of the Penal Code that criminal matters should be given precedence over civil matters and to enable defendants in criminal actions to have the speedy trials which are guaranteed by the Constitution a greater number of judges should have been assigned to departments handling criminal matters. There are twenty-two judges in the Superior Court of the City and County of San Francisco, and the showing that a large number of civil cases were pending does not excuse the failure to assign a sufficient number of judges to handle criminal matters. Nor was there any showing made that the chairman of the judicial council was notified that a sufficient number of judges was not available to try criminal cases. In rule 35, adopted by the judicial council for the guidance of the superior court, it is provided that the departments handling criminal cases shall be sufficient in number to hear all criminal cases within the time required by law. Dearth v. Superior Court, supra."

Respondent argues the courts in In re Vacca, supra, and Sigle v. Superior Court, supra, were influenced by the fact that there were other judges available in the county to hear criminal cases and there was no showing the Judicial Council was notified of the lack of judges. He attempts to distinguish these facts from the case at bar by arguing the availability of another judge, or even the assigning of additional judges, would have been useless because of the lack of facilities. He states that the fact that there was no date available for trial because of a congested criminal and civil calendar between the time of arraignment on April 18th and June 8th, coupled with the fact that there was only one jury box for both departments constitutes "good cause" for the delay.

Appellant answers this argument by contending that the burden is placed upon the state under section 1135 of the Penal Code to provide a jury room. There is no requirement that any particular portion of a courtroom be set aside as a formal "jury box" and under section 1128 of the Penal Code, the jurors may, if they wish, deliberate their verdict in court.

Respondent also argues since any delays in prosecution in the early stages were occasioned by the appellant's own request for a continuance to April 23rd, this period should be substracted from the total period of delay between the arrest and the hearing on the motion to dismiss. While a ten-day continuance was requested, the case was actually heard five days later, appellant therefore argues only five days should be subtracted even if the court should follow respondent's view.

Respondent contends the 30-day period should relate back to the date the complaint was filed and not to the date when appellant was arrested. As authority, he cites People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381; and Harris v. Municipal Court, 209 Cal. 55, 285 P. 699. Appellant replies such an interpretation is in violation of the wording of section 1382, subdivision 3 of the Penal Code, which states a prosecution must be dismissed if a defendant in a misdemeanor case "* * * is not brought to trial within 30 days after [the defendant] is arrested and brought within the jurisdiction of the court * * *." The appellant was within the jurisdiction of the court at the time of his arrest. In People v. Godlewski, supra, the court was only concerned with the question of when time commenced to run when there was an information against a person already in prison and held that it started from the time the prisoner made demand upon the District Attorney that he be brought to trial in accordance with the exact wording of section 1381 of the Penal Code. In the Harris case, the defendant had not been arrested on any charges prior to the filing of the complaint.

[6] Respondent states the rule in In re Lopez, 39 Cal.2d 118, 245 P.2d 1, is applicable to this case. The court stated in 39 Cal.2d at page 120, 245 P.2d at page 2: "* * * But the further delay must not be unreasonable and good cause is shown where the condition of the court's business would not permit the trial to proceed." The defendant had agreed to postponement of the trial beyond the 60-day period and only after the 60-day period had passed did he object to further extensions. There was no agreement in the case at bar to a continuance beyond the 30-day period and the defendant continually stated he did not waive time. Respondent cites several cases for the view that congested calendars may give a court good cause for a delay. In People v. Benc, 130 Cal. 159, 62 P. 404, the defendant agreed to delays beyond the 60-day period before objecting. The case was heard in Tulare County where, at that time, there was only one superior court judge. In Muller v. Justice's Court, 129 Cal.App.2d 570, 277 P.2d 866, the case was set for trial in the presence of the defendant, acting as his own counsel, he made no objection to the fact that the date was beyond the statutory period. Therefore, the court deemed the objection was waived. On the date set for hearing, the defendant requested a change of venue which was granted. He then instituted proceedings in prohibition seeking to prevent any trial from being held. When the defendant, himself, prevents the case from being heard within the statutory period, he cannot complain. In People v. Fegelman, 66 Cal.App.2d 950, 153 P.2d 436, the court found that good cause did not exist and dismissed the action. In People v. Holmes, 13 Cal.App. 212, 109 P. 489, it did not appear that the defendant objected to the setting of the trial on a date more than 60 days after filing of the information.

[7, 8] It is our view that "good cause" has not been shown in this case. There is no showing that the Judicial Council was informed of the lack of judges available to try criminal cases. The existence of a formal jury box should not be deemed necessary for the trying of a jury case. It appears from the facts that the trial would have taken only one day. Certainly, the civil calendar could have been set aside for one day so a criminal matter could be heard.

In view of the foregoing the order denying the Writ of Prohibition must be reversed.

Order denying Writ of Prohibition reversed with directions to the court below to issue the writ.

DOOLING and DRAPER, JJ., concur.

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151 Cal.App.2d 674

Virginia Lou BEKSINSKI, Plaintiff and Appellant,

v.

Gene I. BEKSINSKI, Defendant and Respondent.

Civ. 22017.

District Court of Appeal, Second District, Division 1, California.

June 12, 1957.

Divorce action. From judgment of the Superior Court, Los Angeles County, William E. Fox, J., granting husband an interlocutory decree of divorce, and custody of minor child, the wife appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence sustained finding that wife was not a fit person to have care and custody of minor child.

Judgment affirmed.

1. Divorce 🔑301

Evidence sustained finding in divorce action that wife, who was under influence of intoxicating liquor many times in presence of her children, was unfit person to have care and custody of minor child.

2. Divorce 🔑184(10)

It is for trial judge to resolve conflicts in evidence in divorce action, and in reviewing an attack upon findings, the power and duty of the court ends when it finds any substantial evidence in record that supports such findings.

3. Appeal and Error 🔑996

When two or more inferences can reasonably be deduced from facts, a reviewing court is without power to substitute its deductions for those of trial court.

4. Divorce 🔑301

Taking of testimony by judge, after wife had filed motion for new trial, relative to conditions at foster home in which he had ordered husband to place child, presented no grounds for reversal of judgment granting husband divorce, when record disclosed that judge was taking testimony to satisfy himself only as to placement of child.

5. Divorce 🔑223, 286

Allowance of attorney's fees in divorce case is within reasonable and fair discretion of trial court, and in absence of clear showing of abuse of discretion, determination of court as to attorney's fees will not be disturbed upon appeal.

6. Divorce 🔑223

Allowance of $175 as fee for wife's counsel in contested divorce case was not an abuse of discretion in view of husband's difficulty in finding work and his obligation to support minor child in foster home.

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Irvin S. Bartfield, North Hollywood, for appellant.

No appearance for respondent.

DRAPEAU, Justice pro tem.

Defendant husband was granted an interlocutory decree of divorce from plaintiff wife, and custody of the minor child of the parties. The trial court ordered that the husband place the child in a foster home, and pay for its support there. There was no community property, and the court refused to order additional fees for the wife's lawyer.

The wife appeals from the interlocutory judgment of divorce, and from "that certain Order of the above entitled Court * * allowing a hearing for the further introduction of evidence in the above entitled action, and the subsequent denial of such hearing on the 7th day of June, 1956".

The husband has not filed a brief in this court, and the appeal has been submitted for decision on the wife's opening brief.

Grounds of appeal are:

1. That there was no substantial evidence to support the trial court's finding that the wife was an unfit person to have the care and custody of her minor child, and for the order placing the child in a foster home.

2. There being no substantial evidence to support the aforesaid finding the court could not award custody of the child to strangers.

3. That the court could not grant a motion for a new trial on part of the issues, and then deny plaintiff the right to a hearing and the production of evidence on this issue.

4. That it was an abuse of discretion for the court to deny additional attorney's fees for the plaintiff.

The first and second grounds of appeal may be settled together.

[1] Inasmuch as the welfare of a child is concerned, this court has read the reporter's transcript of the proceedings in the Superior Court. While it is a serious and sometimes a distressing duty for a court to have to declare a mother an unfit person to have custody of her child, in the facts of this case it is difficult to see how the trial judge could have made any other order as to custody of the child, or any other finding than extreme cruelty on the part of plaintiff toward her husband.

It appears from the record that this woman was under the influence of intoxicating liquor many times in the presence of her husband and her children. (She had a child by a former marriage.) That occasionally she made a public spectacle of herself, to the embarrassment of her husband and others who saw it. And that after she left her husband her conduct was still worse. This court will not recite that conduct in this opinion, to be published in the advance reports, and to be preserved in the bound volumes of California decisions; but will let it rest in the reporter's transcript in the files.

[2] Counsel for plaintiff forgets that while his client denied any wrongful conduct, it was for the trial judge to resolve this conflict in the evidence, and that in reviewing an attack upon the findings the power and the duty of this court ends when it finds any substantial evidence in the record that supports such findings. Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231; La Mar v. La Mar, 30 Cal.2d 898, 186 P.2d 678; Steele v. Steele, 132 Cal.App.2d 301, 282 P.2d 171.

In the Primm case, supra, the rule is clearly stated (46 Cal.2d at page 693, 299 P.2d at page 233) by Mr. Justice McComb, speaking for a unanimous Supreme Court:

> "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citing cases.]
>
> [3] "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citing cases.]"

Referring to plaintiff's complaint about the hearing after the trial, and while her motion for a new trial was pending.

[4] After the motion for a new trial was made, the court took testimony relative to conditions at the foster home. The man and his wife who operated the home were interrogated. The judge expressed a desire to question one of the persons plaintiff had been going around with, and continued the hearing. It was suggested that a subpoena be issued for this person's appearance. Then the judge said, "I won't consider this up for further hearing unless he is here in court so we will have our opportunity to examine him."

Neither the clerk's nor the reporter's transcript show that any further testimony was taken, or that any other order was made than in the interlocutory judgment.

The next thing in the record is that the motion for a new trial was denied.

Therefore, taking the facts from the record it appears that the judge was taking testimony to satisfy himself as to placement of the child, and the motion for a new trial was submitted and denied. These circumstances present no grounds for reversal of the judgment.

Finally, referring to plaintiff's complaint as to attorney's fees.

[5] Applications for attorney's fees in divorce cases are within the reasonable and fair discretion of the trial judge. In the absence of a clear showing of abuse of discretion, the determination of the trial court as to attorney's fees will not be disturbed upon appeal. Primm v. Primm, supra, 46 Cal.2d 690, 696, 299 P.2d 231; McClure v. Donovan, 86 Cal.App.2d 747, 750, 195 P.2d 911.

[6] This court can find no abuse of discretion in the denial of this motion. By stipulation counsel was paid $175 on the initial order to show cause. This was apparently in contemplation of an uncontested case. After the trial as a contested case, plaintiff's counsel felt the fee of $175 was not enough.

While that may be true, the court had to consider the finances and the ability to earn money of the defendant, and his obligation to his child. At times he found it hard to secure work. Perhaps he wasn't the best provider in the world. But he cheerfully assumed the burden of taking care of his child in the foster home. This was about as much as should have been asked of him under all the facts before the court.

The purported appeal from the order mentioned in plaintiff's notice of appeal is dismissed, for the reason that no order was made except the order as to custody in the interlocutory judgment.

Interlocutory judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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151 Cal.App.2d 842

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lester BECKWORTH, Defendant and Appellant.

Cr. 1141.

District Court of Appeal, Fourth District, California.

June 19, 1957.

Defendant was convicted of burglary. The Superior Court of Riverside County, O. K. Morton, J., entered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant, by pleading not guilty by reason of insanity without also pleading not guilty, admitted the commission of the burglary charge and thereby waived any right to a jury trial on that issue, and that where it was stipulated that issue raised by plea of not guilty by reason of insanity should be submitted on doctor's reports, and, when that was done, the Superior Court asked defendant if that was satisfactory to him, and that he replied in the affirmative, there was an express waiver of jury trial by defendant on issue raised by plea of not guilty by reason of insanity.

Judgment affirmed.

1. Jury ⚷29(6)

Defendant, by pleading not guilty by reason of insanity in burglary prosecution without also pleading not guilty, admitted commission of the burglary and thereby waived any right to jury trial on that issue. West's Ann.Pen.Code, §§ 459, 1016.

2. Jury ⚷29(6)

Where it was stipulated in burglary prosecution that issue raised by defendant's plea of not guilty by reason of insanity should be submitted on doctors' report, and when that was done, the trial court asked the defendant if that was satisfactory to him, and he replied in the affirmative, there was an express waiver by defendant of a jury trial on issue of plea of not guilty by reason of insanity. West's Ann.Pen.Code, §§ 459, 1016.

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E. Scott Dales, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of burglary (violation of sec. 459 of the Penal Code), a felony. He was arraigned on September 14, 1956, with his counsel present, and it was stipulated that he had been informed of his legal rights. A plea of not guilty by reason of insanity only was entered, and it was stipulated that the degree of the burglary was second degree. The court appointed two alienists to examine the defendant as to his sanity and to report to the court. The matter was then continued to October 9, 1956.

On October 9, the date set for trial, it was stipulated by counsel for the State and counsel for the defendant that the issue of sanity, raised by the defendant's plea, was to be determined solely upon the written reports of the doctors appointed by the court. After considering the reports the court found that the defendant was sane at the time of the commission of the offense, and the matter was referred to the probation office for a presentence investigation. On October 26, the court considered the probation officer's report and arraigned the defendant for judgment. Probation was denied and the defendant was sentenced to state prison for the term prescribed by law. On November 2, the defendant, in propria persona, filed a notice of appeal.

At the request of the appellant this court appointed an attorney to represent him on this appeal. This attorney has filed a report stating that he has been advised by the appellant that his only contention is that he was denied the right of a trial by jury; that he has carefully examined the complete record; and that he has concluded that the appellant does not have any meritorious grounds for an appeal. After examining the record we agree with this conclusion.

[1, 2] By pleading not guilty by reason of insanity without also pleading not guilty the defendant admitted the commission of the offense charged and thereby waived any right to a jury trial on that issue. Penal Code, sec. 1016; People v. Walker, 33 Cal. 2d 250, 201 P.2d 6. With respect to the plea of not guilty by reason of insanity it was stipulated that this issue should be submitted on the doctors' reports. The record shows that when this was done the court asked the appellant "Is that satisfactory to you?" and that the appellant replied, "Yes, sir". This constitutes an express waiver of a jury trial and fully complies with the requirement stated in People v. Barnum, 147 Cal.App.2d 803, 305 P.2d 986 and cases there cited, to the effect that the consent of the defendant to a trial before the court without a jury must be expressed by him personally and may not be implied. As was

said in People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614, 616, "Article 1, section 7 of the Constitution of California provides that trial by jury may be waived in criminal cases by the consent of both parties, expressed in open court when such consent is given by both defendant and his counsel. No stereotyped language expressing such waiver need be used by the parties, it being necessary only that the words used in their ordinary meaning show an intention to submit the case to a court without a jury."

The appellant having waived a jury trial, in open court, with respect to both issues, there is no merit in his present sole contention that he was denied the right of a trial by jury.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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151 Cal.App.2d 598

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas M. RODRIGUEZ, Defendant and Appellant.

Cr. 5865.

District Court of Appeal, Second District, Division 1, California.

June 10, 1957.

Defendant was convicted of offense of possessing marijuana. The Superior Court of Los Angeles County, H. Burton Noble, J., rendered judgment, and defendant appealed. The District Court of Appeal, Fourt, J., held that the evidence was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law 🔑1144(13)

On appeal from conviction, reviewing court must view the evidence in light most favorable to prosecution and all intendments are in favor of upholding judgment.

2. Poisons 🔑4

Physical or constructive possession, coupled with knowledge of the presence and narcotic character of the substance, is essential to crime of "possession" of marijuana. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

3. Poisons 🔑9

Conduct, admissions or contradictory statements and explanations may be sufficient to show knowing possession of marijuana. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑370

Evidence of other acts of similar nature, when not too remote, are admissible to show guilty knowledge of possession of marijuana. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

Evidence was sufficient to support conviction for possessing marijuana. West's Ann.Health & Safety Code, § 11500.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information filed in Los Angeles county on August 3, 1956, the defendant, with Gene Paul Adair, was charged with a violation of section 11500, Health and Safety Code, in that they did, on or about July 14, 1956, have in their possession certain cannabis sativa (marijuana), and that prior to the commission of the offense alleged defendant had, in 1948, been convicted of a violation of section 11500, Health and Safety Code, and in 1951, was convicted of a violation of section 11500, Health and Safety Code, and served a term of imprisonment therefor in the state prison. The defendant pleaded not guilty and denied the prior convictions. At the trial the defendant and counsel for both sides waived a jury trial and the defendant's case was submitted on the transcript of the preliminary hearing. The defendant was found guilty as charged and the prior convictions were found to be true as alleged, and thereupon he was sentenced to the state prison. This appeal is from the judgment of conviction.

The facts, as unfolded by the evidence, are substantially as follows: Stanley Fletcher, a deputy sheriff, some time before noon on July 14, 1956, received information from Sam Shapiro, who owned the property at 406¾ South Maple Street, Montebello, that a young man, described as tall and slim, had rented this property on June 17, 1956, and that such person had used the name of D. R. Myers; that Shapiro visited the property July 13, 1956, and observed that the back door was open; he talked to different tenants and was informed that they had seen no one entering or leaving the premises since it was rented; Shapiro went inside and the establishment appeared to be deserted; he found three suitcases, two in a linen closet and one in a clothes closet; upon opening one of the cases he found ten bags containing a green leafy substance, and in another case he found the same substance; Shapiro took one of the bags to the Montebello police department.

After receiving the information above set forth, Fletcher went to the Montebello police department and examined the contents of the bag and observed that it appeared similar to the plant marijuana or cannabis sativa. Fletcher, with other officers, then set up a surveillance at the property. When they arrived at the property, about 1:00 o'clock p. m., Fletcher and Fain, another officer, examined the three suitcases and dusted all of them with a fluorescent powder. Afterwards they replaced the cases where they had found them.

At about 4:00 o'clock p. m., Fletcher saw appellant go to the rear of the property, where he was out of sight for a short period of time, and thereafter he departed. At about 8:30 or 9:00 o'clock p. m. the officers saw a tall slim man approach the property and then walk away rapidly. At about 10:05 o'clock p. m., Fletcher saw defendant and Adair approach the door. Fletcher and Sergeant Cole, an officer, went to the rear door, which was open. Deputy Fain and Officer Wiseman went to the front door. Fletcher went into the house and upon turning on his flashlight, saw Adair approaching the kitchen from the front room, carrying a small red and yellow suitcase and a large yellow and brown case. Appellant was in the bathroom. The defendants were placed under arrest. Fletcher examined both of them with an ultraviolet quartz lamp, which demonstrated that each of the defendants had traces of fluorescent powder on his hands and arms. Immediately upon being apprehended the appellant stated, in the presence of his co-defendant Adair, "The kid is innocent. It is all my stuff". Adair told the officers he was only helping Rodriguez move the suitcases; however, he knew that they contained marijuana. Adair also stated that he did not rent the facility.

Rodriguez testified in his own behalf at the trial in the superior court and stated that he had known Adair for about ten months before the arrest and that Adair had telephoned him and asked that he assist him in moving from an apartment on Maple Street. Further, that the arrangement was that he would meet Adair between 3:30 and 4:00 o'clock p. m. When he arrived at the property there was no one present, so he returned to his home. Rodriguez further testified that on the evening in question Adair had asked him to help him (Adair) move. In consideration of the assistance he was to render Adair, the latter was to give him some gears for his automobile. Rodriguez also testified that when they arrived at the house on Maple Street, Adair directed him to the closet and asked him to pick up the suitcases; that he picked up the suitcases, put them down on the floor and then went to the bathroom. Rodriguez stated that at that point the officers entered the establishment. He denied any knowledge of the contents of the cases and denied that he had said to the officers, "The kid is innocent; it is all my stuff". Rodriguez did recognize the contents of the cases as being marijuana when the officers turned their flashlights upon it. On cross-examination he admitted the two prior convictions.

Defendant contends that the evidence is insufficient, as a matter of law, to sustain the judgment of conviction. The most which can be said in his behalf is that the evidence is conflicting. The trial court believed officer Fletcher and disbelieved the defendant as to the essential elements of the offense.

[1] We are required to view the evidence taken in the light most favorable to the respondent, and all intendments are in favor of upholding the judgment of the trial court.

[2-4] It is, of course, true that it is essential to the crime with which he was charged that the defendant have physical or constructive possession, coupled with knowledge of the presence and narcotic character of the substance. People v. Winston, 46 Cal.2d 151, 161, 293 P.2d 40. "To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient." People v. Foster, 115 Cal.App.2d 866, 868, 253 P.2d 50, 51; People v. Brickman, 119 Cal.App.2d 253, 263, 259 P.2d 917. Evidence of other acts of similar nature are admissible when not too remote in order to show *guilty knowledge* of the possession of marijuana by defendant. People v. Denne, 141 Cal.App.2d 499, 511, 297 P.2d 451.

[5] Considering all of the facts of this case, it is clear that there was ample and sufficient evidence to support the conclusions reached by the trial court.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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151 Cal.App.2d 736

Owen BANDY, Petitioner and Appellant,
v.
MUNICIPAL COURT OF SAN ANTONIO JUDICIAL DISTRICT, Respondent.
Civ. 22315.

District Court of Appeal, Second District, Division 1, California.
June 17, 1957.

Hearing Denied Aug. 13, 1957.

Proceeding on petition for peremptory writ of mandate directing a municipal court to properly appoint official court reporter. After an alternative writ of mandate was issued, the Superior Court, Los Angeles County, Edward T. Bishop, Frank G. Swain, and Kurtz Kauffman, Judges, denied the peremptory writ, and discharged the alternative writ and petitioner appealed. The District Court of Appeal, Doran, J., held that where municipal judges, pursuant to an alternative writ of mandate, appointed certain persons to act as official reporters, and such persons were qualified, as required by law, petitioner was not entitled to a peremptory writ on any theory of abuse of discretion merely because he happened to be a stenographic reporter but was not chosen for the post of official court reporter.

Judgment affirmed.

1. Mandamus ⚿160(6)

An alternative writ of mandamus could not order appointment of a specific person as an official court reporter for a municipal court, but could only require the court to take proper action leading to the appointment of an official court reporter. West's Ann.Gov.Code, § 72194.

2. Mandamus ⚿29

Where municipal judges, pursuant to an alternative writ of mandate, appointed certain persons to act as official reporters, and such persons were qualified, as required by law, petitioner was not entitled to a peremptory writ on any theory of abuse of discretion merely because he happened to be a stenographic reporter but was not chosen for the post of official court reporter. West's Ann.Gov.Code, § 72194.

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Kenneth M. Liskum, Huntington Park, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Assistant County Counsel, Los Angeles, for respondent.

DORAN, Justice.

The petition alleges that appellant is a certified shorthand reporter "fully qualified and entitled to appear in any and all courts of the State * * * when hired so to do by litigants or their counsel"; that over a four year period many lawyers have hired petitioner to so appear but have been "informed by the Clerk of the Municipal Court of San Antonio Judicial District that one, and only one firm of Court Reporters were permitted to appear and take down proceedings * * *, to-wit, the firm of Bob Stevens & Associates".

It is further alleged that "there is not now, nor has there ever been, since January 1, 1952, an Official Court Reporter" of said court, and that there has been no "examinations testing the competency of any person or persons for the position", nor evidence of good character required, in accordance with the statutes. It is also alleged that by reason of the Court's order, "Petitioner has been forced to breach his contracts with said attorneys" and has been damaged in the sum of $80,000; that petitioner is the real party in interest; that said order is discriminatory and "is arbitrary, capricious and unlawful".

An alternative writ of mandate was ordered, commanding said court "to cause to be conducted, examinations and tests leading to the appointment of Official Court Reporter", or that cause be shown why the same has not been done. To this writ return was made alleging that on January 1, 1952, the judges of said Municipal Court appointed Bob Stevens and E. S. Brink as official court reporters, and that on August 10, 1956 in compliance with the alternative writ, the judges named this firm as official reporters; "that all of said persons have qualified, as required by law, to be official reporters" and that the "petitioner has never qualified as an official court reporter" pursuant to law. On this showing, and it having been stipulated that the facts stated in respondent's answer were true, the peremptory writ of mandate sought by petitioner was denied and the alternative writ discharged.

[1] The judgment must be affirmed. In response to appellant's petition, an alternative writ of mandate required the Municipal Court in question to "cause to be conducted, examinations and tests leading to the appointment of Official Court Reporter". The return to this writ, the truth of which is conceded, shows that on August 10, 1956, the judges did appoint certain persons, but not appellant, to act as official reporters, and that such persons "have qualified, as required by law". The alternative writ could not and did not order the appointment of appellant; it could only require the Municipal Court to act in the premises, which respondent has now done.

In respect to the persons appointed, Assistant County Counsel Lamoreaux informed the trial court, "I checked insofar as I could with the Los Angeles Municipal Court to see if any of those people had taken the examination there, and I found that four of them had taken the examination: Nelson, Way, Melman, and Yamada. The last three passed; Nelson did not pass. When I discovered that, I notified the respondent court that unless Nelson took another examination and qualified, he could not act as the official court reporter, and that therefore they would have to scratch him from the list." It was thereafter stipulated that "Frank Nelson's name should be stricken from the list."

As stated in the respondent's brief, "No mandatory duty is enjoined upon the judges of respondent court to appoint appellant an official court reporter. The appointment of official reporters of a municipal court lies solely in the discretion of the judges of that court. Section 72194 of the Government

Code provides as follows: * * * 'By order entered upon the minutes of the court, a majority of the judges * * * may appoint as many competent phonographic reporters as the business of the court requires, to be known as official reporters of such court. The official reporters shall hold office during the pleasure of the judges of such court'. The provisions of that section are clearly wholly discretionary and no one person can claim any right to be appointed official reporter of any municipal court".

[2] There is no merit in any of the appellant's contentions. No right of appellant has been violated, and no abuse of discretion has been shown. The fact that appellant happens to be a stenographic reporter not chosen for the post of official court reporter provides no beneficial interest in the matter of appointment different from that of any other member of the public. After the issuance of the alternative writ, the respondents did show cause why a peremptory writ should not issue, and the latter was properly denied.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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152 Cal.App.2d 64

John Earl HASKINS, Plaintiff and Respondent,

v.

Lewis J. CRUMLEY, John W. Crumley, and Crumley, Inc., Defendants,

John W. Crumley and Crumley, Inc., Appellants.

Civ. 22196.

District Court of Appeal, Second District, Division 1, California.

June 24, 1957.

Certain of the defendants appealed from an adverse judgment, and plaintiff made a motion to strike the opening brief of the appealing defendants and to dismiss their appeal. The District Court of Appeal, Drapeau, J. pro tem., held that where appellants did not comply with Rule on Appeal because appellants instructed the court reporter to transcribe only the oral proceedings directly connected with that portion of the judgment appealed from and consequently much of the testimony of witnesses had not been transcribed, and there was no stipulation concerning the transcribing of only a portion of the testimony of witnesses, motion to strike appellant's opening brief and to dismiss appeal would be denied on condition that appellant within ten days should make arrangements with and compensate court reporter for preparation of a transcript containing all testimony not transcribed in the partial transcript.

Motion denied, on condition that appealing defendants make arrangements with and compensate official reporter for preparation of transcript containing all testimony not previously transcribed, and otherwise motion granted.

1. Appeal and Error 🔑608(2)

Where appeal was predicated on assertion that evidence did not support findings, Rule on Appeal dealing with partial transcript by stipulation or designation was not satisfied by showing of appellants that testimony ordered reported was all that there was on the specific points they urged on appeal, and it was necessary for the District Court of Appeal to have the reporter's transcript of all of the evidence in the case. West's Ann. Rules on Appeal, rule 4(b).

2. Appeal and Error 🔑801(1)

Though rules on appeal are essential to orderly conduct of the work of reviewing courts, and will be enforced whenever necessary, the policy of the law is to favor, if possible, hearings or appeal on their merits.

3. Appeal and Error 🔑640

Where appellants did not comply with Rule on Appeal because appellants instructed the court reporter to transcribe only the oral proceedings directly connected with that portion of the judgment appealed from and consequently much of the testimony of witnesses had not been transcribed, and there was no stipulation concerning the transcribing of only a portion of the testimony of witnesses, motion to strike appellant's opening brief and to dismiss appeal would be denied on condition that appellant within ten days should make arrangements with and compensate court reporter for preparation of a transcript containing all of the testimony not transcribed in the partial transcript. West's Ann. Rules on Appeal, rules 4(b), 13, 15(a).

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Walter W. Faner, Canoga Park, for appellants.

Howard W. Hunter, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Respondent in this case moves to strike appellants' opening brief, and to dismiss the appeal. The motion is made upon the ground that appellants have not complied with Rules 4(b), 13 and 15(a), Rules on Appeal.

The motion under Rule 4(b) is made because appellants designated portions only of the proceedings on the trial to be transcribed by the reporter, and failed to state in their notice of appeal the points upon which they rely.

[1] In opposition to the motion appellants say that the testimony ordered reported is all that there is upon the specific points they urge on appeal. This, however, doesn't satisfy the rule, and as the appeal is predicated upon the assertion that the evidence does not support the findings, it will be necessary for this Court to have the reporter's transcript of all of the evidence in the case.

This ruling is made upon the following statement in respondent's notice of motion to strike:

"In this case appellants have appealed from only a portion of the judgment, and the Court Reporter was instructed to transcribe only the oral proceedings directly connected with that portion of the judgment appealed from, consequently much of the testimony of witnesses have not been transcribed and there is no stipulation concerning the transcribing of only a portion of the testimony of witnesses.

"The supporting evidence relevant for a finding may be included in the testimony of the witness which was not transcribed.

"It is obvious, therefore, that the appellate tribunal cannot determine the sufficiency of any finding as to whether or not said finding is supported by the evidence unless the whole of the testimony of the witness is before the court."

[2] While rules on appeal are essential to orderly conduct of the work of appellate courts, and will be enforced whenever necessary, the policy of our law is to favor if possible hearings on appeal upon their merits. Lundy v. Lakin, 89 Cal.App.2d 849, 852, 202 P.2d 369; Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 156 P.2d 969.

[3] Appellants will, therefore, be permitted to perfect their appeal.

It is therefore ordered that if appellants, within 10 days from and after the filing of this opinion, shall make arrangements with and compensate the official superior court reporter for the preparation of a transcript containing all of the testimony not transcribed in the partial reporter's transcript herein, and upon receipt by this court of said reporter's acknowledgment of the aforesaid fees, or of other arrangements made with him by appellants for the preparation of such additional transcript, then, and in that event, the motion to strike appellants' opening brief and to dismiss the appeal will be denied. Otherwise, the motion to dismiss the appeal will be granted without further hearing.

WHITE, P. J., and FOURT, J., concur.

152 Cal.App.2d 60

In the Matter of the GUARDIANSHIP OF the Person and Estate of Lena TOMPIONER, an Incompetent Person.

Lena TOMPIONER, Contestant and Appellant,

v.

Dorothea Hanna CROSBY, Petitioner and Respondent.

Civ. 22083.

District Court of Appeal, Second District, Division 1, California.

June 24, 1957.

Rehearing Denied July 24, 1957.

Hearing Denied Aug. 20, 1957.

Proceeding for settlement of account of guardian. From an order of the Superior Court, Los Angeles County, Harold W. Schweitzer, J., the contestant appealed. The District Court of Appeal, White, P. J., held that jurisdiction of probate court in proceeding for settlement of guardian's account extends only to determination of amount of money or property of estate that has come into hands of guardian, and court did not have jurisdiction of claim of alleged fraud committed by guardian with respect to property of ward prior to adjudication of latter's incompetency.

Order affirmed.

1. Mental Health ⚷295

Jurisdiction of probate court in proceeding for settlement of guardian's account extends only to determination of amount of money or property of estate that has come into hands of guardian, and court did not have jurisdiction of claim of alleged fraud committed by guardian with respect to property of ward prior to adjudication of latter's incompetency.

2. Appeal and Error ⚷1011(1)

Decision arrived at by duly constituted arbiter of facts on conflicting evidence is not open to review on appeal.

Joseph W. Fairfield, Ethelyn F. Black, Los Angeles, for appellant.

Horace Appel, Albert Weiner, Los Angeles, for respondent.

WHITE, Presiding Justice.

Respondent, Dorothea Hanna Crosby is the daughter of appellant Lena Tompioner, and on August 2, 1955, was appointed guardian of the estate and person of her mother. On February 9, 1956, said incompetent filed a petition for restoration to capacity, and on April 2, 1956, such petition was granted. On April 23, 1956, respondent guardian filed her Final Account, Report and Petition for Discharge, and on May 14, 1956 the guardian filed what was designated "Supplement to First and Final Account, Report and Petition for Discharge of Guardian", covering the receipts and disbursement of certain social security payments received by the guardian on behalf of her ward. On May 9, 1956, appellant filed written objections to the Final Account of the guardian. On June 6, 1956, with all parties present, a hearing was had on the Account and Supplement thereto. Thereupon, the court made its order settling the guardian's account and supplement thereto as prayed and overruling the objections filed thereto by the incompetent. From such order the incompetent prosecutes this appeal.

In her petition for appointment as guardian respondent listed as assets of the incompetent's estate the following personal property:

"A trust deed in the sum of $12,000, payable $150.00 per month;

"Cash in bank account	$2,000.00
"United States Bonds	600.00
"Israel Bonds	300.00"

In her First and Final Account, Report and Petition for Discharge, respondent guardian included the foregoing property and then set forth the principal and interest payments she had received in the foregoing listed trust deed, interest collected on a savings account in bank and on United States government bonds. The guardian also included social security payments received by her for the incompetent.

Respondent guardian also set forth the disbursements she had made for and on behalf of her ward, and for which she claimed she was entitled to credit. To epitemize, the final account of respondent guardian showed that at the time she assumed her obligations as such, the assets of the incompetent amounted to $14,900, and at the time of rendition of the final account, representing a period of some eight months, the assets of the guardianship estate amounted to $14,610.97.

On May 9, 1956, appellant, the former incompetent, filed her objections to the accounting as follows:

"I.

"Objects to so much of the accounting which fails to include the sums of money received by the guardian on behalf of the incompetent from social security benefits.

"II.

"Objects to so much of the accounting which fails to include the sums of money received by the guardian on behalf of the incompetent during the month of April, 1956.

"III.

"Objects to any attorney's fees being allowed to the attorney for the guardian.

"IV.

"Objects to so much of the accounting which fails to include the United States Government bonds in the amount of approximately $2,675.00.

"V.

"Objects to so much of the accounting which authorizes the payment to Harvey L. Crosby, husband of the guardian, in the sum of $300.00."

The first objection was cured by the Supplement to the First and Final Account on May 14, 1956, wherein the social security payments were set forth. The second objection is met by the fact that appellant was restored to competency on April 2, 1956, and respondent guardian received two payments on the trust deed thereafter, which payments, less one month's rental paid for appellant, was held available for her.

The following three objections were decided against appellant by the court after hearing evidence thereon.

In support of her contention that the order of the probate court should be reversed, appellant asserts:

"1. It was error for the court to bar the former incompetent from presenting evidence that the trust deed set forth in the petition and the account did not belong to the incompetent and that the guardian has substituted the cash funds of the incompetent for the trust deed.

"2. It was error for the court to approve the final and the supplement account."

In this regard, the record reflects that in the year 1951, respondent guardian and her husband owned some property consisting of an avocado grove in San Diego County. They sold it to Colonel and Mrs. Horton. In the transaction respondent guardian and her husband received a trust deed in their names. According to the testimony of respondent guardian, it appears that the incompetent, long before she was so adjudged, agreed with her subsequent guardian that the trust deed was to be taken in the name of the guardian and her husband as beneficiaries. Asked if the trust deed was ever assigned to her mother prior to the adjudication of the latter as an incompetent, the witness answered, "No, that's the way she wanted it." The record further reflects that on December 7, 1954, the trust deed was assigned to respondent guardian by her husband and which assignment was not recorded. This is the deed of trust referred to in the petition of respondent for appointment as guardian of appellant. The latter, at the hearing before the probate court, sought to show that the trust deed did not belong to the guardianship estate but was substituted by cash taken from the estate in the amount represented by the unpaid balance due on the note secured by such trust deed. In answer to a query by the court, it was stipulated "that all of the transactions that have been testified to by the mother, and also the daughter, the financial transactions here occurred *prior* to the filing of the petition for appointment of guardian." (Emphasis added.)

The probate court took the position that "* * * The objections you speak about are principally objections that are going to have to be raised in civil litigation and cannot be raised in probate; they all transpired before the guardianship proceedings were instituted. If there was any misappropriation of funds, any undue influence or fraud, or something of that kind, it all occurred before the guardianship, and so all I have before me is, require an accounting of the guardian and what she had in her possession."

[1] Aside from the fact that appellant did not raise this specific issue in her grounds of objections and that the hearing might well have been limited to the objections so presented (Estate of Boyes, 151 Cal. 143, 147, 148, 90 P. 454) which did not present a triable issue as to the trust deed, nevertheless, we are persuaded that the probate court was correct in its holding that its jurisdiction extends only to a determination of the amount of money or property of the estate that has come into the hands of the guardian, for the purpose of charging her therewith. That, if there was any fraud committed by the guardian with regard to the property of his ward prior to the adjudication of the latter's incompetency, there was presented a question to be decided in an appropriate civil action in which such an issue would be properly framed. The power of the probate court is limited to a determination of the amount and nature of property that has come into the hands of the guardian and to inquiry into all accounts and conduct of the latter in connection therewith. What may have transpired prior to the adjudication of incompetency cannot be the subject of inquiry by the superior court sitting in probate if the guardian has faithfully and honestly administered his trust in connection with the property received into his possession pursuant to his appointment. What transpired prior to such adjudication and appointment presents a question for another judicial tribunal.

[2] Other objections filed to the account were decided on conflicting evidence, and under well recognized rules, the decision arrived at by the duly constituted arbiter of the facts is not open to review on appeal.

The order is affirmed.

DORAN, and FOURT, JJ., concur.

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151 Cal.App.2d 739

Matter of the Application of Albert KOSTAL and Arthur Watson, for Writs of Habeas Corpus.

Cr. 2781.

District Court of Appeal, Third District, California.

June 17, 1957.

Habeas corpus proceeding by prisoners who, though appealing California convictions for robbery, had been ordered delivered to Colorado authorities on fugitive warrants. The District Court of Appeal, Van Dyke, J., held that Governor of California had power to issue warrants authorizing delivery of prisoners to agents of Colorado, even though prisoners were in process of appealing from convictions in California for robbery.

Writs denied.

1. Extradition 🔑31

Governor of California had power to issue warrants authorizing delivery of prisoners to agents of Colorado, even though prisoners were in process of appealing from convictions in California for robbery.

2. Extradition ⚷31

The Governor of an asylum state has the right and power to grant extradition of a fugitive from the justice of a sister state upon a proper demand although at the time the demand is made the fugitive, having broken the laws of the asylum state, is serving an uncompleted sentence imposed upon him; extradition may also be granted even though courts of asylum state are, when demand is made, engaged in proceedings upon charges for breach of laws of asylum state and have not yet completed such proceedings.

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Floyd V. Gibbert, Asst. Public Defender, Sacramento, for petitioners.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, G. A. Strader and Lloyd Hinkelman, Deputies Atty. Gen., and J. Francis O'Shea, Dist. Atty., Sacramento County, and Edward McCarthy, Deputy, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Petitioners Kostal and Watson are currently in the custody of the Sheriff of Sacramento County pursuant to warrants of extradition issued by the Governor of this State. They petitioned for writs of habeas corpus, claiming that their detention under the extradition warrants is illegal. This court entered an order directed to the sheriff that he show cause for such detention, and, the Attorney General appearing on behalf of respondent, the matter has been briefed, argued and submitted.

Petitioners were sentenced to prison after having been convicted of the crime of robbery in the Superior Court for Los Angeles County. They were delivered into the custody of the Warden of Folsom State Prison. Each petitioner appealed and the appeals are still pending. The Governor of this State, upon request of the Governor of the State of Colorado, issued warrants of rendition authorizing the delivery of petitioners to agents of Colorado. Respondent sheriff, pursuant to the warrants, took custody of petitioners. Petitioners do not challenge the sufficiency of the showing made by the applications for extradition nor do they deny they are fugitives from the justice of the State of Colorado. They do contend that the Governor of this State does not have the power to issue warrants of rendition while they are confined to prison serving sentence and while they are prosecuting appeals from the judgments of conviction.

[1, 2] We have carefully examined the cases cited in support of and in opposition to the validity of the warrants of rendition issued by the Governor of this State and have concluded that the Governor acted within his power in issuing the warrants. Although there is some conflict, the weight of authority clearly preponderates in favor of the right and power of the governor of an asylum state to grant extradition of a fugitive from the justice of a sister state upon a proper demand although at the time the demand is made the fugitive, having broken the laws of the asylum state, is serving an uncompleted sentence imposed upon him; and that extradition may also be granted even though the courts of the asylum state are, when the demand is made, engaged in proceedings upon charges for breach of the laws of the asylum state and have not yet completed such proceedings. We think it unnecessary to discuss in detail the various holdings made and various situations arising under extradition laws. The majority rule, so far as material here, is well expressed in 35 C.J.S. Extradition § 11, page 328, as follows:

> "If at the time of the demand accused is held on a criminal charge in the state where he is a fugitive, he need not be surrendered until after the judgment of that state is satisfied. However, while there is some authority to the contrary, it is usually held that the executive of the asylum state may waive the right of that state to retain the prisoner, and may surrender him to the demanding state, before or after the fugitive's arrest, on his acquittal, or after his conviction and while he is still undergoing,

or subject to, punishment in the asylum state."

We are in accord with the views so expressed and accordingly hold that the writs prayed for should not issue.

Petitioners rely upon the Supreme Court's decision in the case of In re Peterson, 14 Cal.2d 82, 92 P.2d 890. We find nothing stated in the opinion in that case which conflicts with the views herein expressed.

Writs denied.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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151 Cal.App.2d 709

Tony BARAJAS and David Barajas, a minor, by Tony Barajas, Guardian ad litem, Plaintiffs and Respondents,

v.

SAN DIEGUITO HIGH SCHOOL DISTRICT, John P. Kirby, Clarence F. Stuber, Paul T. Mannen, Wilbur W. Carpenter and Andrew J. Blecha, Defendants and Appellants.

Civ. 5436.

District Court of Appeal, Fourth District, California.

June 13, 1957.

Rehearing Denied July 3, 1957.

Hearing Denied Aug. 6, 1957.

Action for damages sustained by minor plaintiff while pole vaulting on the grounds of defendant school district. The Superior Court, San Diego County, Gerald C. Thomas, J., entered judgment adverse to defendants and they appealed. The District Court of Appeal, Barnard, P. J., held that where a verified claim against school district was prepared by plaintiffs' attorney, but was not presented to or filed with the clerk or secretary of the school district or with anyone connected with the school district, until some 90 days after statutory period for filing same as a prerequisite to an action had expired, and instead, an unverified and unsigned copy of the claim was served by the sheriff on the clerk of the school district within the 90 days, there was not sufficient compliance with the statute, and under such circumstances, the action could not be maintained.

Judgment reversed.

Schools and School Districts 🔑115

Where a verified claim against school district was prepared by plaintiffs' attorney, but was not presented to or filed with the clerk or secretary of the school district or with anyone connected with the school district until some 90 days after statutory period for filing same as a prerequisite to the action had expired, and instead an unverified and unsigned copy of the claim was served by the sheriff on the clerk of the school district within the 90 days, there was not sufficient compliance with the statute, and under such circumstances, the action could not be maintained. West's Ann.Education Code, §§ 3, 1007.

Luce, Forward, Kunzel & Scripps, San Diego, for appellants.

William Murray Hill and Murry Luftig, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages based on a fall sustained by the minor plaintiff while pole vaulting on the grounds of the defendant school district during the lunch hour on May 3, 1954. After a trial without a jury the court made findings in favor of the plaintiffs and entered a judgment awarding them $3,178.91.

The defendants have appealed from the judgment on the sole ground that the evidence was insufficient to support one finding in which it was found "that plaintiffs have complied substantially with the provisions of Section 1007 of the Education Code." That section requires the filing of a verified claim with the secretary or clerk of the school district within 90 days after the accident, as a prerequisite to bringing such an action.

It appears from the evidence that the attorney for the plaintiffs prepared a claim entitled "Verified Claim for Damages", and setting forth the facts required by section 1007. This claim was signed by the father and mother of the minor plaintiff and by the father on behalf of the minor plaintiff. It was also sworn to by the father and mother, and by the father on behalf of the minor plaintiff, before a notary public on June 23, 1954. This verified claim will be referred to as the original claim. The attorney sent this original claim, with a purported copy thereof, to the sheriff of San Diego County for service. This copy of the claim was not signed by anyone and the typed verification thereon was not signed by any of the parties or by the notary public. The original claim was retained in the sheriff's office and the unsigned and unverified copy was sent to a deputy sheriff at Encinitas, who served it on the clerk of the school district on July 27, 1954. The sheriff then returned the original claim to plaintiffs' attorney, with a certificate of service stating that a copy of "Verified Claim for Damages" had been delivered to and left with the clerk of this school district on July 27. Aside from this unsigned and unverified copy of the claim no claim was presented to or filed with the secretary or clerk of this district within 90 days of the date of the accident. This action was brought on October 1, 1954. On October 19, the attorney for the plaintiffs again sent the original claim to the sheriff's office with instructions to serve that original on the clerk of the school board as soon as possible. It was received in the sheriff's office on October 20 and was delivered to the clerk of the school board on October 21, 1954. The original claim, with the certificate of service on July 27, and the unsigned and unverified copy which was served on July 27 were received in evidence and these exhibits are now before us. The original claim is stamped on its face as received in the sheriff's office on July 23, 1954 and again as received in the sheriff's office on October 20, 1954.

The appellants contend that there was no evidence before the trial court that any verified claim was presented and filed with the clerk of this school district within 90 days, as required by section 1007 of the Education Code; that the evidence did not show a substantial compliance with that statute; and that the evidence was insufficient, as a matter of law, to support the court's finding that there had been a substantial compliance with the provisions of that section. The respondents contend that the record shows a substantial compliance with section 1007, and that the evidence supports the court's finding to that effect. It is argued that the object of this statute was met since the respondents had verified the claim within the 90-day period and thus placed themselves under the penalty of perjury, and since the receipt of the unsigned copy would enable the officers of the school district to investigate the merits of the claim and to settle it without the expense of a lawsuit if settlement appeared to be proper; that the original claim was sent to the sheriff within the required time and the unsigned copy was served by the sheriff within the prescribed time; that the evidence shows that the respondents made a reasonable attempt to comply with the law; and that there is no evidence of any intent to mislead the appellants or that the appellants were misled.

In support of their contention, that the evidence here was sufficient to show a substantial compliance with the statutory requirement that a verified claim must be presented and filed with the secretary or clerk of the school district within 90 days after the accident, the respondents cite Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Peters v. City and County of San Francisco, 41 Cal.2d 419, 260 P.2d 55; Sayre v. El Dorado County High School Dist., 97 Cal.App.2d 333, 217 P.2d 713; and Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29. In all of these cases it appears that a verified claim was filed with some officer of the city or district, or filed and called to the attention of the proper officer within time, or that no question with respect to the filing of a verified claim was raised. In these, and other cases, it has been held that a substantial compliance with the statute was sufficient where the question was as to whether the facts required by the statute were sufficiently stated, or whether the claim had been left with the proper officer of the public body involved. In no case of which we are aware has it been held that the filing of an unverified claim constitutes a substantial compliance with the basic requirement of this statute.

In Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320, 321, this court held that the filing of a verified claim is mandatory, that the filing of an unverified claim was ineffectual, and that the filing of an unverified claim is not a substantial compliance with the statute requiring that a verified claim be filed. It was there said: "No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure and conditions under which it may be exercised. That such a claim must be verified is a reasonable provision which should not be held to be ineffectual and meaningless." This holding was approved and declared to be the law in Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353. In Oda v. Elk Grove Union Grammar School Dist., 61 Cal.App.2d 551, 143 P.2d 490, it was held that a similar statute requiring the filing of a verified claim as a condition of maintaining a suit for damages was mandatory; that the filing of an unverified claim was not a substantial compliance with the statute; and that the filing of an unverified claim could not be justified under section 3 of the Education Code, which provides that the provisions of that code are to be liberally construed. In Erde v. City of Los Angeles, 137 Cal.App.2d 175, 289 P.2d 884, it was held that the filing of a claim was not sufficient where the verified claim which was filed did not state the date of the accident although an unverified copy of the claim which was retained by the claimant did show such date. In Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13, 15, where the claim failed to state the place where the accident occurred, it was held that there was an entire failure on the part of the plaintiff to comply with one of the mandates of the statute. The court there said: "Substantial compliance cannot be predicated upon no compliance. A contrary holding would permit a claimant to bring suit against a city on the basis of a claim that included none of the information required by the statute if he offered to show that the city acquired the information independently of the claim. Such a holding would emasculate the statute." In Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779, 782, in speaking of a number of cited cases, the court said: "They proceed upon the theory that substantial compliance cannot be based upon an entire absence of one factor, * * *." To the same effect, see White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933. It would seem clear that the entire failure to comply with the basic requirement that a verified claim be filed within the time prescribed is a more serious defect than the failure to state one of the several facts required to be included in such a claim.

In the instant case, a verified claim was not presented to and filed with the clerk or secretary of the school district, or with anyone connected with the school district, until some 80 days after the statutory period had expired. The basic statutory requirement was not complied with and the evidence of what was done in an attempt to comply therewith is not sufficient to show a substantial compliance with the statute. While a verified claim was prepared in time it was not presented or filed as required by the statute. If the requirement for the filing of a *verified* claim, as a prerequisite to the maintaining of such an action, is to be dispensed with this should be done by the legislature and not by the courts. The finding here complained of is not supported by the evidence.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, and SCHAUER, JJ., dissenting.

151 Cal.App.2d 570

Ralph L. JENSEN, Plaintiff, Cross-Defendant and Respondent,

v.

WESTERN PIONEER INSURANCE COMPANY, a corporation, Defendant, Cross-Complainant and Appellant.

Ralph L. JENSEN, Plaintiff, Cross-Defendant and Respondent,

v.

WESTERN PIONEER INVESTMENT COMPANY, a corporation, Defendant, Cross-Complainant and Appellant.

Civ. 17148.

District Court of Appeal, First District, Division 2, California.

June 10, 1957.

Rehearing Denied July 10, 1957.

Hearing Denied Aug. 6, 1957.

Actions for breach of contracts of employment of plaintiff as general manager of insurance company and investment company, which had been organized by plaintiff, who had resigned as president and director of each corporation after expansion of Boards of Directors to eleven members but who had been re-elected to same positions by new boards of directors of companies, which claimed fraud, duress and abuse of confidential relations in inception of contracts, illegality of consideration for insurance company contract, and wilful and substantial breaches of contracts. The cases were consolidated for trial and jury verdicts were returned in favor of the companies. The Superior Court, Alameda County, Ralph E. Hoyt, J., granted a new trial, and the companies appealed. The District Court of Appeal, Dooling, J., held that the evidence was insufficient to sustain the verdicts.

Orders affirmed.

1. Appeal and Error 🔑1015(3)

In passing upon motion for new trial based upon insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh the evidence.

2. New Trial 🔑71

In considering sufficiency of evidence to support motion for new trial, court may draw inferences opposed to those drawn at trial, and where only conflicts consist of inferences deduced from uncontradicted probative facts, court may resolve such conflicts in determining whether case should be retried.

3. Appeal and Error 🔑1015(1)

Reviewing court will reverse order of trial court granting new trial only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

4. Appeal and Error 🔑901

On appeal from order granting plaintiff new trial, burden was on appellants to establish that one or more defenses was established as a matter of law and without contradiction.

5. Master and Servant 🔑40(3)

In action for breach of contracts of employment of plaintiff as general manager of insurance company and investment company, which had been organized by plaintiff, who resigned as president and director of each company after expansion of boards of directors to eleven members and was then re-elected to same positions by boards of directors of each company, which claimed fraud, duress and abuse of confidential relations in inception of contracts, illegality of consideration for insurance company contract, and willful and substantial breaches in performance of contracts, evidence was insufficient to sustain verdicts in favor of companies.

Robert H. Kroninger, Lewis E. Lercara, Oakland, for appellants.

Nichols, Richard, Williams, Morgan & Digardi, Oakland, for respondent.

DOOLING, Justice.

Respondent brought separate actions against the two appellant companies for damages for the breach of a separate contract with each of them. The two cases were consolidated for trial and jury verdicts were returned in favor of the defendants. The court granted plaintiff's motion for new trial by an order which recited: "The grounds upon which said new trial is granted include, but are not limited to, the ground of the insufficiency of the evidence to sustain the verdict."

Respondent, in 1947, undertook to form an insurance company to write insurance for members of the Japaneses race who were finding it difficult to secure insurance after the Second World War. This company, the appellant Western Pioneer Insurance Company, was incorporated and received a permit to do business in California in October of 1949. Initial sale of stock realized $330,000 and $30,000 par value of stock was issued to respondent for his services in promoting the corporation. The Board of Directors was expanded from three members to eleven, and respondent who had been president resigned as president and director, with the expressed purpose of giving the new Board complete freedom of action. The Board, however, immediately reelected him to both positions.

Most of the stock was purchased by persons of Japanese ancestry and most of the directors and agents of the company were Japanese-Americans.

The appellant Western Pioneer Investment Company was incorporated later. It had a Board of fifteen directors and many of its directors were also directors of the appellant insurance company.

Each of the contracts sued upon made the respondent the general manager of the corporation which entered into it.

The contract with the insurance company was authorized by the Board of Directors, with respondent present at the meeting but not voting, in February 1953. This contract was approved at a stockholders' meeting on March 31, 1953.

The contract with the investment company was authorized September 18, 1953, by its Board, respondent not voting. By identical letters of April 1, 1954, from each corporation respondent was discharged and notified that the respective contracts were rescinded.

The insurance company contract was for seven years and provided for a salary of $1,200 per month plus a sum equal to the amount that five percent of the underwriting profit of the company exceeded the amount of salary for a year. Reasonable and necessary expenses incidental to his work were provided for, to be computed on a monthly basis. In addition to provisions for discretionary increases in salary, disability payments were also provided to an amount of $750 per month for the unexpired term of the contract. A death benefit of $400 per month to respondent's widow was provided on the same terms. Respondent had an irrevocable option to renew the contract for seven years. Respondent was to have "the general management, supervision and direction of the business affairs of Company." He was to appoint, employ, supervise, and discharge employees and agents; and prescribe duties, terms of employment, and compensation. In addition he was to serve as general business advisor to the Board of Directors and was to exercise other reasonable powers and perform other reasonable duties as prescribed by the Board. All these powers and duties were expressly subject to the control of the Board. Respondent agreed to devote his "*full* time and efforts * * * and to faithfully serve" the Company.

The contract with the investment company contained the same language as to authority and duties and provided for a salary of $300 monthly and an expense account. Respondent agreed to devote *substantial* time and diligence to this position.

[1-3] The rules governing the review on appeal of an order granting a new trial on the grounds of insufficiency of the evidence are well settled and are clearly expressed in the following quotation from Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690:

> "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. People v. Sarazzawski, 27 Cal.2d [7], 161 P.2d 934; Green v. Soule, 145 Cal. 96, 102, 78 P. 337. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial (Mercantile Trust Co. v. Sunset etc. Co., 176 Cal. 451, 456, 168 P. 1033), and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. Cauhape v. Security Savings Bank, 118 Cal. 82, 84, 50 P. 310. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. See Dempsey v. Market Street Ry. Co., 23 Cal.2d 110 [113], 142 P.2d 929."

We approach the consideration of this appeal with these settled principles in mind. In their opening brief appellants state the following defenses which they assert were established without conflict in the evidence: "That a confidential relationship existed between the parties and that the contracts were not, as to the defendants, just and reasonable; that the contracts were secured by plaintiff in bad faith; that the consent of defendants to enter said contracts was obtained by undue influence exercised by plaintiff; that the consent of defendants was obtained by fraud; that the contracts and their consideration were illegal; that there was a failure of consideration; and that plaintiff breached the contracts in numerous specific material respects."

In their closing brief appellants single out three defenses which they say "were established at the trial as a matter of law and without contradiction." These are set out under the following headings: "A. Illegality of consideration for insurance company contract. B. Respondent committed material breaches of his duty to appellant insurance company. C. A wilful breach of respondent's contract with defendant investment company was established as a matter of law."

[4] The trial of the action took twenty-three days and the reporter's transcript is therefore voluminous, containing over 2000 typewritten pages. The burden is on appellants to establish that one or more defenses was, as they themselves put it, "established * * * as a matter of law and without contradiction."

[5] The grounds of defense relied upon naturally fall into three classes: 1. fraud, duress and abuse of confidential relations in the inception of the contract; 2. illegality of consideration for the insurance company contract; and 3. wilful and substantial breaches in the performance of both contracts.

While appellants' presentation in their briefs does not always clearly segregate the discussion of the various grounds of defense it may be gathered that they attempt to find fraud, duress and abuse of a confidential relationship in the following factors summarized on pages 29-31 of appellants' opening brief: 1. The fact that at the inception of the insurance corporation respondent was at one time the sole director, appointed a second director and the two elected the third, which Board determined to increase the membership of the Board of Directors to eleven. 2. At the time the stock in the insurance company was sold the respondent solicited proxies and seven year proxies were secured from the holders of over 28,000 shares of stock out of approximately 30,000 shares sold. 3. Respondent named and controlled the proxy committees which voted this stock. 4. Respondent named the persons to become candidates for the expanded eleven member Board and the proxy committees selected and dominated by respondent furnished the votes to elect such candidates. 5. It was this Board of Directors of the insurance company which authorized the contract here in suit and the votes of the proxy committee which ratified it at the stockholders' meeting. 6. This contract was unfair and unreasonable in its provisions, particularly in its provisions for disability payments to respondent and death payments to his wife, and in its length of term and option for seven year renewal. 7. Prior to the authorization of this contract the insurance company was operating at a loss and plaintiff at no time exhibited to the directors or shareholders the quarterly audits or other financial statements. 8. Respondent concealed his expense accounts, which included expenses for his wife and costs of pleasure trips and trips to race-tracks. To these may be added, as gleaned from other parts of the briefs, the further claims: 1. that the contracts were unfair because respondent had suffered a prior heart attack; 2. that respondent further dominated the Boards of Directors because he had secured the appointment of directors as agents of the companies and they feared incurring his displeasure; 3. that he falsely represented that he had suffered a $17,000 loss in promotional expenses for which he had received no reimbursement.

Owing to the fact that appellants in their briefs have cited testimony indiscriminately concerning both facts preceding the execution of the contracts and facts relied upon to show alleged breaches thereof, without clearly setting out any more definite specifications than those herein enumerated (and those only in the body of the brief in a continuous narrative fashion), it may be that appellants intended to urge other matters in this regard. If so we can only point to appellants' palpable failure to comply with Rule 15(a) of the Rules on Appeal providing: "Each point in a brief shall appear separately under an appropriate heading * * * which [is] generally descriptive of the subject matter covered." The only heading referring to insufficiency of the evidence in appellants' opening brief reads: "The trial court abused its discretion in granting the motion for new trial on the ground of insufficiency of the evidence." Under this heading, which was too general in form to be of any assistance to this court, appellants gathered together material going to the inception of the contracts and material relied upon to show breaches thereof, without any clear demarcation and without any greater detail of specification than herein set out and all of the points here suggested except the three set out in the closing brief had to be gleaned from the body of the opening brief. An undue burden has thus been placed on this court which counsel for appellants could largely have avoided by a better organization of their opening brief and a clear specification of the separate grounds on which they relied.

As to the alleged domination of the directors and stockholders the defense evidence showed that the contracts were prepared by a Mr. Ericksen, who was the attorney for the corporations, without interference by respondent, that the amounts of salary, disability and death payments were not inserted therein until the directors had discussed them in the directors' meeting and arrived at the figures as a result of such discussion, and that respondent though present exerted no pressure on the directors and abstained from voting thereon. The evidence further showed that in the only instance in which respondent attempted to discharge a director from a position with the insurance company the directors overrode respondent's action and retained the director in the same position at an increased salary. As to the proxies respondent testified that when they were obtained no pressure was exerted on the stockholders and it was explained to them that their proxies were revocable. The proxy committees were elected by the Boards of Directors.

The Japanese members of the Boards were all men of American education with experience in business affairs. The respondent had done the promotional work for the organization of the insurance company, had successfully brought it into being, and although he resigned as president and director when the new Board of eleven met, they immediately reelected him to both positions. Thereafter as general manager he had directed the company through the lean years of a completely new insurance business to a point where in 1954 it showed such substantial profit (16.3%) that its total operation, including the previous years' losses, showed a three percent profit.

The early steps in the organization of the insurance company several years before were no different than those of most corporations and the ultimate Board of eleven directors had functioned through the period thereafter and the trial court certainly could draw the inference that they were not under respondent's domination when the contract of employment was entered into.

The alleged fraud consisted in 1. the representation that respondent had spent $17,000 in promotional activities for which he was never reimbursed although in fact he had received $30,000 in stock of the insurance company; 2. the concealment of the fact that respondent had taken vacation trips and trips to race-tracks and charged them to his expense account without disclosing those facts; 3. that he had similarly charged expenses for his wife without disclosure; and 4. that he concealed audits and other financial statements which showed the insurance company operating at a loss.

Respondent testified as to these matters: 1. that he did not speak of his financial loss in promotional activities to any director in connection with his contract of employment; 2. that he charged to his expense account only business trips and the company was charged for no vacation trip or trip to any race-track. 3. that because of advice not to drive great distances his wife accompanied him on business trips to drive his automobile if necessary and further that his wife furnished services on such trips by meeting the wives of agents whom he was considering for employment and sizing up their home environment, that her expenses were only charged when she furnished such services, and that the fact that his wife accompanied him was known to the directors; (4) that adequate financial reports were made and discussed at all directors' meetings and the detailed audits and financial statements were always available to the directors if they wished to examine them. The evidence presented fact questions which all might reasonably be resolved in respondent's favor.

While the contract contained features quite generous to respondent, particularly in the disability provision and death benefits for the wife, in view of respondent's leading and important part in the formation and previous management of the insurance company, the fact that the contract was prepared by the company's attorney without dictation by respondent, and the fact that its features were fully discussed by the directors and the amounts inserted therein after and as a result of such discussion certainly supports the trial court's conclusion that there was no element of overreaching or abuse of confidence on respondent's part. His prior heart attack was well known to the directors, he had made a good recovery, and recent history has emphasized that a man may suffer a severe heart attack and make such a recovery as to be unimpaired for continued useful service. Those were matters known to the directors and the court could well draw the conclusion that they had the due consideration of the Board.

The alleged wilful breaches consisted, in addition to the continuance of the claimed practice of making improper charges to his expense account sufficiently discussed above and visits to race-tracks which he denied interfered with his proper performance of his duties, in his drawing advances for expenses which appellants argue were violations of the provision of section 1104 Insurance Code prohibiting loans to "any officer, director, trustee or other person having authority in the management of its funds." Respondent testified that these advances never exceeded a succeeding two weeks estimated expenses and in view of the contract provisions for the payment of respondent's necessary expenses we cannot say that the trial court's conclusion that they were not loans within the meaning of the section referred to is unreasonable or not supported by the evidence.

The contract with the insurance company recited with other recitals in a preamble: "Whereas, Manager * * * has performed valuable and excellent services in forming and promoting Company and in organizing and readying Company for business, at great personal sacrifice * * *." On cross-examination respondent was asked if his promotional services formed one of the considerations for the contract and gave an affirmative answer. The legal meaning of "consideration" was not explained to respondent and there is no evidence that he knew it. It is one reasonable conclusion that respondent understood consideration to mean something taken into consideration rather than consideration in the purely legal sense. He testified that he did not suggest the insertion of the quoted recital in the contract but that it was inserted therein on his own initiative by the company's attorney and, as previously noted, he testified specifically that his promotional losses were not mentioned to any director by him in any discussion leading up to the contract's authorization. The contract contains sufficient consideration in the mutual promises of the parties and it is not customary for careful attorneys to recite a consideration by way of recital in this form in the preamble of a contract. Rather the customary recital of legal consideration takes some such form as "in consideration of." The trial court was not bound from respondent's testimony to conclude that these services were one of the legal considerations for the contract in view of all the circumstances. If the trial judge concluded, as he reasonably might, that they were not one of the legal considerations for the contract there could be no violation of section 840 Insurance Code as claimed by appellants.

Appellant investment company cites the failure of respondent to attempt the negotiation of a loan from the Bank of Tokyo as directed by a resolution of its Board adopted February 26, 1954. Respondent was formally discharged on April 1, 1954. Only the month of March intervened. Respondent testified that in the exercise of his judgment he felt that the negotiation of such a loan might disturb the company's loan arrangement with another bank on which it had an undrawn credit of $213,000. He testified that he wanted to discuss this matter further with the directors and if, after such discussion, they had still desired him to contact this bank he would have done so. The court could well conclude that respondent's delay in pursuing this matter did not constitute a wilful or any breach of his contract.

The fact that the insurance company's contract required the respondent's "full time" and the investment company's "substantial time" was well known to the directors of both companies, many of whom were on both Boards. The offices of the two were together and on trips for one the respondent could well serve the other. Indeed the investment company was formed primarily to handle business incidental to that done by the insurance company. The action of the directors in approving both contracts and in permitting respondent to operate under both amounted to a practical construction that there was no inconsistency involved.

The case is the familiar one of substantial conflicts in the evidence and in the inferences reasonably to be drawn therefrom.

The order granting a new trial in both cases is affirmed.

KAUFMAN, P. J. and STONE, J. pro tem., concur.

152 Cal.App.2d 115

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alfonso GUITERREZ, Defendant and Appellant.

Cr. 3320.

District Court of Appeal, First District, Division 1, California.

June 26, 1957.

Prosecution for attempted burglary. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment on verdict of attempted burglary in second-degree and defendant appealed. The District Court of Appeal, Peters, P. J., held that errors in admission of testimony, some of which were partially cured by admonitions to the jury, were not, under circumstances, prejudicial.

Affirmed.

1. Criminal Law ⚷1169(1)

In most cases, importance of an error in admission of testimony depends upon the closeness of the evidence.

2. Burglary ⚷29

Where glass door to entrance of store had been broken, if jury believed that defendant was responsible for the breakage, it could infer the necessary intent to commit burglary.

3. Witnesses ⚷337(4)

In absence of special circumstances it is improper over defendant's objection, to question him about the claimed use of an assumed name.

4. Witnesses ⚷337(4)

In prosecution for attempted burglary in which defendant was also charged with two prior burglaries which he admitted, it was error to allow cross-examination of defendant as to whether he had used an assumed name when he was arrested on a prior burglary charge.

5. Witnesses ⚷337(5)

It is improper to ask the defendant in a criminal case whether he has been arrested or in trouble with the police on prior occasions since it is improper to impeach a witness by raising matters, other than evidence of general reputation or conviction of a felony, which generally tend to degrade him. West's Ann.Code Civ.Proc., § 2051.

6. Witnesses ⚷337(5), 350

When a defendant in a criminal case testifies he may be impeached by showing prior felony convictions, but only the nature of the conviction can be identified and their details are not a proper subject of inquiry.

7. Criminal Law ⚷338(7)

In prosecution for attempted burglary, where people produced on rebuttal, a police officer that had talked with defendant on day after his arrest, testimony of officer that defendant stated that he had been to a party where he had taken a narcotic, was improper as being made for purpose of degrading defendant in eyes of jury.

8. Criminal Law ⚷371(12)

Although motive for crime may sometimes be shown by evidence of the commission of other specific and independent criminal acts, the obvious prejudicial effect of such testimony requires its cautious use, and where the justification is remote, such testimony is inadmissible.

9. Criminal Law ⚷1169(1)

In prosecution for attempted burglary, errors in admission of testimony respecting defendant's use of an alias, his prior arrest record, his use of narcotics, were not, either singly or as a group, prejudicial under the circumstances where there was quite overwhelming evidence of defendant's guilt.

◆

Elizabeth M. Claros, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with attempted burglary, in that on June 24, 1956, he attempted to enter Zukor's Clothing Store on Market Street in San Francisco with intent to commit theft. He was also charged with two prior burglaries. He pleaded not guilty to the attempted burglary, but admitted the priors. A jury found him guilty of attempted burglary and fixed the degree as second. Defendant appeals from the judgment entered on that verdict.

[1] No direct attack is made upon the sufficiency of the evidence. Appellant does contend that several errors were committed during his cross-examination, and that the court admitted prejudicially erroneous rebuttal testimony. The attorney general makes no serious effort to refute several of the claims of error, but argues that the errors committed were not prejudicial. Thus, the basic inquiry on this appeal is to determine whether the errors were prejudicial. This, of course, requires the appellate court to consider the state of the evidence, because in most cases the importance of an error depends upon the closeness of the evidence. People v. Zemavasky, 20 Cal.2d 56, 123 P.2d 478; People v. Fleming, 166 Cal. 357, 136 P. 291.

The prosecution's case was established almost entirely through the testimony of Harold Miller, a special patrol officer hired by private firms to patrol their premises. One of Miller's clients was Zukor's Clothing Store near 5th and Market Streets, San Francisco. On the morning of June 24, 1956, at 5:56 a.m. Miller was on duty and was standing directly across the street from Zukor's, when he observed defendant turn into the entryway leading to the entrance of Zukor's. The doors of this store are a considerable distance from the Market Street sidewalk. The entryway is divided into two sections by an island of glass display cases. Miller testified that at this hour of the morning that side of the street was deserted except for defendant. He noticed that defendant was then wearing a yellow sport jacket. He became suspicious when defendant entered the entryway to Zukor's store, and kept his eyes on the area. Shortly thereafter he heard glass breaking and ran across the street and into the entryway. There he found defendant, who now had the yellow sport coat over his arm. Defendant ran away. There was a large hole in the glass door of Zukor's, and there was a white powder mixed in with the broken glass. Miller testified that he started to chase defendant and was at no time more than two feet from him; that defendant violently resisted; that defendant had white powder all over his shirt and pants; that after a chase of several blocks defendant was eventually subdued with the help of a regular police officer.

The manager of Zukor's testified that he had locked the store when it was closed the night before and that defendant did not have permission to enter the store. He also testified that when he arrived at the store Sunday morning in response to a telephone call from the police he found that there was a big four-foot hole in the front door of the store, and that there was a lot of fine white powder mixed in with the broken glass.

The third and last witness for the prosecution was a police officer who interviewed defendant after his arrest. He testified as a rebuttal witness that defendant then told him that on the night of June 23rd he had taken a shot of heroin.

Defendant was the sole witness called by the defense. He testified that he had attended an all night party on June 23rd, and, about 4:30 a.m., was walking towards his hotel located between 6th and 7th on Mission Street; that he crossed Market Street directly opposite 5th Street, intending to walk down 5th to Mission; that at no time did he walk in front of Zukor's which is located a short distance from the corner of 5th Street and Market; that while he was peaceably walking along, Miller started after him yelling that he was under arrest and attempted to hit him with a blackjack; that he continued to walk along trying to ward off these blows; that he thought Miller was drunk; that several blocks later a regular police officer joined Miller and started to beat defendant and arrested him. He denied resisting arrest, breaking the glass, of being in front of Zukor's, and denied that he ever owned or wore a yellow sport jacket, or that his clothes were covered with white powder. He admitted, however, that, based on the events surrounding his arrest, he had been charged with resisting arrest and had been convicted of that misdemeanor. He admitted that at that trial he had not told the story told on this trial, but contended that the Municipal Court judge had prevented him from testifying at all.

[2] On this evidence the jury brought in a second degree attempted burglary conviction. It is apparent that, although there are some gaps in the evidence produced by the prosecution,[1] the evidence of guilt is strong. Appellant admits his presence in the general area, and Miller, who was practically an eye witness, directly links appellant to the offense. It should be noted that after Miller entered the entryway of the store, and observed the broken door and saw defendant as the only occupant of the entryway, at no time thereafter during a several block chase did he lose sight of him. There is no doubt that the glass door was broken. If the jury believed that appellant was responsible for the breakage it could, of course, infer the necessary intent to commit burglary. People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913; People v. Bletson, 117 Cal.App.2d 731, 256 P.2d 614.

With this factual background, we turn to the claimed errors committed on the cross-examination of appellant. The first of these related to the claimed use by appellant of an assumed name. The prosecution attorney asked the following questions:

> "Mr. Campbell: Q. Mr. Guiterrez, by the way, is your name Guiterrez or Romeris? A. No. Guiterrez.
>
> "Q. Not Pedro Romeris? A. No, sir.
>
> "Q. You have used the name of Pedro Romeris? A. No, sir.
>
> "Mr. Postel [For the Defense]: I object to that as incompetent, irrelevant and immaterial.
>
> "The Court: Objection overruled.
>
> "Mr. Campbell: Q. Did you ever use the name of Pedro Romeris? A. Pedro, no, sir,—Pete Rodriquez.
>
> "The Court: Pete Rodriquez, he says; never Pedro.
>
> "Mr. Campbell: Q. You never used the name of Romeris? A. No, sir.
>
> "Q. When you were arrested on February 25th, 1947, here in San Francisco on a burglary charge, didn't you give the name of Pedro Romeris? A. No, sir.
>
> "Mr. Postel: Now, if your Honor please, here at this point I move for a mistrial; I move that the question be stricken out—first, I move for a mistrial on the ground that it is a clear attempt to prejudice the jury, bringing everything in the picture here. If he has been convicted of a felony, that may be admitted—not 'When you were arrested,' et cetera.
>
> "The Court: The question, as I understand it, would simply call for a denial that he has ever been known as that. However, I must caution the jury that nothing he may have done before is of any moment in this case. He is only on trial here for attempted burglary that took place on the date alleged in the Information. He is not on trial for anything else. Mr. Campbell, if he wishes, can establish the evidence that he has been previously convicted of a felony, but that is merely for the purpose of impeaching his testimony, it is not for the purpose of proving his guilt of this particular offense. I sug-

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[1] The prosecution did not introduce the yellow sport jacket into evidence nor account for its absence, nor did it produce or account for the absence of the police officer who participated in the arrest of defendant.

> gest, if you know of any such convictions, I suggest you ask the question directly.
>
> "Mr. Campbell: That was not for that purpose. It was only for the purpose of finding out if he ever used the name of Romeris."

[3-5] Appellant contends, and the attorney general quite properly concedes, that, in the absence of special circumstances not here present, it was improper over appellant's objections to question him about the claimed use of an assumed name. People v. Fleming, 166 Cal. 357, 136 P. 291; People v. Mohr, 157 Cal. 732, 109 P.2d 476; People v. Arlington, 123 Cal. 356, 55 P. 1003; People v. Denby, 108 Cal. 54, 40 P. 1051. The attorney general does "suggest" that this examination may have been "to ascertain for certain" that appellant had a prior conviction. The prosecutor, however, renounced any such intention, and the appellant had admitted the priors. Under such circumstances it was clearly error to overrule the objections to these questions. It was also error, for the same reasons, to fail to sustain the objection to the question "When you were arrested on February 25th, 1947, here in San Francisco on a burglary charge, didn't you give the name of Pedro Romeris?" It is clearly improper to ask a defendant in a criminal case whether he has been arrested or in trouble with the police on prior occasions. People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659. It is improper to impeach a witness by raising matters, other than evidence of general reputation or conviction of a felony, which generally tend to degrade him. (See § 2051, Code Civ. Proc.)

Immediately after the cross-examination above quoted the following occurred:

> "[Mr. Campbell]: Q. Have you ever been convicted of a felony? A. Yes, sir.
>
> "Q. On how many occasions? A. I guess twice.
>
> "Q. What was the first occasion for? A. Burglary.
>
> "Q. What was the second occasion for? A. Burglary.
>
> "Q. Both for burglary? A. Yes, sir.
>
> "Q. And the second occasion was of a burglary, was in a woman's dress shop?
>
> "Mr. Postel: I will object to that, your Honor, as incompetent, irrelevant and immaterial, improper impeachment.
>
> "The Court: Objection overruled. He can establish the particular type of crime. You may answer the question. A. Yes, sir.
>
> "Mr. Campbell: Q. And entry was gained by smashing a glass? A. No, sir.
>
> "Q. It was not? A. No, sir.
>
> "The Court: Let's not go into the details. I didn't intend to open that up.
>
> "Mr. Campbell: All right, your Honor.
>
> "Q. And at that time you resisted arrest also? A. No, sir.
>
> "Mr. Postel: I object to that, your Honor, on the same ground.
>
> "The Court: Objection sustained."

[6] Appellant contends that this cross-examination violates the rule that, although when a defendant testifies he may be impeached by showing prior felony convictions, in such case only the nature of the convictions can be identified and their details are not a proper subject of inquiry. This is undoubtedly the rule, and the attorney general so admits. See People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Gregor, 141 Cal.App.2d 711, 297 P.2d 734. The attorney general does suggest that some of these questions were proper to show a common scheme, plan or design for committing burglary. This may be true with respect to the questions as to whether defendant had previously burglarized a dress shop by breaking the glass door to gain entry (People v. Coefield, 37 Cal.2d 865, 236 P.2d 570; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Burns, 109

Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9; People v. King, 4 Cal.App.2d 727, 41 P.2d 593; People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130), but obviously this exception does not apply to the question as to whether, on his prior arrest, he "resisted arrest also." This inquiry should not have been made. The trial court, it will be noted, sustained an objection to this question.

[7] The third claimed error occurred during the rebuttal testimony presented by the prosecution. The People produced a police officer who had talked with appellant in the city prison the day after his arrest. During his examination, when he was asked to recount this conversation, he stated:

> "A. * * * He said that on that Saturday night before his arrest he had been to a party. He stated he had been out in the Mission and while he had been out in the Mission he had a shot of heroin; and he stated then that after he had taken this narcotic he had gone over to the area of Vallejo and Jackson street. * * *
>
> "Mr. Campbell: You may cross-examine.
>
> "Mr. Postel: May it please the Court, I will move to strike that reference to the shot of heroin, and again move for a mistrial. It was not called for; it was not proper rebuttal, it was a clearly voluntary statement.
>
> "The Court: I am going to caution the jury that that statement was not called for. I am quite surprised that Mr. Campbell proceeded at this late time, it is quite prejudicial to the defendant, and I am very sorry that it had to happen under these circumstances. I am not going to grant a new trial, but I am going to caution the jury that they are not to consider that for the purpose of this case at all."

[8] This statement given by the officer of another and independent crime was improper. Its only purpose was to degrade the defendant in the eyes of the jury. The attorney general argues that perhaps the remark can be justified on the theory that it may show a motive for the attempted burglary, namely, that appellant needed money to buy more narcotics. While motive may sometimes be shown by evidence of the commission of other specific and independent criminal acts, the obvious prejudicial effect of such testimony requires its cautious use. Where the justification is remote, such testimony is inadmissible. In People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7, 20, it was stated: "The trial court, however, should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." In the present case, the inflammatory effect of the statement outweighs its slight relevancy to show motive. Therefore, the question should not have been asked.

Were these errors prejudicial? The test of prejudicial error within the meaning of Article VI, § 4½ of the state Constitution has recently been restated by the Supreme Court as follows in People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probably that a result more favorable to the appealing party would have been reached in the absence of the error."

[9] Tested by this standard we do not think the errors singly or as a group were prejudicial. Although, as already pointed out, there are gaps in the prosecution case, and although improper questions were asked, the evidence of guilt is quite overwhelming. One who was practically an eye witness identified appellant as the culprit. Although appellant denied that he resisted arrest, the fact that he did so was demonstrated by his testimony that, based on the

events of that morning, he was subsequently convicted of the misdemeanor of resisting arrest. The story told by appellant is quite unbelievable, while that told by Miller is clear, coherent and reasonable. As to several of the errors, the trial court sustained objections, and, as to others, gave specific admonitions, which helped to alleviate the impact of the errors. Under such circumstances we cannot say that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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151 Cal.App.2d 562

Ella MALONE and Edith E. Marbuch, Petitioners and Appellants,

v.

STATE EMPLOYEES' RETIREMENT SYSTEM of the State OF CALIFORNIA, et al., Respondents.

Civ. 9062.

District Court of Appeal, Third District, California.

June 7, 1957.

Hearing Denied July 31, 1957.

Proceedings on petition for writ of mandate compelling respondents to pay certain retirement benefits to petitioners. The Superior Court, Sacramento County, James H. Oakley, J., rendered judgment discharging the writ, and petitioners appealed. The District Court of Appeal, Van Dyke, P. J., held that in view of Government Code sections making those chapter provisions applicable to patrol members likewise applicable to warden members and forestry members, widows of fish and game wardens who had retired for service were entitled to receive benefits which Code Section accorded to wives of deceased patrol members who had retired for service.

Reversed.

1. Fish 🔑11

Game 🔑6

In view of Government Code sections making those chapter provisions applicable to patrol members likewise applicable to warden members and forestry members, widows of fish and game wardens who had retired from service were entitled to receive benefits which code section accorded to widows of deceased patrol members who had retired from service. West's Ann.Gov. Code, §§ 21208, 21209, 21252.1 to 21252.3, 21256.1, 21256.2, 21257, 21257.1, 21263.

2. Statutes 🔑181(1), 190

Intent of legislature must be gathered from what it has said, and when it has spoken plainly, clear expression of its intent is controlling.

3. Statutes 🔑159, 223.4

The "later-in-time" and the "special-over-general" rules are no more than aids by which intent of legislature may be ascertained, and such rules will not be applied where legislature has plainly declared its intention.

James H. Phillips, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by William J. Power, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

Appellants herein petitioned the superior court for a writ of mandate compelling respondents to pay certain retirement benefits to them after the deaths of their respective husbands, who had been employed by the state as Fish and Game Wardens and had retired for service. The court issued an alternative writ of mandate. From a judgment discharging the writ, petitioners have appealed. The issue presented is the proper interpretation of controlling statutes.

The pertinent legislation is found in Chapter 9, Part 3, Division 5, Title 2 of the Government Code. Chapter 9 is entitled "Benefits" and follows legislation implementing constitutional permission to the legislature to provide a state retirement system. Section 21208, the salient statute in this case, provides: "The provisions of this chapter applicable to patrol members are applicable to warden members. 'Highway patrol service' means 'warden service' as applied to warden members." Like provisions are made as to forestry members. Sec. 21209. The next section, the first section of Article 2 of Chapter 9 entitled "Service Retirement", defines the elements of allowance on retirement for service and contains a special provision that patrol members' widows, or minor children, or dependent parents, in that order, shall receive one-half the member's annuity allowances after death of the member. Sections 21252.1, 21252.2 and 21252.3 are special sections addressed to benefits to patrol, warden and forestry members which are alike, save that the normal retirement age for patrol members is fixed at age 55, but for warden and forestry members is fixed at age 60. Sections 21256, 21256.1, and 21256.2 again are special sections devoted to patrol, warden, and forestry members, alike, save for normal retirement age. What has just been said is true also of Sections 21257 and 21257.1.

Section 21263, which is the specific section on which appellants ground their claims for continuing benefits after death of their husbands, provides:

> "Upon the death of a patrol member after the effective date of this section and after retirement for service or for industrial disability, including such members heretofore and hereafter retired, one-half his retirement allowance as it was at his death, excluding the portion of said allowance derived from accumulated additional contributions of the member, shall be continued throughout life or until remarriage, to his surviving wife. * * *"

[1] It is contended by appellants that the provisions of Section 21263 apply to warden members as well as to patrol members and that, therefore, under the provisions of that section they are entitled to receive the benefits which the section accords to wives of deceased patrol members who had retired for service.

The sections providing that the provisions of Chapter 9 applicable to patrol members shall also be applicable to warden members and to forestry members are found in Article 1 of the chapter, which article is devoted to general provisions. At that point the statutes clearly show a legislative intent to group such members together as to benefits to be derived from membership in the state retirement system. The first possible application of the statutory directives that provisions of Chapter 9 applicable to patrol members shall equally apply to warden and forestry members occurs in the first section of Article 2. By that section, 21250, patrol members are expressly accorded benefits differing from benefits accorded to members of the system generally in that, as to patrol members, there is a provision for automatic continuance of service retirement annuities to a surviving wife, to minor children and to dependent parents. We fail to see how Section 21250, with its special provisions for patrol members, can be excluded from the statutory directives that all provisions applicable to patrol members shall be applicable to warden and forestry members. The juxtaposition of the three sections, 21208, 21209 and 21250, in addition to the plain provisions of the first two sections, compels such construction if, indeed, obedience to the plain legislative mandate can be considered as construction where, due to the clarity of the legislation, no construction is needed. The following sections which we have noted treat patrol members, warden members and forestry members alike, save only as to a difference in normal retirement age. We then come to Section 21263, which, conforming to the general requirement of Section 21250 for automatic continuance of service retirement annuities to surviving wives, children or dependent parents, provides that one-half the retirement allowance of a patrol member shall be extended to such relicts. Again, we can see no reason why the statutory mandates do not require that these special provisions as to patrol members be applied to warden and forestry members, subject only to the difference in normal retirement age. We think applicable here what is said in 23 California Jurisprudence, "Statutes", Section 103:

> "When the language of a statute is such that the intention of the lawmakers is in any respect doubtful—as where the language is ambiguous or uncertain and it is impossible to reconcile to the full extent the various provisions—it is necessary to resort to construction to ascertain the true intention. * * * On the other hand, it is a cardinal rule that a statute free from ambiguity and uncertainty needs no construction, and will be enforced as written. Thus it has been repeatedly announced, in varying language, that there is no room for construction, liberal or otherwise, or for interpretation or comment, where the language is clear, plain and unambiguous, or direct, explicit and unmistakable, and leaves no doubt as to the legislative intent. The legislature should be credited with meaning what it has plainly expressed. In other words, if the statute is plain, it speaks for itself, and no exposition may be made which is opposed thereto. The court must follow the language employed and give to it the plain meaning, whatever may be thought of the wisdom, expediency or policy of the law, or even though it may appear probable that a different object was in the mind of the legislature."

[2] The contentions of respondents are stated as follows: Where the state employees' retirement law is amended to provide that warden members of the retirement system are to be given the same treatment as patrol members and four years thereafter the legislature specifically grants certain additional benefits to patrol members and fixes the contributions to be paid by the members to whom the additional benefits are given and provides for an increase in the state's contribution with respect to such members, do the additional benefits extended to highway patrolmen inure to warden members even though such members are not mentioned in the statute creating the additional benefits and neither the member contributions nor the state contribution for warden members is mentioned in the statute. It may very well be that we are presented here with an error in draftsmanship. It may even be that in fact the legislature did not intend to extend the extra benefits to widows of warden and forestry members when it enacted the sections which extended such additional benefits to the widows of patrolmen. But the intent of the legislature must be gathered from what it has said and when it has spoken plainly the clear expression of its intent is controlling. It is idle to discuss what the legislature probably intended to do or from a policy point of view what it ought to have done. It has told us what it intended to do in language so clear as to forbid construction, and whether or not it ought to have done so is a matter exclusively for legislative determination. We note also that what the respondents term the special or additional benefits extended to highway patrolmen where the subject of legislation enacted four years after the legislative declaration that provisions in Chapter 9, applicable to patrol members, were also applicable to warden and forestry members. But this legislation was enacted in 1949, and the legislature has met and adjourned several time since then with no attempt being made to change the legislation. For aught we know the legislature may have considered that the hazardous nature of the duties of patrol members justified the extension of additional benefits to them and their dependents over those extended generally to members of the state retirement system;

and may have considered also that the duties of warden and forestry members were also hazardous to a point that justified the extension of the same additional benefits.

[3] Respondents argue that we should ignore the plain provisions of Sections 21208 and 21209 because legislation enacted at the same time as Section 21263 also provided for the funding of the increased cost of additional benefits extended to patrol members. Section 21263 was added to the statutes by Chapter 1498 of the Statutes of 1949, p. 2641, and the title of the legislation was worded as follows: "An act to amend Sections 20603, 20750.2, 21250, 21330 of the Government Code and to add Section 21262 [21263] thereto, relating to the State Employees' Retirement System, and providing for status, rights, privileges, contributions, and benefits of patrol members thereof, and for the state contribution thereto in respect to such members." Respondents argue that Chapter 1498, which includes the legislation that became Section 21263, does more than provide an additional benefit for certain members of the retirement system; that it also fixes the contributions to be paid by the members benefited and the contributions to be paid by the state on their behalf; that only patrol members are the members designated as "such members" in the title of the statute. Respondents note that Section 20603, which is the subject of Section 1 of Chapter 1498, fixes the employee contribution for those affected by the bill and makes specific reference to highway patrolmen and highway patrolmen only; that the rate of contribution provided in that section is geared to a retirement age of 55; and that it is only highway patrolmen that have normal retirement at that age; that warden members are entitled to retire at age 60, not age 55, and that their rate of contribution is fixed by Section 20603.1, not by Section 20603. They note also that Section 20750.2, which is the subject of Section 2 of Chapter 1498, makes specific reference to highway patrolmen and that the state's contribution for warden members is fixed by Sections 20750.4 and 20750.41. Respondents argue that the words "patrol member" as used in Sections 1 and 2 of said Chapter 1498 can have reference only to highway patrolmen, and that there is nothing in the chapter to indicate that the words "patrol member" as used in Sections 4 and 5 are to be understood otherwise than as used in Sections 1 and 2; that it is patently evident that the words have the same connotation throughout the act. Respondents, while admitting that standing by itself Sections 21208 and 21209 are unambiguous, yet say that they exist as a part of the state employees' retirement law which must be read as a whole; and that so read it becomes, as they put it, "abundantly clear that the term 'patrol member' used in Section 21263 has reference to highway patrolmen alone." They say the problem resolves itself into a conflict between two provisions of the same law, and they ask this court to apply the rules that among conflicting enactments those later in time are controlling, and that a special provision controls one that is general. Respondents concede that the two rules above mentioned are no more than aids by which the intent of the legislature may be ascertained. Respondents say it is inescapable that if the legislature intended that the provisions of Chapter 1498 as now appearing in the code were to extend to warden members and also to forestry members under Sections 21208 and 21209, some mention would have been made in Chapter 1498 of the contributions of those two classes, which was not done.

If there were room for interpretation, the arguments of respondents would be persuasive. But in our view we have no right to embark upon interpretation where the legislature has plainly declared its intention, and that is the situation here. The legislature knew that Sections 21208 and 21209 provided that provisions of Chapter 9 relating to benefits to patrol members also applied to the other two classifications. We see no way to avoid the application of Sections 21208 and 21209 to the provisions of Section 21263. The matter is one entirely within legislative control. We see no need for the courts to construe these sections away from their plain and literal meaning on the assumption the legislature did not know what it was doing. If amendatory legislation is required, it is for the legislature to supply it.

The judgment is reversed.

SCHOTTKY and PEEK, JJ., concur.

Philip F. JOHNSTON and Merle F. Johnston, Plaintiffs, Respondents and Cross-Appellants,

v.

CITY OF CLAREMONT, a municipal corporation; Chester G. Jaeger, Elliott C. Lincoln, John A. Shaw, Reuben D. Cespides and Walter F. Kraus, All as Members of the City Council of said City of Claremont; Robert Bolinger, Edna M. Soper, Thomas O. Matzen, Dwight L. Ryerson and Harry S. Johnson, All as Members of the Planning Commission of said City of Claremont; William G. Bergman, Jr., as City Attorney of said City of Claremont; Margaret F. Drinker, as City Clerk of said City of Claremont; and William J. Fox, as Building Inspector of said City of Claremont, Defendants, Appellants and Cross-Respondents.

Civ. 21965.

District Court of Appeal, Second District, Division 1, California.

June 12, 1957.

Rehearing Denied July 10, 1957.

Hearing Granted Aug. 6, 1957.

Action by landowners against city and city officials for declaratory and injunctive relief on ground that original zoning ordinance changing zoning of the land and subsequent ordinance also changing the zoning where in effect, that easement granted city by landowners was valid, and that zoning of the land for residential and agricultural use in the general zoning ordinance law was unreasonable. The Superior Court, Los Angeles County, Donald R. Wright, J., entered judgment partly adverse to landowners and partly adverse to city, and city and landowners appealed. The District Court of Appeal, Drapeau, J. pro tem, held that, even if legislation establishing a basic zoning plan for a general law city were subject to a referendum, city council's action in changing certain property in city from one zone to another was administrative, not legislative, in character and, therefore, was not subject to a referendum.

Judgment affirmed.

1. Municipal Corporations 🔑601(7)

Zoning ordinance which was adopted without hearing or published notice as required by the Government Code was not adopted in conformity with state law and, therefore, was invalid. West's Ann.Gov.Code, §§ 65654, 65803, 65804.

2. Municipal Corporations 🔑76

Where zoning ordinance was not adopted in conformance with state law, curative acts would not be held to have had a validating effect since, to adopt such contention, would of necessity imply that the state law was inoperative upon all cities which had previously enacted ordinances contrary to state law and would give a validating act a prospective operation instead of the retroactive effect intended, and general laws would then not have uniform application throughout the state. West's Ann.Gov.Code, §§ 65654, 65803, 65804; St.1951, p. 3895, § 14; St. 1953, p. 2913, § 4; West's Ann.Const. art. 1, § 11.

3. Municipal Corporations 🔑108.7

Even if legislation establishing a basic zoning plan for a general law city was subject to referendum, city council's action in changing certain property in city from one zone to another was administrative, not legislative, in character and, therefore, was not subject to a referendum. West's Ann.Gov.Code, §§ 65654, 65803, 65804.

4. Municipal Corporations 🔑601(15)

No hard and fast rule can or should be laid down to determine whether a change in a zoning law is legislative or administrative, and, if a material change is made in a basic zoning law affecting all the property within the city, the act may be legislative, but, if parcels of property are transferred from one zone to another in a fair application to individuals of a general zoning law, such transfers are administrative, not legislative, in character.

5. Municipal Corporations 🔑601(17)

Any review by the courts ot zoning changes must be governed by the facts in each particular case.

6. Municipal Corporations 🔑601(15)

Where property, which had been zoned for single family dwelling and agricultural use, had lost greater part of its value for residential or agricultural use due to poisonous gases from traffic on highway and constituted a small fraction of the city, city council, in its administrative capacity, properly rezoned such property to a business use.

7. Easements 🔑12(1)

Where city council, properly and by valid ordinance, granted application to rezone residential and agricultural property as commercial property, and property owners granted the city by deed a 20-foot easement for widening of a city street and provided in such deed for a defeasance of the grant should the zoning ordinance be repealed or suspended or not take effect according to its terms, the deed constituted a valid and subsisting grant, according to its terms, of the easement described.

8. Declaratory Judgment 🔑129

Municipal Corporations 🔑601(18)

City ordinance, by which the general zoning law was enacted, and another city ordinance which gave landowners the rezoning they desired had to be read together to determine the city law which measured landowners' rights, and, therefore, no justiciable controversy calling for declaratory relief was presented by landowners' contention that the general zoning law ordinance, without aid of the other ordinance, constituted an arbitrary exercise of power by city and deprived landowners of their property without the due process of law.

9. Municipal Corporations 🔑63(1)

Courts will not interfere with a city's power to zone or administer its plan of zoning unless the exercise of such power transcends constitutional limitations, and, if there is reasonable basis for zoning authorities' action, their action will not be disturbed by the courts even though the basis may be debatable.

10. Municipal Corporations
🔑601(7), 625, 626

General zoning ordinance of the City of Claremont, as amended, is not arbitrary, oppressive, discriminatory, unconstitutional, or void.

◆

William G. Bergman, Jr., City Attorney, Claremont, Burke, Williams & Sorensen, Los Angeles, for appellants and cross-respondents.

Harry R. Roberts, Pomona, for respondents and cross-appellants.

DRAPEAU, Justice pro tem.

The facts in this case, about which there is very little controversy, are as follows:

The City of Claremont is a municipal corporation of the sixth class, organized and existing under the general laws of the State of California.

In 1951 the city council of Claremont adopted a comprehensive general zoning plan, Ordinance No. 441. Portions of the city were restricted to single family dwellings and for agricultural use, denominated in zoning parlance as zone R-1. Business was permitted in other parts of the city, denominated zone C-2. Other zones and restrictions were set up by the ordinance, not necessary to be here mentioned.

Plaintiffs own property fronting on Foothill Boulevard. This boulevard is also called U. S. Highway No. 66. It is one of the main east-west highways from

Los Angeles to the desert and all eastern states.

This highway carries an ever-increasing volume of motor driven traffic, with an ever-increasing dissemination of noxious gases, and an ever-increasing volume of noise.

The south line of Foothill Boulevard is the boundary between the City of Claremont and the County of Los Angeles. It is Claremont's boundary on the north.

Plaintiffs' property had been farmed to citrus for many years. Due to poisonous gases from traffic on the highway the citrus trees became so unproductive that the orchard would not pay taxes on the land or the cost of tilling the soil and caring for the trees.

And with the noise and the obnoxious fumes day and night it is difficult to sell for residential purposes any part of plaintiffs' property fronting on the highway.

In 1954, under the provisions of Ordinance No. 441, plaintiffs filed a request with the city council for a zoning change from residential to general commercial of their frontage on Foothill Boulevard, R–1 to C–2. The property requested re-zoned was 959 feet in length, on the boulevard, and 300 feet in depth.

Plaintiffs proposed to establish there a general sales agency for a popular make of automobile. They have a franchise from the manufacturer for this business in the City of Claremont, and they have maintained their agency in the area in the city zoned for business. But that location was under lease, and was inadequate and unsuited to their growing needs.

As required by the general zoning ordinance, the planning commission of the City of Claremont held a hearing upon this request, but referred it back to the city council without recommending approval or rejection.

The council then adopted Ordinance No. 503, rezoning plaintiffs' boulevard frontage as requested.

About a week later the council adopted an urgency measure, Ordinance No. 504, repealing Ordinance No. 503.

Then the council amended the general zoning law so that a hearing was required by both the planning commission and the council before any re-zoning application could be considered.

After this amendment to the general zoning law, plaintiffs filed another application to re-zone their boulevard property. The planning commission failed to act upon this application. This resulted in its automatic approval by that body under the provisions of the general ordinance. The city council then held a public hearing and again granted plaintiffs' application to re-zone their property as commercial. This was done by Ordinance No. 513.

At the same time plaintiffs granted to the city by deed a twenty-foot easement over the most easterly part of their boulevard frontage, for the widening of a north-south city street, Mountain Avenue, located there. This deed provided for defeasance of the grant should Ordinance No. 513 be repealed, or suspended, or for any reason not take effect according to its terms.

Then referendum petitions as to Ordinance No. 513 were filed with the city clerk.

Plaintiffs protested to the city council that referendum could not be invoked against Ordinance No. 513; but the council went ahead any way with the election provided for by the referendum law.

At the election 1153 votes were cast for the ordinance, and the same number of votes were cast against it. When the absentee ballots were counted the ordinance was defeated by 24 votes.

Plaintiffs then filed their complaint in this action against the city and its officers for declaratory and injunctive relief.

Four causes of action were pleaded:

1. That Ordinance 503 was not effectively repealed. Therefore it is still in full force and effect. And that in any event

this ordinance was validated by the curative acts of 1951 (Stats.1951, p. 3895, Chap. 1690, § 14) and of 1953 (Stats.1953, p. 2913, Chap. 1355, § 4).

2. That Ordinance No. 513 is also in full force and effect, because referendum does not apply to this change in the general zoning ordinance of the city.

3. That the easement granted to the city for Mountain Avenue is presently valid and subsisting.

4. That zoning of plaintiffs' boulevard property for residential and agricultural use in the general zoning law, Ordinance No. 441, is unreasonable, oppressive, arbitrary, and discriminatory, in the light of all the conditions surrounding and affecting the property: namely, (a) highway traffic conditions; (b) county zoning for business across the boulevard and on plaintiffs' side of the boulevard westwardly; (c) that 37% of all the frontage on Foothill Boulevard as it passes along the north boundary of Claremont is now zoned for business anyway; (d) a reservoir and pumping plant has adjoined plaintiffs' property for many years, and before the incorporation of the city; (e) commercial zoning of two of the three north-south highways in Claremont intersecting Foothill Boulevard; and (f) growth of the city resulting in an artificial monopoly of those who own property zoned for business within the city limits.

After a lengthy trial the Superior Court found as follows:

1. That the highway conditions were as alleged in plaintiffs' complaint, and that such conditions rendered plaintiffs' boulevard frontage more reasonably usable and suitable for commercial purposes, and unsuitable and unusable for residential or agricultural purposes. That substantially all of the property in the county contiguous to and for some distance east and west along Foothill Boulevard was and has been zoned for business, with a reservoir, water well, and pumping plant next to plaintiffs' property used for commercial purposes for many years.

But the court found that Ordinance No. 503 was invalid, because it was not adopted in conformity with the requirements of state law then in effect. The Government Code required that the legislative body hold at least one public hearing before adopting a change in a zoning ordinance, and that notice of the time and place of such hearing be published in a newspaper of general circulation. Concededly this was not done.

The court also found that the curative acts that plaintiffs asserted gave the ordinance validity did not apply in the circumstances in this case.

2. That Ordinance 513 complied in all respects with the requirements of the general zoning law of the city and with state law; that it was not subject to referendum under the laws of the State of California; and that it is now a valid and subsisting part of the general zoning plan of the City of Claremont.

3. As a necessary corollary of the foregoing finding, the court then found that plaintiffs' deed to the city was and is a valid and subsisting grant.

4. Finally the court found that the general zoning law, Ordinance No. 441, as amended by Ordinance No. 513, was not discriminatory as to plaintiffs.

Defendant city appeals from the judgment and the whole thereof; plaintiffs appeal from that part of the judgment that Ordinance 503 was invalid, and also from that part of the judgment that the general zoning law was not discriminatory.

These grounds of appeal will be commented upon in the order in which the pleadings and findings have been stated.

1. Referring first to Ordinance 503.

[1] As already stated, this ordinance was not adopted in conformity with the state law. No hearing was had, and no notice was published, as required by our Government Code. (See sections 65804, 65803 and 65654, Gov.Code.) Therefore, Ordinance No. 503 is invalid.

[2] So far as curative laws are concerned, this court adopts the reasoning of the trial judge, found in a well considered memorandum of opinion in the files:

"The plaintiffs contend that even though Ordinance No. 503 did not comply with the requirements of state law, the curative acts of 1951 and 1953 (citing statutes) respectively had a validating effect. With this contention the Court cannot agree. To adopt such a construction would of necessity imply that the state law was inoperative upon all cities which had previously enacted ordinances contrary to the provisions of the state law and would give to a validating act a prospective operation instead of the retroactive effect intended. General laws would then not have uniform application throughout the state. Sec. 11 of Art. I of Constitution. The state legislature determined as a matter of public policy that before the enactment of an ordinance which changed the permitted use of property within a city there should be a hearing before the local legislative body. It would, in this Court's opinion, be a perversion of the law to hold that this provision did not apply to the City of Claremont but did apply to other general law cities within the state."

2. Was Ordinance 513 nullified by referendum?

This is the most important question in this case. For it squarely poses the problem whether or not the referendum may be invoked to veto any change in a general zoning law made by the city council of a sixth class city.

The briefs of both parties to this appeal refer time and again to two California cases that touch upon this problem: Dwyer v. City Council, 1927, 200 Cal. 505, 253 P. 932; and Hurst v. City of Burlingame, 1929, 207 Cal. 134, 277 P. 308.

In Dwyer v. City Council, supra, our Supreme Court held that under the broad language in the charter of the City of Berkeley amendments to the general zoning law of that city were not excluded from the initiative and referendum.

In Hurst v. Burlingame, supra, the court was called upon to determine the validity of a general zoning law adopted by the electorate of a sixth class city under the initiative laws of this state.

In an unanimous opinion written by Mr. Justice Shenk, the Court said that our initiative and zoning laws are hopelessly inconsistent and in conflict as to the manner of preparation and adoption of zoning laws. The Court then held that in a general law city a zoning law may not be enacted by initiative.

In support of this decision, and in view of the Dwyer case, the Court said, 207 Cal. at page 138, 277 P. at page 310:

"The city of Burlingame is a city of the sixth class organized and existing under and by virtue of the provisions of the General Municipal Corporations Act. [Citing statutes.] As such the city is limited in the exercise of its powers by the Constitution and general laws. It has only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the municipal corporation. Its powers are strictly construed, and any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation. * * * A zoning ordinance falls within the classification of police measures. [Citing cases.] But an ordinance adopted by a city organized under general law is subject to and controlled by general law. [Citing authorities.] The Zoning Act of 1917 is a general law of the state and the method prescribed by that law for the enactment of a zoning ordinance is binding on the city of Burlingame."

Evidently in the Hurst case our Supreme Court had given some thought as to whether or not zoning laws in a sixth class city were subject to referendum. For in that case we find the following interesting dictum, 207 Cal. at page 142, 277 P. at page 312: "The question of the operation of the initiative law to such local legislation was not involved in the Dwyer case, and therefore no necessity arose to distinguish between the effectiveness of the initiative and the referendum in zoning cases. If the point were involved, it would undoubtedly be conceded that, had the board of trustees of the city of Burlingame adopted a zoning ordinance, as provided by the statute, its final action would be subject to the referendum provisions of the Constitution and laws of the state, for the obvious reason that there is embodied in the enactment of a zoning ordinance such elements of legislative action as to subject the ordinance when adopted to the reserved legislative power of the electors of the city, when properly invoked, to approve or reject it."

[3] Assuming that legislation establishing a basic zoning plan for a general law city is subject to referendum, Dwyer v. City Council of Berkeley, supra; and Hurst v. City of Burlingame, supra, this court has come to the conclusion that the action of the Claremont city council changing the property here in question from one zone to another was administrative and not legislative in character, and therefore was not subject to referendum.

[4] No hard and fast rule can or should be laid down to determine whether a change in a zoning law is legislative or administrative. If a material change is made in a basic zoning law affecting all of the property within the city we may have a legislative act. If parcels of property are transferred from one zone to another, in a fair application to individuals of a general zoning law, then such transfers are administrative and not legislative in character.

[5] And any review by the courts of zoning changes must be governed by the facts in each particular case.

So we come then to a consideration of the facts in this particular case.

The property here in question is a small fraction of the City of Claremont. It had lost the greater part of its value for residential or for agricultural use. While hardship often follows the exercise of the police power, and may not always defeat it, there can be no doubt where the justice in this case lies, as between the City of Claremont and the owners of this small boulevard frontage.

[6] The city council, in its administrative capacity, recognized the equities in this situation, and did the right thing. And their action was in consonance with the true spirit of all the law bearing upon this interesting situation.

The test here applied was approved in the recent case of Essick v. City of Los Angeles, 34 Cal.2d 614, 213 P.2d 492. In that case referendum was denied when the city council granted conditional use permits for cemetery purposes under a comprehensive zoning plan.

Many other administrative measures of municipalities have been held not subject to the initiative and referendum laws of this state, i.e., selecting a courthouse site, Simpson v. Hite, 36 Cal.2d 125, 222 P.2d 225; street improvement proceedings, Chase v. Kalber, 28 Cal.App. 561, 153 P. 397; street opening proceedings, Starbuck v. City of Fullerton, 34 Cal.App. 683, 168 P. 583; off-street parking projects, Alexander v. Mitchell, 119 Cal.App.2d 816, 260 P.2d 261; and revocation of variances for parking, Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 237 P.2d 32.

Therefore, in this case the referendum was not operative, and Ordinance No. 513 is now in full force and effect.

[7] 3. It necessarily follows then that plaintiffs' deed to the city is a valid and subsisting grant, according to its terms, of the easement described.

4. Now we come to the final ground of appeal, that the general zoning law, Ordinance No. 441, without the aid of Ordinance No. 513, is an arbitrary exercise of power by the city and is void constitutionally in that it deprives plaintiffs of their property without due process of law.

There are at least two complete answers to this contention.

[8] First, it is obvious that Ordinance No. 441, as amended by Ordinance No. 513,

gives to plaintiffs all that they ask for. The two ordinances must be read together to determine the city's law that measures plaintiff's rights. So read together no justiciable controversy that calls for declaratory relief is presented.

[9] Secondly, our courts will not interfere with a city's power to zone, or to administer its plan of zoning, unless the exercise of that power transcends constitutional limitations. If there is a reasonable basis for the action of zoning authorities, even though that basis may be debatable, their action will not be disturbed by the courts. Lockard v. City of Los Angeles, 33 Cal.2d 453, 461, 202 P.2d 38, 7 A.L.R.2d 990.

[10] Therefore, the general zoning ordinance, No. 441, of the City of Claremont, as amended by Ordinance No. 513, is not arbitrary, oppressive, discriminatory, unconstitutional, or void.

For the foregoing reasons, the judgment is affirmed. Plaintiffs to recover costs on appeal.

WHITE, P. J., and DORAN, J., concur.

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152 Cal.App.2d 112

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Dewey D. HAMLIN, Defendant and Appellant.

Cr. 3302.

District Court of Appeal, First District, Division 1, California.

June 26, 1957.

Defendant pleaded guilty to assault with intent to rape and was given probation and he filed a motion to set aside the judgment revoking probation and from the judgment in the Superior Court, Alameda County, James R. Agee, J., the defendant appeals. The District Court of Appeal, Peters, P. J., held that the motion to vacate would be treated as a petition for writ of error coram nobis and that the evidence justified revocation of probation.

Order affirmed.

1. Criminal Law 🔑997(1)

A motion to vacate made nearly three years after the date of an order revoking probation and over three years from the date defendant pleaded guilty to the offense charged should be treated as a petition for writ of error coram nobis.

2. Criminal Law 🔑997(11)

A motion made nearly three years after date of order revoking probation to vacate the order, and over three years from the day defendant pleaded guilty to the offense charged was fatally defective, where the order revoking probation was regular on its face, and there was no explanation for the delay, and no allegation of facts which had they been known to the trial court, would have prevented the judgment's rendition. West's Ann.Pen.Code, § 1203.2.

3. Criminal Law 🔑982

Evidence justified an order revoking probation of defendant who had pleaded guilty to the felony of assault with intent to commit rape. West's Ann.Pen.Code § 1203.2.

4. Criminal Law 🔑982

Where defendant pleaded guilty to assault with intent to commit rape and was given probation, order revoking probation for commission of another sexual offense was not improper, because the prosecuting witness after filing a complaint refused to testify, since such merely went to her credibility, and the trial court could have believed her sworn testimony given at the revocation hearing.

5. Criminal Law 🔑163

An order revoking probation does not place a defendant in jeopardy twice for the same offense.

William D. Corbett, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

In April of 1953 defendant pleaded guilty to the felony of assault with intent to commit rape, and was given probation. In October of that same year, after a court hearing, probation was revoked. So far as the record shows, no appeals were taken from these orders. On August 1, 1956, defendant filed a "Motion to Quash, Vacate, and Set Aside Judgment." This motion was based on allegations that (1) the verdict was contrary to law; (2) that defendant has been placed in double jeopardy, and (3) that the trial judge and prosecuting attorney had been guilty of prejudicial misconduct. The motion was denied. Defendant appeals.

On the appeal counsel for appellant makes no reference to the motion nor to the grounds upon which it was based. The sole point urged is that the trial court abused its discretion in revoking probation. As already pointed out, no appeal from the order revoking probation was taken. The only appeal is from the order refusing to vacate the judgment.

[1, 2] This motion to vacate, made nearly three years after the date of the order revoking probation, and over three years from the date appellant pleaded guilty to the offense charged, can and should be treated as a petition for a writ of error coram nobis. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Remling, 146 Cal.App.2d 476, 304 P.2d 97; People v. Harden, 118 Cal.App.2d 563, 258 P.2d 531; People v. Cook, 97 Cal.App.2d 284, 217 P.2d 498; People v. Ward, 96 Cal.App.2d 629, 216 P.2d 114. So treated, it is fatally defective. The order sought to be reviewed is regular on its face. There is not only no explanation for the nearly three years' delay between the revocation of probation and the filing of the motion, but there is no allegation about any fact or facts which, had they been known to the trial court, would have prevented the judgment's rendition. Such allegations are, of course, indispensable to a proper petition for a writ of error coram nobis. Thus, the trial court correctly denied the motion to vacate.

[3] It should be noted that, even if the propriety of the order revoking probation were before this court on this appeal, there is ample evidence in the record to justify the order. Under Penal Code, § 1203.2, probation may be revoked "if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life." Such a showing was here made.

[4] The record shows that while on probation appellant had sexual intercourse with one Jessie May Lewis, aged 19. Such intercourse was accomplished by means of force and violence and against the will of the girl. Appellant denied the act but admitted that he was very drunk on the night in question. This showing was obviously sufficient to warrant the trial judge in revoking probation. In re Larsen, 44 Cal.2d 642, 283 P.2d 1043; People v. Mancha, 133 Cal.App.2d 685, 284 P.2d 931.

Appellant bases his entire argument that probation should not have been revoked on the fact that Miss Lewis, after filing a complaint, refused to testify, and the charge was dropped. This merely went to her credibility. The trial court could have believed her sworn testimony given at the revocation hearing. As was said in People v. Sweeden, 116 Cal.App.2d 891, 895, 254 P.2d 899, 902: "In such a proceeding it is not necessary that the defendant be proven guilty of a new crime beyond all reasonable doubt, and there is no abuse of discretion in revoking the prior order when the evidence shows clearly and satisfactorily that the defendant has violated the terms of his probation."

[5] Of course, an order revoking probation does not place a defendant in jeopardy twice for the same offense. People v. Bennett, 120 Cal.App.2d 835, 262 P.2d 59.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

WEST KEY NUMBER SYSTEM

151 Cal.App.2d 764

Irwin I. LENARD and Bertha C. Lenard, his wife, Plaintiffs and Respondents,

v.

James A. EDMONDS, Defendant and Appellant.

Civ. 17113.

District Court of Appeal, First District, Division 1, California.

June 19, 1957.

Rehearing Denied July 19, 1957.

Hearing Denied Aug. 13, 1957.

Purchasers' action against vendor for rescission and damages. From judgment for purchasers rendered by the Superior Court, County of Alameda, Thomas J. Ledwich, J., vendor appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that purchasers who brought action against vendor for rescission and damages were entitled to preliminary injunction against execution of third party notes given as part of consideration with respect to either count, and the granting of such injunction did not constitute an election to sue for rescission which would bar their maintenance of damages action.

Affirmed.

1. Election of Remedies ⇨3(2, 3)

Rescission and damages are alternative remedies and an election to pursue one is a bar to the other.

2. Election of Remedies ⇨3(1)

Where person entitled to pursue one of two inconsistent remedies performs some act in pursuit of one of the alternative remedies by which he gains an advantage over the other party, on principles of estoppel, he will be held to have made an irrevocable election of remedies.

3. Election of Remedies ⇨1

Under modern view, before election will be held to have been made, all elements of estoppel must be present and election is made only where party asserting it has been injured.

4. Election of Remedies ⇨3(3)
Injunction ⇨136(2)

Purchasers who brought action against vendor for rescission and damages were entitled to preliminary injunction against execution of third-party notes given as part of consideration with respect to either count, and the granting of such injunction did not constitute an election to sue for rescission which would bar their maintenance of damages action.

5. Injunction ⇨132

Statute authorizing preliminary injunctions does not limit them to equitable proceedings. West's Ann.Code Civ.Proc., § 526, subd. 3.

6. Injunction ⇨144

Under statute authorizing issuance of preliminary injunctions where party to action is doing, threatens, or is about to do something in violation of rights of adverse party, allegations of purchasers of motel in their damages action against vendor, that vendor was threatening to sell the motel under deed of trust and to execute third-party notes given as part consideration, were sufficient to authorize granting of preliminary injunction to hold matter in statu quo. West's Ann.Code Civ.Proc., § 526, subd. 3.

7. Appeal and Error ⇨1106(4)
Trial ⇨374(2), 388(2)

Where action is equitable in nature, a jury verdict is merely advisory and trial court should make findings, but failure to make findings does not necessarily require a reversal, and reviewing court may remand with directions to make finding on challenged issue.

8. Action ⚷22

Generally, controlling factors in determining whether an action is fundamentally legal or equitable are historical basis of asserted right and nature of relief sought.

9. Action ⚷25(2)

Purchasers' action against vendors for damages was legal and was not rendered equitable in nature by facts that purchasers requested reconveyance of third party promissory notes and deeds of trust given as part of consideration, upon allegations of fraud and deceit and accepted such as a set-off.

10. Trial ⚷240

Instructions should state rules of law in general terms, and it is not proper to insert detailed recitals of fact that amount to an argument to jury in guise of statement of law.

11. Trial ⚷240

In purchasers' action against vendor for damages, vendor's proffered instruction on effect of purchasers' statements of value of property in their listings for sale as admissions against interest was properly refused as argumentative.

◆

Fitzgerald, Abbott & Beardsley, Oakland, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, for respondents.

PETERS, Presiding Justice.

In January of 1953 the plaintiffs purchased a Berkeley motel from defendant James Edmonds for $100,000. To secure part of the purchase price they gave Edmonds their promissory note secured by a deed of trust, and also in partial payment gave Edmonds certain notes of third parties payable to them, which notes were secured by deeds of trust on property other than the motel. In October of 1954 plaintiffs brought the present action, the complaint containing two causes of action, one for rescission and the other for damages.[1] Prior to trial plaintiffs sought and secured a preliminary injunction restraining defendant from disposing of the third party promissory notes and deeds of trust above mentioned, and restraining defendant from taking any action under a notice of default and election to sell given on the deed of trust on the motel property. Over defendant's objection plaintiffs were granted a jury trial on the second cause of action—the one for damages. After selection of a jury, and prior to the opening statements, and over the objections of defendant, plaintiff was granted permission to abandon the rescission cause of action and to proceed solely on the damage cause of action. The jury returned a general verdict for plaintiffs in the sum of $32,673.70. The trial court then continued the preliminary injunction in effect, ordered that the promissory note of third parties then in the possession of the court should be delivered to plaintiffs, and that this should constitute part payment of the judgment, and entered judgment for the balance. Edmonds appeals.

Edmonds attempted to appeal on a limited transcript. He has limited his appeal to points other than the sufficiency of the evidence. Respondents insisted on a complete transcript. Appellant makes three major contentions. (1) That by securing the preliminary injunction respondents, as a matter of law, made an irrevocable election to proceed on the equity cause of action; (2) that the second cause of action, on which the cause was tried, was, in fact, an equitable cause of action on which the court was required to make findings; and (3) that there was error in failing to give a proffered instruction.

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[1] Plaintiffs originally joined other defendants in addition to Edmonds. Some of these were exonerated by the jury, and, as to the rest, all but Edmonds were granted a new trial. The present appeal involves Edmonds as the sole appellant.

The main contention of appellant is that respondents, necessarily, secured the preliminary injunction pursuant to the equitable cause of action for rescission, and that having so proceeded, they made an irrevocable election of remedies that precluded them from proceeding on the legal cause of action for damages. Appellant states his position as follows (App.Op.Br. p. 7): "We do not contend that the mere filing of an action for rescission, without more, constitutes an election, nor that the mere filing of a suit containing two causes of action, one for rescission and the other for damages, constitutes an election. We do contend, however, *first,* that rescission and damages are inconsistent remedies, and, *second,* that whenever a party performs an act in pursuit of one remedy whereby he has gained any advantage over the other party he will be deemed to have made an election of remedy and will not be entitled thereafter to pursue any other inconsistent remedy for the enforcement of his right."

[1, 2] There can be no quarrel with the general principles stated by appellant. It is clearly the law that rescission and damages are alternative remedies, and that an election to pursue one is a bar to the other. Alder v. Drudis, 30 Cal.2d 372, 182 P.2d 195. It is also undoubtedly the law that where a person entitled to one of two inconsistent remedies performs some act in pursuit of one of the alternative remedies by which he gains an advantage over the other party, on the principles of estoppel, he will be held to have made an irrevocable election of remedies. De Laval Pac. Co. v. United Cleaners' & Dyers' Co., 65 Cal.App. 584, 224 P. 766; Steiner v. Rowley, 35 Cal.2d 713, 221 P.2d 9; Acme Paper Co. v. Goffstein, 125 Cal.App.2d 175, 270 P.2d 505. It is this rule that appellant seeks to invoke here. The questions are: When a plaintiff in the same complaint sues for a rescission and for damages, which he may admittedly do, is the securing of a preliminary injunction of the type here involved an irrevocable election to proceed solely on the rescission action? Could the preliminary injunction only have been granted as an incident to the rescission action, or could it have been granted under the facts here involved as an incident to the action for damages?

[3, 4] We think that the answers to these questions are clear. Under the facts alleged, respondents were entitled to the preliminary injunction as an incident to either or both causes of action. This being so, applying for and securing such an injunction could not possibly constitute an election to proceed on either one. Of course, where, as here, a person has two inconsistent remedies, some place before judgment, he must elect which remedy he desires to pursue, and once he elects he is precluded from pursuing the other remedy. See generally, 1 Witkin on California Procedure, § 46, p. 542. But, under the modern view, before an election will be held to have been made, all the elements of an estoppel must be present. 1 Witkin on California Procedure, § 51, p. 548; § 56, p. 554. Thus, it has been stated that the "doctrine [of election] is based on estoppel and, when applicable, operates only if the party asserting it has been injured." Pacific Coast Cheese, Inc. v. Security-First Nat. Bank, 45 Cal.2d 75, 80, 286 P.2d 353, 356. Obviously, if the preliminary injunction could have been secured as an incident to either cause of action, the securing of it could not have injured appellant, and thus could not be the basis of an estoppel. As a result there was no election of remedies.

While preliminary injunctions of the type here involved are more frequently granted in equitable proceedings such as rescission, there is no legal obstacle to the granting of such an injunction in a purely legal action for damages. Particularly is this so in a legal action like the present one where appellant was threatening to negotiate the third party notes given as partial consideration, and had started proceedings to sell the motel under the deed of trust. Obviously, it was reasonably necessary and fair to both sides to maintain the *status* *quo* pending the outcome of the litigation. Otherwise, appellant could have deliberately stripped himself of all assets and made it impossible for him to pay any judgment that might be secured.

[5, 6] The statute relating to preliminary injunctions does not limit its operation to equitable proceedings. Section 526 of the Code of Civil Procedure provides that such an injunction may be granted "3. When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual." Here, it was alleged that appellant was threatening to sell the property which was the basis of the action and threatening to transfer the third party notes given in partial payment for the property. If these acts were allowed to be completed appellant might well render himself unable to pay the judgment, if one were secured, and deprive respondents not only of the fruits of the judgment but also of the motel property. Thus, the precise situation contemplated by the code section was present.

There seems to be but little authority on the subject of whether preliminary injunctions can be secured as an incident to a legal action. But there is some authority on the subject. Thus, an action for ejectment is a purely legal action. Roffinella v. Roffinella, 191 Cal. 753, 218 P. 397. As an incident to such an action it is permissible to issue a preliminary injunction to restrain the defendant from committing waste. Hunt v. Steese, 75 Cal. 620, 17 P. 920. The United States Supreme Court has held that a federal district court may issue a temporary injunction whenever necessary "for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." United States v. United Mine Workers of America, 330 U.S. 258, 290, 67 S.Ct. 677, 694, 91 L.Ed. 884; for a general discussion of the problem see 1947 Annual Survey of American Law 803, 807; Daniels v. Williams, 125 Cal.App.2d 310, 270 P.2d 556; Stockton v. Newman, 148 Cal.App.2d 558, 307 P.2d 56; Ahlers v. Smiley, 11 Cal. App. 343, 104 P. 997; Ahlers v. Smiley, 163 Cal. 200, 124 P. 827.

Appellant, in attempting to establish that the securing of the preliminary injunction constituted an election to proceed on the rescission action, relies on the cases that hold that the securing of an attachment in pursuit of contractual remedy ordinarily operates as an election to proceed under the contract count and estops the plaintiff from seeking relief on a tort theory of liability. Steiner v. Rowley, 35 Cal.2d 713, 221 P.2d 9; Jones v. Martin, 41 Cal.2d 23, 256 P.2d 905; Estrada v. Alvarez, 38 Cal.2d 386, 240 P.2d 278; Acme Paper Co. v. Goffstein, 125 Cal.App.2d 175, 270 P.2d 505; Gedstad v. Ellichman, 124 Cal.App.2d 831, 269 P.2d 661. Even this rule is not an absolute one. It has been held that under some circumstances the issuance of a writ of attachment pursuant to one cause of action does not constitute a binding election not to proceed under a second non-attachable cause of action. Crag Lumber Co. v. Crofoot, 144 Cal.App.2d 755, 301 P.2d 952. But the contract-tort-attachment rule is not here applicable. In a contract-tort complaint the attachment, which is statutory, may be secured only on the contract cause of action. It is not available on the tort cause of action. Thus, the securing of the attachment could relate only to the contract cause of action. The securing of it injured defendant and therefore constituted an election of remedies. But, as already held, since the preliminary injunction could have related to either cause of action, the securing of it was not an unequivocal election to proceed on either of the causes of action.

Appellant does cite one case where the securing of an injunction was held to constitute an election—Frederickson v. Nye, 110 Ohio St. 459, 144 N.E. 299, 35 A.L.R. 1163. There, about six months prior to the commencement of the second action, plaintiffs brought an action for deceit, and obtained an order restraining defendants from disposing of the property involved. This proceeding was dismissed without prejudice. Defendants then conveyed the property to Frederickson. Plaintiffs then brought a second action seeking to enforce a trust against the original defendants and Frederickson. It was held that the two actions were inconsistent, and that by securing the injunction in the first action plaintiffs had irrevocably elected their remedy because defendants had suffered a serious detriment. The ruling is a questionable one See criticism in 34 Yale Law Journal 665. But even if correct, it is not here applicable. Here, there were not separate complaints. Both causes of action were set forth in one complaint. The injunction could have been secured on either. This being so, the securing of it could not constitute an election of remedies.

The second contention of appellant is that the second cause of action was not a simple one for damages but was, in fact, one for a *pro tanto* rescission, and was therefore equitable in nature. Appellant refers to allegations in that cause of action requesting a reconveyance of the third party promissory note and deeds of trust given as part of the consideration for the purchase price, and to the allegations requesting cancellation of the note, deed of trust and chattel mortgage on the motel and its contents. It is urged that these allegations converted the second cause of action for damages into an equitable action in which the trial court was required to make findings.

[7] Of course, if the second cause of action was equitable the jury verdict was merely advisory, and the trial court should have made findings, which it did not do. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182; Holland v. Kelly, 177 Cal. 43, 169 P. 1000; Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238. But even where findings should have been made, the failure to make them would not necessarily require a reversal. In a proper case, the appellate court can and should simply remand the case with directions to make findings on the challenged issues. Meinecke v. Frasier, 69 Cal.App. 688, 232 P. 499. In the present case appellant has failed to establish that, even if this were a case where court findings were required, which it is not, this error would require an unqualified reversal. In fact, in view of the record, there can be no reasonable doubt that if the case were sent back for findings on the claimed equitable issues, such findings would necessarily be adverse.

The second cause of action was "for damages for fraud and deceit, and other relief." It incorporated most of the allegations of the first cause of action, including the claim that the property purchased for $100,000 was worth only $50,000, thus resulting in damages of $50,000. In addition, respondents alleged that they were entitled to "have re-transferred and re-conveyed to them, as a set off, the Promissory Note * * * and the Deed of Trust securing the same" given to defendant as partial payment for the motel. This note was payable to respondents by third parties from a prior transaction. Respondents also alleged that they were entitled "to a credit and set off by cancellation of the Promissory Note, Deed of Trust and Chattel Mortgage * * *" which plaintiffs had executed themselves in favor of defendant upon consummation of the transaction in question. As already pointed out, a preliminary injunction was also sought on this cause of action, restraining the transfer of notes, deeds of trust, and chattel mortgage as well as further proceedings pursuant to the notice of breach of obligation and election to sell under the deed of trust which were threatened by defendant. The jury rendered a general verdict assessing plaintiffs' damages in the sum of $32,673.70. Upon motion of plaintiffs, that sum was reduced by the amount of the principal and interest unpaid on the note executed by them to defendant. The trial court also continued the preliminary injunction, in part, as follows: The defendant was restrained from transferring the note, deed of trust, and chattel mortgage executed by plaintiffs and until after judgment became final they were to stay in the custody of the clerk of the court; he was restrained from acting pursuant to his notice of breach and election to sell; the injunction regarding the transfer of the note and deed of trust, payable to plaintiffs by the third parties and assigned to defendant, was dissolved; the $1,000 undertaking was continued.

[8] The problem as to whether a particular cause of action is fundamentally legal or equitable is not always easy of solution. Generally, the controlling factors are the historical basis of the asserted right and the nature of the relief sought. See 1 Witkin on California Procedure, § 21, p. 510. Neither the label put on the asserted cause of action, the principles by which relief is sought, nor the prayer controls the determination.

[9] The present case does not present serious difficulties. The basic thing that respondents sought and obtained was damages. The jury undoubtedly awarded the respondents damages. Respondents could have accepted the damages prayed for in cash or its equivalent. With appellant's apparent approval (R.T. 755–762) respondents agreed to accept the notes as a setoff. This partial change in the form of the compensation did not operate to change the essential nature of the cause of action. The ultimate purpose and result of this cause of action was an award of money for fraud.

The case is not fundamentally different from Hines v. Brode, 168 Cal. 507, 143 P. 729. That was an action, in part, for alleged deceit in the execution of a contract. The court held that it was proper for the jury to deduct from its award the unpaid part of the purchase price. See also Foster v. Gorham, 63 Cal.App. 601, 219 P. 476; Hullinger v. Big Sespe Oil Co., 50 Cal.App. 6, 194 P. 742; Pembrook v. Houston, 41 Cal. App. 54, 181 P. 828. The mere fact that respondents secured recoupment by cancellation of notes instead of by payment in cash did not change the nature of the action. In the instant case, at the request of both appellant and respondents, no instruction to the jury on recoupment was given because the balance owing on the purchase price was definite and certain, but the set-off allowed by the court is of the same character as that involved in the Hines case.

The last contention of appellant is that the trial court committed prejudicial error in failing to give several instructions proffered by him on the law applicable to admissions. The refused instructions read as follows:

"I instruct you that the evidence in this case shows listings and advertising on the part of the plaintiffs, the Lenards, to sell the Berkeley Motel in about the middle of the year 1953, and within a period of less than one-half year after they signed their agreement to buy the Berkeley Motel from Edmonds. Such listings and advertising set forth the attempt of plaintiffs, the Lenards, to sell the Berkeley Motel for the sales price of $118,000, whereas, on the contrary, in their complaint they claim that the value of the Berkeley Motel, when sold to them by the defendant Edmonds in the early part of 1953, less than six months earlier, was only $50.000.00.

"Such listing and advertising is an admission against the interest of plaintiffs, the Lenards, as to the value of said Berkeley Motel and may be considered by you, together with other evidence in the case, as to the actual value of the Berkeley Motel, in determining whether the actual value of the Berkeley Motel on January 23, 1953, was greater or less than the actual value of that with which plaintiffs, the Lenards, parted.

"I instruct you that statements by the plaintiffs, the Lenards, in offers to sell the Berkeley Motel within a reasonable period of time after January 23, 1953, in which they set forth the daily gross income from the Berkeley Motel as being $88, and in which they state their belief in the possibility of increasing the daily gross to $101.00, and in which they set forth the gross income from the Berkeley Motel as being $22,000 annually, are admissions against the interest of plaintiffs, the

Lenards, as to the daily receipts and as to said annual gross income, and such statements in such offers to sell by the Lenards may be considered by you, together with other evidence as to income and value, in determining the actual value of the Berkeley Motel."

Appellant sets out at length the evidence in the record that demonstrates that relevant and admissible evidence was introduced on the matters referred to in the refused instructions. This evidence was considered by the jury, and by counsel in their arguments, but appellant urges that he was also entitled to the instructions. The court instructed at length, and correctly, on the credibility of witnesses and gave the following instruction on admissions: "Any evidence that has been received in this case of an act, omission or declaration of a party, which is unfavorable to his own interests, should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, other than his own testimony in this trial ought to be viewed by you with caution."

Appellant attacks the last quoted instruction as being vague and uncertain, and also claims that it is misleading in referring to "oral" admissions because, so it is asserted, this implies that respondents made no written admissions in the form of advertisements for the sale of the property.

[10] The refused instructions are argumentative. Instructions should state rules of law in general terms. It is not proper to put detailed recitals of fact in instructions that amount to an argument to the jury in the guise of a statement of law. See discussion and collection of cases in 2 Witkin on California Procedure, p. 1784. In Roy v. Mission Taxi Co., 101 Cal.App.2d 438, 447, 225 P.2d 920, 925, this court stated: "The prevalent practice of seeking to argue a case in instructions should be discouraged and we have no doubt that if the appellant had offered an instruction giving the law as to imminent peril, as approved by the decisions of our courts, it would have been given by the trial court."

[11] These rules are here applicable. The refused instructions are argumentative, referring as they do to the details of the listings by respondents. The court gave, as requested by appellant, the general instruction on admissions above quoted. This instruction, undoubtedly, could have been elaborated upon. But if appellant wanted a more detailed instruction on the subject matter he should have offered such an instruction. This he did not do, contenting himself with offering the improper and argumentative instructions above quoted. These the court was justified in refusing.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

151 Cal.App.2d 818

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

R. MOEBIUS, Jno. Suman, L. R. McIntire, Red Doe Wakefield, Pacific Electric Railway Company, a corporation, Defendants and Respondents.

Civ. 22014.

District Court of Appeal, Second District, Division 3, California.

June 19, 1957.

Hearing Denied Aug. 13, 1957.

Action against corporation and several of its employees to recover statutory penalty wages and damages. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., sustained defendants' demurrer and plaintiff appealed from judgment of dismissal rendered after his refusal to amend further. The District Court of Appeal, Shinn, P. J., held that former employee's complaint which failed to allege any facts from which amount of claimed penalties could be computed failed to state a cause of action for statutory penalty wages and damages.

Judgment affirmed.

1. Labor Relations ⚷1473

Former employee's complaint which failed to allege any facts from which amount of claimed penalty could be computed, failed to state a cause of action for statutory penalty wages and damages. West's Ann.Labor Code, §§ 201, 203, 206, 208, 219.

2. Pleading ⚷218(4)

Upon a plaintiff's refusal or inability to allege facts which would entitle him to proceed to trial, court did not err in sustaining a demurrer and dismissing his action.

3. Labor Relations ⚷1473

Where former employee's complaint for statutory penalty wages and damages against a corporate defendant, and certain employees of such corporation, did not allege that plaintiff contracted with any of such employees, or that such individual employees had any duty to plaintiff to pay his wages or that they were guilty of any wrong, complaint failed to state a cause of action against such individual employees. West's Ann.Labor Code §§ 201, 203, 206, 208, 219; West's Ann.Civ.Code, § 2343.

◆

John G. Oppenheimer, in pro. per.

E. D. Yeomans, Walt A. Steiger, Los Angeles, for respondents.

SHINN, Presiding Justice.

The present action is against Pacific Electric Railway Company, R. Moebius, Jno. Suman, L. R. McIntire and Red Doe Wakefield to recover $35,000 statutory penalty wages and damages. Defendants demurred jointly to the amended complaint. The court sustained the demurrer with leave to amend, but the record does not disclose the ground or grounds on which the demurrer was sustained. Plaintiff declined to amend further and judgment of dismissal was rendered and entered as a minute order. He appeals from the "minute order and judgment."

The material allegations of the amended complaint are the following: Each individual defendant was an officer, agent, servant and employee of Pacific Electric Railway Company, acting within the scope of his authority and with the full knowledge, consent and ratification of the company. Plaintiff was employed by Pacific Electric. On or about June 18, 1955, defendants discharged plaintiff from his employment with the company and wilfully and unlawfully failed to pay him any wages which were then due, owing and accrued, to plaintiff's damage in the sum of $35,000.

Defendants interposed a general and special demurrer; the special demurrer specified a number of respects in which the complaint was uncertain, ambiguous and unintelligible, viz., it did not allege the amount of wages plaintiff earned while in the company's employment nor the amount of wages due at the time of his discharge; it did not allege how or in what manner plaintiff was damaged in the amount claimed or at all.

Plaintiff states in his brief that the present action is one for a statutory penalty under sections 201, 203, 206, 208, and 219 of the Labor Code; it is not one for wrongful discharge in violation of a contract of employment.

In Oppenheimer v. Robinson, 150 Cal. App.2d 420, 309 P.2d 887, we held that a complaint in a statutory action for unpaid wages does not state a cause of action against the employer unless it alleges the amount of wages accrued and unpaid at the time the employment relationship terminated. We said, 150 Cal.App.2d at page 423, 309 P.2d at page 889: "The mere allegation that plaintiff was damaged in the sum of $6,000 by reason of the failure to pay the wages earned is meaningless in the absence of any allegation as to the amount of wages due plaintiff. That allegation is an obvious attempt to claim a sum as damages that would give the superior court jurisdiction of the action, while suppressing facts that would determine whether the action was within the jurisdiction of the superior court. The court was not required to give any effect to the allegation of damage in the absence of the allegation of facts showing liability in damages, nor to proceed further in the action in the face of the refusal of plaintiff to plead essential jurisdictional facts."

We also held that a count for a statutory penalty for failure to pay wages does not state a cause of action unless it alleges facts from which the amount of the claimed penalty can be ascertained.

[1] The complaint in the present action is insufficient to state a cause of action for a statutory penalty. No facts are alleged from which the amount of the claimed penalty can be computed. The most that plaintiff could recover as a penalty would be thirty days' wages at the rate of his earnings under his employment. Labor Code, § 203. The allegation of $35,000 damages is not supported by the allegation of facts that would entitle plaintiff to a recovery in excess of the amount of the penalty.

[2] In view of plaintiff's refusal or inability to allege facts that would entitle him to proceed to trial the court did not err in dismissing the action against Pacific Electric. Hendricks v. Osman, 72 Cal.App. 2d 465, 164 P.2d 545.

[3] The judgment in favor of the individual defendants was also proper. The complaint does not allege that plaintiff contracted with them, that they had any duty to plaintiff to pay his wages or that they were guilty of any wrong. They were simply employees of the company and are not personally liable for penalty wages to a fellow-employee. Civ.Code, § 2343; Oppenheimer v. General Cable Corp., 143 Cal. App.2d 293, 300 P.2d 151; Oppenheimer v. Robinson, supra, 150 Cal.App.2d 420, 309 P.2d 887.

The judgment is affirmed.

PARKER WOOD and VALLEE, JJ., concur.

Leona Faye DOW and Leona Faye Dow, as Guardian ad litem of Richard Floyd Dow, a Minor, Plaintiffs and Respondents,

v.

George W. BLEDSOE, Defendant and Appellant.*

Civ. 5425.

District Court of Appeal, Fourth District, California.

June 19, 1957.

Rehearing Denied July 15, 1957.

Hearing Granted Aug. 13, 1957.

Action was brought against general contractor, who built house, for deaths of occupants of house who were asphyxiated by carbon monoxide emitted from wall heater, which had been improperly installed by a subcontractor, on ground that general contractor was negligent because he knew or should have known of dangerous condition created by installation of the heater by the subcontractor. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment adverse to the general contractor, and he appealed. The District Court of Appeal, Barnard, P. J., held that question whether general contractor was negligent was for jury.

Judgment affirmed.

1. Negligence ⚿55

Generally, a contractor is not liable for damages to third persons because of defective construction after work is completed and accepted by owner, but contractor may be liable if work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, and he knows or should know of the dangerous situation created by him, and the owner does not know of the dangerous condition or defect and would not discover it by reasonable inspection.

2. Negligence ⚿55

Though general contractor was not liable for any negligence on part of subcontractor, general contractor would nevertheless be liable for his own personal negligence.

* Opinion vacated 321 P.2d 736.

3. Negligence ⚷55

Though installation of heater in house was done by subcontractor under subcontract, general contractor had some responsibility to see that the entire work he had contracted to do was properly done.

4. Negligence ⚷136(16)

In action against general contractor, who built house, for deaths of occupants, who were asphyxiated by carbon monoxide emitted from a wall heater, which had been installed in the house by a subcontractor in a negligent manner, question whether general contractor was negligent because he knew or should have known of the dangerous condition created by the subcontractor was for jury.

5. Appeal and Error ⚷1056(2)

Alleged error in exclusion of certain evidence which would have added nothing material, was not prejudicial error.

◆

Gray, Cary, Ames & Frye, San Diego, for appellant.

McInnis, Hamilton & Fitzgerald, John W. McInnis, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for the death of the husband of Leona Dow and of two of their children, which occurred through asphyxiation from carbon monoxide emitted from a wall heater in their home.

This house was built by the defendant Bledsoe, a general contractor, between September, 1950 and February, 1951, under a contract with a Mr. Muth. Bledsoe prepared the plans and specifications for the house, which called for the installation of two 25,000 B.T.U. wall heaters, the one in the living room to be thermostat-controlled and the other in the hall to be manually controlled. Bledsoe entered into a written contract for the installation of the heaters with one Dover, who was a licensed plumbing contractor and a franchise dealer for the Holly Manufacturing Company. Dover purchased two heaters from the Holly Company which were installed in the house by his employees. It appears that a device known as a "Secondary Heat Exchanger" was installed in the walls immediately above these heaters, and between them and the vents which led to the roof. These were supposed to further heat the air by the passage of the products of combustion up the flue, and a grill was installed near the ceiling to let the air thus heated into the house. These secondary heaters and the portions of the installations above the heaters themselves were installed first, after the studding was up, and were observed by Bledsoe. The inspection department of the city of San Diego inspected the house while the secondary heaters and vents were still visible. The heaters themselves were installed early in February, 1951, when the house was completed or practically completed. Bledsoe then examined the heaters only to see "that the heater is there and complete, that the face pieces fit properly, that they are connected to the gas line, and that the American Gas Association seal is on the heaters". He was not advised to make any changes after the final building inspection by the city.

Mr. Muth sold the house to a Mr. and Mrs. Petty who occupied it without notice of any malfunction from April, 1951 to May, 1953, when they sold it to the Dows. The Dows used the heaters when necessary from September, 1953 until January, 1954. On January 15, 1954, Mrs. Dow left for Kansas, taking Richard who was then two years old. She returned on January 26 and found all the doors and windows of the house shut. When the house was opened the air was found to be very hot and there was little oxygen. The wall heater in the living room was off, but the wall heater in the hall was burning. Mr. Dow and the other two children were found in the house, all dead by asphyxiation from noxious fumes given off by the hall heater.

Mrs. Dow brought this action for herself and on behalf of her minor son, naming as defendants the Holly Manufacturing Company, the maker of the heater, and

Bledsoe the general contractor who built the house. Dover, the plumbing contractor was not sued, apparently because he had gone through bankruptcy.

At the trial ample evidence was introduced to show a faulty installation of the hall heater and its attachments, which would be more dangerous because it was not automatic and would not shut itself off when a certain temperature was reached. Bledsoe testified that the specifications did not call for installation of secondary heat exchangers; that he prepared the specifications for the heater vents and flues, but in doing so did not take into consideration the use of secondary heat exchangers; and that he did not change the specifications in regard to the vents when he saw the secondary heat exchangers in place. An expert witness testified that an examination of the hall heater disclosed very heavy carbon monoxide pouring out through the top grill into the room; that the hall heater was over firing to about 33,000 B.T.U.'s to 35,000 B.T.U.'s; that a sooting-up in the throat near the down draft divider was progressing from the start and increasing the longer the heater was used; that as soon as the sooting became heavy in the throat carbon monoxide was coming out; that in a properly operating heater the product of combustion will go up the stack; that in a sooting heater the products of combustion will split off and come back through the hole and into the room; that the orifice of the hall heater was too large and allowed too much of a flow of gas; and that a reduction of the flue pipe from the top of the heater as it sooted up would cause the products of combustion to spill more into the room.

Another expert testified that when he first saw the hall heater after the tragedy there was a yellow flame which was burning "out" by virtue of the fact that the heat exchanger was filled with soot; that as he found the heater in the Dow house the appliance would be only partially vented; that a substantial portion of the products of combustion would spill out the relief opening of the draft hood; that as the heater overfires it becomes more of a hazard; that the spilled products of combustion would go into the space being heated; that this overfired heater spilled carbon monoxide into the room because the draft hood for this type of appliance is designed to work with a 4-inch vent and not with a secondary heat exchanger, which is roughly half that size in cross sectional area; and that it is not good engineering practice to construct a vent such as this with a secondary heat exchanger and this type of heater in the same unit. The effect of his testimony is that the secondary heat exchanger and reduced vent were causation factors of the sooting. A field inspector for the American Gas Association testified that manufacturers were authorized to use their seal on appliances which were exactly like those submitted to the association for testing; that this hall appliance had never been submitted to them for approval when equipped with a secondary heat exchanger, and no such approval had ever been granted; that the header plate found on the appliance was not the approved type as the approved one had almost twice the cross sectional area; that the addition of the heat exchanger would constrict the passage of flue products up the vent so that they would seek some other path of discharge; that the addition of the heat exchanger retarded the flue products to the extent that they would spill from the relief opening of the draft hood; and that in putting the installation together the outlet from the draft had been "crimped", substantially reducing the cross sectional area and imposing an additional restriction on the passage of products that would normally flow through the vent. There was also evidence that the secondary heat exchanger was a new device recently put out by the Holly Company and designed for use with a different type of heater; that this heater had a double orifice or opening for the admission of gas into the heater; that the single orifice was supposed to have been size No. 42 DMS while the two holes here found were 46

DMS; and that the interior of this installation was found to be very badly sooted up.

A jury returned a verdict of $20,000 in favor of Mrs. Dow for the deaths of her two children, and in favor of both plaintiffs in the sum of $50,000 for the death of the husband and father. The verdict was against the defendant Bledsoe only. A motion for a new trial was denied, and Bledsoe has appealed from the judgment entered on this verdict.

The appellant contends that he had nothing to do with the installation of these heaters; that this was entirely the work of his independent contractor, Dover, and he is not responsible for Dover's torts; that the evidence established beyond question that Dover was an independent contractor; that there was no evidence showing negligence upon appellant's part; and that the court erroneously excluded evidence proving that Dover was an independent contractor. It is argued that the sole cause of the trouble that occurred was the double orifice allowing too great a flow of gas into the heater; that this defect was concealed and could not be seen by the appellant; that he saw to it that the installation was complete and saw the seal of the A.G.A.; that the building was inspected and passed by the city building inspection department; and that there is nothing to show any negligent work on his part, or any failure to do anything that he should have done.

[1–3] The appellant recognizes that there is an exception to the general rule that a contractor is not liable for damages to third persons caused by defective construction after his work is completed and accepted by the owner. Under this exception a contractor may be liable if the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided he knows or should know of the dangerous situation created by him and the owner does not know of the dangerous condition or defect and would not discover it by reasonable inspection. Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183; Johnston v. Long, 56 Cal.App.2d 834, 133 P.2d 409. It is argued, however, that he himself did no work which created any dangerous condition and that there is no evidence that he knew or should have known of any defect in the installation of this hall heater, including the secondary heat exchanger and the vents or flues. While the appellant is not liable for any negligence on the part of his subcontractor, Dover, he may nevertheless be held liable for his own personal negligence if any such negligence is disclosed by the evidence. The work here done by Dover was a part of the work which the appellant had agreed to do under his general contract. Although the installation of the heater was done under a subcontract, the appellant had some responsibility to see that the entire work he had contracted to do was properly done. It appears beyond question that this part of the work was not properly done, and the real question is whether the appellant knew or should have known of the dangerous condition or situation which was thus created. The controlling question is whether the evidence, with the inferences which reasonably may be drawn therefrom, is sufficient to support a finding against him on that issue.

[4] Apparently, the presence of an orifice which was too large and which allowed too great a flow of gas into the heater was one cause of the improper functioning of this heater. This was not the sole cause, however, as shown by the evidence that the secondary heat exchanger and the manner of its installation substantially reduced the available size of the vent or flue to the roof, and eventually caused the sooting-up of the interior and the diversion of the noxious gases into the house itself. The appellant saw the secondary heat exchanger, and the rest of the installation above the heater itself, before they were enclosed in the walls. He knew that they were not in accordance with his specifications and that he had not taken them into consideration in preparing the specifications. Without changing the specifications

he permitted a considerable variance in the vent size, and the installation of an open grill into the room which would be affected thereby. He had prepared the specifications calling for a direct flue or vent from the heater itself to the roof, and it should have been apparent to him that the installation of these additional appliances would affect the discharge of the products of combustion through the direct flue otherwise provided for. Such installations placed between the heater itself and the flue outlet on the roof would naturally obstruct the flue to some extent, and call for a reexamination of the specifications for the size of the flue and vent. It appears that a substantial reduction in the usable size of the flue or vent was thus caused, which had an important effect upon the sooting-up which thereafter occurred. The fact that such a secondary heat supply was installed, with another outlet into the room, would naturally call for an investigation as to whether the provision for vents or flues to the roof was adequate. The fact that the appellant saw these things before they were concealed in the wall was sufficient to call these matters to his attention and it cannot be said, as a matter of law, that he was entitled to ignore them or that he was under no duty to see that proper provision for vents was made. With respect to the heater itself, he testified that he looked at it after it was installed only to see that the face pieces fitted properly, that it was connected with the gas line, and that it had the seal of approval of the A.G.A. and that he did not notice whether it was a 25,000 B.T.U. or any other size. Although the heater in the living room was marked 25 in one place and 35 in another, he testified that he "did not notice" whether the hall heater was a "25,000 B.T.U., or any other size." It appears from the record that the parts of this installation were not designed to go together and that the connection on one part had to be "crimped" in order to go into another part, which further interfered with the direct flue line and added to the reduction of the usable size of the flue. Also, there is evidence that there were "patches" on the hall heater, the reason for which does not appear. From all of these facts it might reasonably be inferred that the appellant failed to do all that could reasonably be required of him in connection with the installation of this heater, especially in view of the fact that he knew that his specifications were not being followed. No good reason appears why he could not have made a reasonable examination of the installation in the wall before it was covered up, or why he should not have made some examination of the heater itself before or at the time it was installed some months later. He had agreed to deliver a fully completed house, it was his duty to have that house well constructed insofar as called for by the plans and specifications, and the record indicates that the house would have met that requirement if the specifications for the installation of these heaters had been followed. While he did not do the faulty part of the work himself it was his duty to see that that portion of the work was done right. While some of the defects may have been hidden, he could readily have seen others and could have required changes or at least have reported the new and unusual condition he saw in order to have a proper investigation made. The evidence was sufficient to justify an inference that the appellant knew or should have known that a dangerous situation was being created which would be unknown to the owner or occupants of the house, and which they could not discover by a reasonable inspection. It cannot be said, as a matter of law, that the appellant was free from personal negligence.

The appellant further contends that the court erred in excluding certain evidence going to show that Dover was an independent contractor. It is argued that it was proved that the written contract between Bledsoe and Dover was lost, and that the court erred in excluding evidence as to the terms of this contract and as to whether Dover believed himself to be an employee of Bledsoe. Objections to questions in that connection were sustained.

[5] The appellant testified that he had a written contract with Dover and that he had made a search for it and could not find it; that he did not purchase or furnish these heaters or any of the materials for the heating job; that he supplied no tools to the men who did the work; that he did not pay any of the men who installed the heaters; that he did not choose what men were to install the heaters; and that he did not tell them what hours to work. He also introduced two checks to Dover, which were cashed by him, one marked part payment on contract and the other as final payment. Dover testified that he had a contract with Bledsoe, but did not say it was in writing. He also testified that he had made a search for any records in connection with this deal and that he was unable to find any. However, he testified that he had some fifteen men working for him, that some of his men did this work, that he carried a Workmens' Compensation policy on the men, and that he made Social Security deductions from their wages. The terms of the contract sufficiently appeared from the evidence, and all of the testimony received was to the effect that Dover installed these heaters as a subcontractor. To have permitted answers to these questions to which objections were sustained would have added nothing material and any possible error in this connection could not have been prejudicial.

In this same connection, the appellant points out that the court instructed the jury that Dover was presumed to be the defendant's servant and that the defendant had the burden of proving that Dover was an independent contractor. After the general instructions and instructions applicable to liability of the manufacturer of such an appliance, the court told the jury that the fact that one is performing work for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary; and that after the plaintiffs here established a prima facie case the burden shifts to the defendant Bledsoe, who then may prove if he can that Dover was an independent contractor. The court then stated the difference between an employee and an independent contractor, and told the jury that it was for it to decide whether Dover was either. The court then told the jury that, as an exception to the general rule, a contractor may be liable if the work turned over by him is so negligently defective as to be imminently dangerous to third persons, provided a contractor knows or should know of the dangerous situation created by him and the owner does not know of such dangerous condition or defect and would not discover it by reasonable inspection. Immediately thereafter, the court instructed the jury that "Before you may hold said defendant Bledsoe liable there are certain findings you must make and they must be supported by a preponderance of the evidence," and that these findings are: that the work done in the installation of the heater was so negligently done as to be imminently dangerous to third persons; that the defendant Bledsoe knew, or in the exercise of ordinary care would have known of the defective condition and its incident danger; that the accepting owners did not know of the defective condition and would not have discovered it by reasonable inspection in the exercise of ordinary care; and that said defective condition was a proximate cause of the injury of which plaintiffs complain.

While the court told the jury that it was for it to decide whether Dover was either an agent of Bledsoe or an independent contractor, it cannot be assumed, in the absence of any evidence to support such a finding, that the jury found that Dover was Bledsoe's employee and not an independent contractor. Viewing the evidence and the instructions as a whole, it cannot be held that any prejudicial or reversible error appears in this connection. The controlling question was one of fact for the jury, and the evidence was sufficient to support the verdict.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

151 Cal.App.2d 678

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Theresa RACE, Defendant and Appellant.
Cr. 5794.

District Court of Appeal, Second District, Division 1, California.
June 12, 1957.

Defendant was convicted of bookmaking. From judgment rendered by the Superior Court of Los Angeles County, Clement D. Nye, J., and from order denying motion for new trial, she appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Affirmed.

1. Gaming 🔑98(3)

Evidence sustained conviction for unlawfully engaging in bookmaking upon result of horse race. West's Ann.Pen.Code, § 337a, subd. 1.

2. Gaming 🔑97(1)

In prosecution for bookmaking, evidence that a police officer had telephoned defendant and purported to place bet on horse and that proffered bet was accepted by defendant was admissible to prove that telephone was placed in defendant's premises for purposes of taking bets. West's Ann.Pen.Code, § 337a, subds. 1, 2, 6.

3. Criminal Law 🔑386

In bookmaking prosecution, wherein officer had testified that he had telephoned defendant who had accepted his proffered bet on race, defendant's objection to officer's identification of her by her "unusual" voice went merely to weight and not to admissibility of the evidence. West's Ann. Pen.Code, § 337a, subds. 1, 2, 6.

4. Criminal Law 🔑472

An officer who was an admitted expert on bookmaking was qualified to testify, in bookmaking prosecution, as to customary methods and equipment of places engaged in bookmaking, to significance of certain markings and to identify exhibits as paraphernalia used for recording and registering bets. West's Ann.Pen.Code, § 337a, subds. 1, 2, 6.

5. Criminal Law 🔑409

In bookmaking prosecution, evidence, including that of police officer and police employee who answered telephone at defendant's premises following her arrest and talked with persons who allegedly proffered bets, sufficiently established corpus delicti to make incriminatory statements by defendant admissible. West's Ann.Pen. Code, § 337a, subd. 1.

6. Criminal Law 🔑317

Where it reasonably appears that defendant could explain away or deny evidence, jury may consider his failure to do so as tending to indicate truth of such evidence and as indicating that among inferences that may reasonably be drawn therefrom, those unfavorable to him are the more probable.

7. Gaming 🔑75(1)

Under statute making it a crime to occupy premises where paraphernalia for purposes of recording bets are present, it is not making of actual bets but such occupancy of premises which constitutes crime. West's Ann.Pen.Code, § 337a, subd. 2.

8. Gaming 🔑98(5)

Evidence sustained conviction for occupying premises where paraphernalia for purposes of recording bets were present. West's Ann.Pen.Code, § 337a, subd. 2.

9. Criminal Law 🔑412(3)

Extrajudicial statements are admissible, not as hearsay, but as original evidence, where very fact in controversy is whether certain things were said or done and not whether statements were true or false.

10. Gaming 🔑98(3)

Evidence sustained conviction for accepting bets upon results of horse races. West's Ann.Pen.Code, § 337a, subd. 6.

Forno & Umann, Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County containing three counts, defendant was accused of violations of Section 337a of the Penal Code. Count I alleged a violation of Subd. 1 in that defendant did unlawfully engage in bookmaking upon the result and purported result of a horserace. Count II charged a violation of Subd. 2 in that the defendant kept and occupied a residence, with books, papers, paraphernalia, etc., for the purpose of recording and registering bets on horseraces. In Count III defendant was charged with the violation of Subd. 6 in that she unlawfully accepted bets upon the result of certain horse races.

Defendant pleaded not guilty, a trial by jury was waived and by stipulation the case was submitted to the court "* * * upon the testimony taken at the preliminary hearing, as it is reflected in the transcript of that proceeding. That the exhibits received in evidence there may be deemed in evidence here. That any stipulations entered into at the preliminary hearing may be deemed re-entered into for this proceeding. And either side reserves the right to present any additional testimony so desired, and any additional objections." A motion to suppress the evidence was denied and defendant neither testified nor offered any evidence in her behalf. She was adjudged guilty on each count of the information. Proceedings were suspended and defendant granted conditional probation. From the judgment and the order denying her motion for a new trial defendant prosecutes this appeal. Since the record does not disclose that a motion for a new trial was made, the attempted appeal therefrom must be dismissed.

The following will serve as a fair epitome of the factual background surrounding this prosecution. On the morning of March 1, 1956, Officer Walters of the Los Angeles Police Department received information from an informant that a "relay spot" was being conducted over the telephone, number NOrmandie 2–8350. The officer "checked out" the number through the telephone company and he and two other officers went to 1536 North Occidental, Los Angeles, arriving there at approximately 2 p. m. They "staked out" the single-story residence there located and kept it under observation. At 2:15 p. m. Officer Walters phoned the number given him by the informant and a female voice answered the telephone. Officer Walters asked, "Who won the second?" She stated, "Keekita. Who is this?" Officer Walters replied, "Carl" and she stated, "I should ask, you know." Officer Walters replied, "O.K. Carl for Bob. In the third Double F. Kay, five to win, and in the fourth Spanish Sherry, ten to win." She repeated the names and the amounts and asked, "Is that all?" Officer Walters answered, "Yes", and hung up. Double F. Kay was listed to run in the third race and Spanish Sherry in the fourth race at Santa Anita that day. After the phone call Officers Walters and Deiro went to the front door of the house and Officer McCartney went to the rear of the premises. Officer Walters knocked on the door and stated, "Police officers. You are under arrest for bookmaking. Open the door." After receiving no response he repeated the same and then told Officer McCartney to force entry through the rear door. Officer McCartney complied. The front door was opened and Officer Walters then entered. The latter observed defendant in a rear room in which there was a white porcelain table; a telephone (NOrmandie 2–8350); some pencils; a can of cleansing powder; two sponges, one of which was wet; and a scratch sheet which had been cut up. The white porcelain table (People's Exhibit No. 1) had writing on it. In the upper right-hand corner was the name "Pauley" followed by the name "Bob" and approximately six inches under that were the numerals "3" and "4". In the opinion of Officer Walters "Pauley" would identify the better and "Bob" would indicate the agent that he was coming in for and the "3" and "4" were the handicap numbers of the winning horses in a race which had been run at 1:56 that day. When Officer Walters first saw the table it was partially wet and had swirls on it. The cut up scratch sheet was found in a closet in the same rear room. While Officer Walters was there the telephone rang approximately thirty times. He answered the phone and the other parties, both male and female, would ask for different people and then hang up. Most of them would hang up without saying anything. After the arrest, Officer Walters heard the defendant speak and because of her "Bostonian accent" he recognized her voice as that of the woman who had accepted his purported wager over the telephone prior to the arrest. When the officers arrested the defendant, Mrs. Mildred Packwood, a woman about seventy years old, was in the front room of the house. Officer Walters asked Mrs. Packwood how long the defendant had been using her phone to make book. The defendant answered, "She doesn't know anything about it. I told her I was soliciting for an insurance company." Defendant further stated that she didn't work for an insurance company and that she had "just told this to Mrs. Packwood". She said that a man named Sam had hired her; that she didn't know how much she was to be paid for she hadn't been paid yet; and that she had met Sam in a bar. Officer Walters then told the defendant that nobody else knew she was arrested and asked her to work with the officers to catch the man "who is running this book". To which the defendant replied, "Don't try and con me. I wouldn't do that."

Cheryl F. Miller, a clerk-typist at Administrative Vice, in the police department, was summoned to 1536 North Occidental Boulevard on the same date. She arrived at about 2:50 p. m. and went inside to the rear room and answered the telephone approximately fifteen or twenty times. One time when she answered the phone she said, "Hello" and a man said, "Hello. This is Daniel for Bob. Your voice doesn't sound right. Is everything O.K.?" Miss Miller answered, "Yes" and the other party hung up. She then took some more calls and the same party called again and said that it was Daniel for Bob again, that he was worried and he called the boys to see if everything was all right; that it was and he then said, "Here's my bet. In the fifth, Buggles, two to win." Miss Miller made notations of the conversations which included:

At 3:05 p. m. a man called, "Tex for 99, in the sixth, Island Queen, two and two. In the eighth, Leona Welch, two and two, a one and one parlay."

At 3:05 p. m., "Curly for Bob. In the fifth, Tall Talk. In the sixth Nooran, four to win. In the seventh, Barely Nothing, two to win, a round robin."

At 3:05 p.m., a woman called, "Barbara. In the fifth, Buggles, two across. In the fifth, Him Said, two to place and two to show. In the sixth, Nooran, two across."

At 3:05 p. m., a female called. At 3:09 p. m. a man called. The conversations on these calls and on all the calls Miss Miller received were similar to those above set out.

It was stipulated that Officer Walters was an expert in bookmaking and he testified concerning the various types of bookmaking operations in Los Angeles County, which include relay spots. He testified that a "relay spot" is a place where a person is at a telephone and the betters have this telephone number. They call this telephone number when they wish to place a wager and leave their identification, the name of the horse and the amount they want wagered on the horse and how they want it wagered. The clerk at the relay spot makes a temporary notation of the wager and the write-in, where the permanent recordations are kept, calls the relay spot periodically and receives the wagers which the relay spot has taken. The clerk at the relay spot then erases the temporary notations that have been made. The clerk at the relay spot makes these temporary notations on anything which can be written on and easily erased.

In the opinion of Officer Walters the operation going on at this address was a relay spot, wherein the person at the telephone would write on the white table and when the permanent recorder called in she would give him the information and then erase what was on the table. That this was the reason for the scouring powder and the wet sponges.

As her sole ground for a reversal of the judgment appellant contends that the evidence is insufficient to sustain a finding of guilt on any of the three counts of the information.

Count I

Appellant urges that the only evidence to sustain the conviction on this count is "Semi-incriminatory statements by defendant admitted in the absence of a corpus delicti". This count involved the charge of bookmaking as set forth in Subd. 1 of Penal Code, § 337a.

With reference to establishing the corpus delicti, this court stated in People v. Bradford, 95 Cal.App.2d 372, 379, 213 P.2d 37, 41: "It is now established law in this state that proof of the corpus delicti by evidence of the conclusive and convincing character required to support a conviction of the offense charged is not a prerequisite to the reception in evidence of the extrajudicial statements of the accused. Prima facie proof is all that is necessary and the corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from facts established. Direct or positive evidence is not essential, nor is it necessary that evidence in proof of the corpus delicti connect the accused with the commission of the crime charged. [Citing cases.]"

[1-4] To us a mere recital of the evidence hereinbefore narrated is a refutation of appellant's claim that there was insufficient evidence to support the finding on Count I. There is here present the telephone conversation in which Officer Walters purported to place a bet on two horses running that day, and which proffered bet was accepted by appellant. Though it be assumed that such evidence was admitted not to prove the truth of the conversation, it was admissible to prove that the telephone was placed in the residence for the purpose of taking bets (People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901; People v. Kalmes, 100 Cal.App.2d 795, 796, 224 P.2d 408). Appellant challenges the sufficiency of the officer's identification of her by her "unusual" voice and asserts that "None of the callers to the female employee seemed to notice a difference". This attack goes to the weight of the evidence which is addressed solely to the trier of fact. There is, however, evidence, corroborative of Officer Walters' testimony. Miss Cheryl F. Miller, the police department employee, testified that when she answered one of the telephone calls, the caller said, "Your voice doesn't sound right. Is everything O.K.?" When Miss Miller answered, "Yes", the caller "hung up". In addition to the foregoing, we have the cut-up scratch sheet in the closet, and the white porcelain table with the writing on it. Officer Walters gave as his expert opinion that this writing indicated the names of the betters and the agents that they were coming in for and the handicap numbers of the horses in races which had been run on that day. As a conceded expert, the officer was qualified to testify as to the significance of the markings (People v. Klein, 71 Cal.App.2d 588, 591, 163 P.2d 71; People v. Brown, 123 Cal.App.2d 361, 364, 266 P.2d 805). The same officer was qualified to testify as to the customary methods and equipment of the places engaged in bookmaking. People v. Klein, supra. He described the general method of operations of relay spots where temporary notations are made. He testified, without objection by the appellant, that in his opinion this was a "relay spot" wherein the person on the telephone would write on the table and use the scouring powder and sponges to erase these notations. As an expert he was also qualified to identify these

exhibits as paraphernalia used for recording or registering bets. People v. Klein, supra, 71 Cal.App.2d at page 590, 163 P.2d at page 72.

Then there is the testimony of Officer Walters that while he was in the house the telephone rang approximately thirty times and that when he answered it most of the other parties would hang up without saying anything. Miss Miller, the clerk from the police department, answered the telephone approximately fifteen or twenty times and made notations of the conversations. She answered six calls within a period of nine minutes and the conversations were all similar to the one set forth in the aforesaid narrative of her testimony.

Appellant urges that testimony of the phone calls has no probative value "if not explained and their import is a mystery". With this contention we cannot agree. As was said by this court in People v. Overman, 149 Cal.App.2d 125, 307 P.2d 1000, 1004: "It does not appear to us that any explanation of the purport of the telephone talks was required. Almost anyone of adult years, who is even casually acquainted with what goes on in the so-called 'sport of kings' at the various race tracks in Southern California and elsewhere would understand what was meant by what was said in the various telephone conversations. With all of the divers advertisements in the various mediums concerning the horse races at the several race tracks, the repeated radio announcements of the results and televising of the different races at last once each week, and with all of the propaganda about how many millions of dollars are given to charity by the race track owners, and all of the news stories of the frailties of the human beings who engage in embezzling money to 'play the horses', it would be difficult to avoid coming into contact with, and having an understanding of the incidence of the race tracks and what the words meant. As was said in People v. Larum, 111 Cal.App.2d 732, at page 734, 245 P.2d 323, 324: 'The conversations and the passing of the money would be commonly understood as wagers on horse racing, and in the absence of any explanation by defendant that the transactions had a different meaning or purpose, the court could scarcely have failed to find they were wagers. The evidence was sufficient * * *.'" See, also, People v. Powell, 1 Cal.App.2d 222, 224, 36 P.2d 201; People v. Thompson, 119 Cal.App. 310, 311, 6 P.2d 301. One of the conversations indicates clearly that the words exchanged between Officer Walters and appellant involved a purported wager. This was the conversation between Miss Miller and a man who called on the telephone after the same individual had previously questioned Miss Miller's voice, and upon the second occasion said, "* * * he was worried and he had called the boys to see if everything was O. K., and it was", whereupon he said, "Here's my bet. In the fifth, Buggles, two to win." These conversations tended strongly to prove that the premises were occupied for the purpose of recording wagers on horse races. People v. Joffe, supra, 45 Cal.App.2d at page 235, 113 P.2d at page 901; People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564.

[5] From the foregoing we are satisfied that the *corpus delicti* of the offense of bookmaking was clearly established and that the incriminatory statements made by appellant were admissible. We shall not here again narrate the admissions made by appellant to Officer Walters. Suffice it to say that we find it difficult if not impossible to conceive how any inference of innocent activity on the part of appellant can be drawn from the facts and circumstances presented by the evidentiary features of this case (People v. Allen, 113 Cal.App.2d 593, 596, 248 P.2d 474).

[6] In the instant case appellant did not testify in her own behalf, and in this connection, as stated in People v. Adamson, 27 Cal.2d 478, 490, 491, 165 P.2d 3, 10: "* * * if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider

his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." See also People v. Smith, 113 Cal. App.2d 416, 419, 248 P.2d 444.

Count II

[7, 8] In this count appellant was accused of a violation of Subd. 2, Penal Code, § 337a, in that she unlawfully occupied a residence with books, papers, paraphernalia, etc., for the purpose of recording and registering bets on horse races. She asserts that the only evidence to sustain the conviction on this count is "a porcelain table with vague writings on it, Ajax scouring powder, and sponges. The same objects to be found in any home in the land". The offense charged in this count is complete when it is shown that the accused occupied an enclosure with papers, etc., for the purpose of recording a bet or bets on the result or purported result of any horse race or purported horse race. The character of the paraphernalia found on the premises, established by the testimony of Officer Walters, without objection, as hereinbefore noted, coupled with his testimony as to the use to which the same could be, and in the instant case actually was being put, and the presence of appellant on the premises in question, all point unerringly to the conclusion that she had the paraphernalia in her possession and was occupying the premises for the unlawful purpose denounced by the foregoing Penal Code section. It is not the actual making of bets, but the occupancy of premises where paraphernalia for the purpose of recording such bets which constitutes the offense defined in Subd. 2 of Penal Code, § 337a. In the light of the evidence herein narrated, it would tax one's credulity and do violence to reason to conclude other than that every element of the offense charged was sufficiently established. And when there is added to the foregoing, appellant's admissions, her guilt is practically demonstrated (People v. Manning, 37 Cal. App.2d 41, 43, 98 P.2d 748; People v. Watkins, 126 Cal.App.2d 199, 203, 271 P.2d 641; People v. Battaglia, 107 Cal.App.2d 476, 479, 237 P.2d 70; People v. Lewis, 91 Cal. App.2d 346, 349, 204 P.2d 919).

In the instant case appellant did not testify nor did she offer any evidence in her own behalf. In that regard this case is similar to People v. Smith, supra, 113 Cal. App.2d at page 419, 248 P.2d at page 446, wherein the court said: "* * * The defendant failed to avail himself of an opportunity to explain or deny a number of incriminating circumstances about which he could reasonably be expected to know. The court was entitled to consider his failure to do this 'as tending to indicate the truth of such evidence and as indicating that among the inferences that may * * be drawn therefrom, those unfavorable to the defendant are the more probable'. * * *"

Count III

[9, 10] Finally, appellant challenges the sufficiency of the evidence to sustain her conviction on Count III wherein she was charged with the violation of Subd. 6 of Penal Code, § 337a, in that she accepted a bet upon a horse race. The contention is untenable. We shall not here repeat the evidence above narrated other than to say that the offense was proven by the heretofore mentioned conversation between Officer Walters and appellant, wherein the officer said, "O. K. Carl for Bob. In the third Double F. Kay, five to win, and in the fourth Spanish Sherry, ten to win." The appellant repeated the names and the amounts and asked, "Is that all?" Officer Walters replied, "Yes", and hung up. Double F. Kay and Spanish Sherry were horses listed to run at Santa Anita that day. Appellant urges that the hearsay rule excludes extrajudicial statements when offered "as assertions to evidence the truth of the matter asserted". This contention is answered by the case of People v. Henry, 86 Cal.App.2d 785, 789, 195 P.2d 478, 480, as follows: "* * * There is a well established exception or departure from the

hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts were admissible not as hearsay, but as original evidence. * * *" See also People v. Kahn, 27 Cal.App.2d 645, 646, 81 P.2d 632; People v. Burch, 118 Cal.App.2d 122, 123, 125, 257 P.2d 44; People v. Chaney, 147 Cal.App.2d 740, 305 P.2d 955.

The judgment is affirmed. The attempted appeal from a non-existent order denying defendant's motion for a new trial is dismissed.

DORAN and FOURT, JJ., concur.

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151 Cal.App.2d 810

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph J. BETLEY, Defendant and Appellant.

Cr. 3309.

District Court of Appeal, First District, Division 2, California.

June 19, 1957.

Defendant was convicted in the Superior Court of Marin County, Carlos R. Freitas, J., of grand theft by embezzlement, and he appealed. The District Court of Appeal, Kaufman, P. J., held that discrepancies between deposit slips and carbons thereof, which were in defendant's handwriting, were sufficient to raise jury questions as to whether defendant converted money to his own use with felonious intent.

Affirmed.

1. Embezzlement 🔑22

Where check to employer appeared on deposit slip for September 7, 1955, in employee's handwriting, it could be included in determining whether employee embezzled jurisdictional amount sufficient to make him guilty of grand theft under amendment effective September 7, 1955. West's Ann.Pen.Code, § 487, subd. 1.

2. Criminal Law 🔑1172(8)

Where defendant was convicted of only a misdemeanor he was not prejudiced by charge based on felony.

3. Embezzlement 🔑47

In prosecution for grand theft by embezzlement, discrepancies between deposit slips and carbons thereof, which were in defendant's handwriting, were sufficient to raise jury questions as to whether defendant converted money to his own use with felonious intent. West's Ann.Pen.Code, § 487, subd. 1.

4. Embezzlement 🔑36

In prosecution for grand theft by embezzlement, prosecution was not required to produce evidence of loss to employer or of excessive spending by defendant employee. West's Ann.Pen.Code, § 487, subd. 1.

5. Embezzlement 🔑36

In prosecution for grand theft by embezzlement, committed by employee who had duty to record checks received in proper books and credit accounts of various customers, it was not necessary to show that books did not balance. West's Ann. Pen.Code, § 487, subd. 1.

6. Criminal Law 🔑1159(1)

Before verdict can be set aside on appeal, it must be clear that on no hypothesis whatsoever is there evidence to support the conclusion reached below.

7. Criminal Law 🔑1172(2)

Instruction that "neither the prosecution nor the defense" was required to call as witnesses all persons present at events involved, or having knowledge of matters in question, was not prejudicial.

8. Criminal Law ⚷661

The prosecution is under no duty to call any particular witness or all persons who may know something about the case.

9. Criminal Law ⚷824(6, 8)

If defendant did not request instructions as to presumption of adversity or on effect of evidence, he could not complain on appeal. West's Ann.Code Civ.Proc., § 1963, subds. 5, 6; § 2061, subds. 6, 7.

10. Criminal Law ⚷822(1)

All instructions given must be considered as a whole.

11. Criminal Law ⚷434

In prosecution for grand theft by embezzlement, books which it was primarily defendant's duty to keep were admissible, though on occasion other persons would make entries in such books.

12. Criminal Law ⚷433, 434

In prosecution for grand theft by embezzlement, wherein defendant admitted that deposit slips were in his handwriting and that he had written particular letter, carbon copies of deposit slips and the letter were admissible.

13. Criminal Law ⚷730(1)

Alleged misconduct of prosecuting attorney was not ground for reversal where court properly admonished the prosecution and gave usual cautionary instructions.

◆

Carl B. Shapiro, Fairfax, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., W. O. Weissich, Marin County, Dist. Atty., Roger P. Garety, Chief Deputy Dist. Atty., San Rafael, for respondent.

KAUFMAN, Presiding Justice.

Appellant Joseph J. Betley was found guilty by a jury of grand theft in the form of embezzlement. This appeal is prosecuted from the judgment and the order denying his motion for a new trial. Appellant contends that he was improperly charged with a felony instead of several misdemeanors, that the evidence was insufficient to establish the necessary elements of the offense charged, that prejudicial error was committed by the trial court in its rulings on evidence and instructions, and prejudicial misconduct on the part of the prosecution. We find no merit in any of those contentions.

The facts are as follows: From 1954 until the end of November 1955, the appellant was employed by J. L. Robinson, the owner and proprietor of J. L. Robinson Trailer Sales, in San Rafael, California. The appellant's job was that of general office man, which included various bookkeeping and accounting duties such as entering checks and cash received in the proper record books and making bank deposits as well as writing "dun" letters to customers whose accounts were overdue.

Although J. L. Robinson and his wife, and Johnson, their other employee also occasionally performed these functions, these matters were primarily the appellant's duties. Checks and money orders received as payments on account from customers, as well as checks received from certain insurance brokers for whom J. L. Robinson Trailer Sales acted as agents were to be entered in the company's day book. Cash received was recorded in the money receipt book or the merchandise receipt book. The checks and money orders in question here were never so recorded and were not credited to the proper customer's accounts. The checks and money orders, however, did appear on the original deposit slip given to the bank, so that they were properly credited to the commercial checking account of J. L. Robinson and deducted from the accounts of the various drawers. The checks and money orders did not appear on the carbon copies of the deposit slips retained by the J. L. Robinson Company; amounts corresponding to the amounts of the various checks appeared on the carbon copies as "cash deposit." The total amount shown on the carbon copy agreed with the total amount deposited in the bank, and the total reflected in the day book in which records of the checks were kept. The appellant was accused of using this method to appropriate the cash amounts reflected on the carbon copies of the deposit slips. There is no direct evidence that the appellant took the amounts in question or that he at any time spent large sums of money or lived beyond his means. The appellant admitted that a number of deposit slips and carbon copies in question were in his handwriting. The appellant testified on his own behalf and denied taking any of the Robinson Company's money. He also testified that on many occasions after he had prepared the deposit slips for the bank, Mr. Robinson would ask him to cash a check out of the cash set aside to go to the bank; appellant would do this and then make out a new original deposit slip, but would not make a new carbon copy as the totals remained the same. This practice was denied by the testimony of Mr. Robinson, although he admitted that it may have occurred occasionally and that employees' and customers' checks were cashed from the cash box. The appellant testified that on the particular dates in question, he did not remember being asked to cash checks in the above manner for Mr. Robinson. The appellant offered no other explanation for the admitted discrepancies between the original deposit slips and the carbon copies thereof, both of which were in his handwriting. A bank official testified that the deposit slips and carbon copies in question were the only deposit slips for the J. L. Robinson general account on the dates involved. Robinson testified that on the dates in question he had not given the appellant permission to substitute a check for the cash amount on the original deposit slip. There is also some evidence that the regular procedures for recording checks and cash were not always followed, particularly with regard to insurance commission checks which were to be deposited in a separate trustee account. Robinson's testimony revealed that during the period in question, he had the periodical services, of CPAs; however, none of the audits were introduced into evidence, or any showing of loss to the company made. Robinson's testimony also revealed that the cash records indicated that certain amounts of cash had been received on the dates in question. Robinson testified that while around $50 in cash was always kept in the cash box, no daily or other record of cash on hand was kept. However, when cash was taken from the cash box for business purchases, a slip of scratch paper showing the amount taken was left in the cash box. The discrepancies between the cash records, the day book and the amount of the bank deposits were revealed by a letter sent by the appellant to one of J. L. Robinson's customers, advising him of an incorrect balance due on a trailer he had purchased. The letter had been misaddressed. A few days after sending out the letter, the appellant voluntarily left his job without giving advance notice.

The appellant was charged by information with grand theft in the form of embezzlement, for a series of transactions alleged to have occurred during the period from January 24, 1955 to November 28, 1955. After denial of his motion to dismiss the information, the appellant pleaded not guilty, was tried and a verdict of guilty returned. He was sentenced to one year in the county jail, with the execution of the sentence suspended for a probation period of three years, conditioned on restitution to the complaining witness.

The first contention of the appellant is that the evidence fails to establish that he took the requisite jurisdictional amount of $200 after September 7, 1955, the effective date of the amendment to Penal Code Section 487, which reads as follows:

> "1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); *provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee*

> *from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft.*" (Emphasis added.)

The underlined portion was added by the 1955 Amendment. Appellant concedes that the following four items could be merged to total $198.95:

Maker of Check	Amount	Date	Exhibit No.
Baker	$40.00	9/13/55	13
Gilchrist	41.75	11/19/55	16
Collins	50.00	10/22/55	17
Flavell	67.20	11/11/55	18

[1, 2] The question arises as to a check for $157.12, representing insurance commission, made payable to J. L. Robinson, dated September 4, 1955, and mailed on September 4, 1955, a Sunday, or on September 5, 1955, Labor Day, a holiday, from the Oakland area. As his check appears on the deposit slip for September 7, 1955, which is in the appellant's handwriting, there is no difficulty as to the applicability of the statute in question. Furthermore, as the sentence shows the appellant was convicted of only a misdemeanor, it does not appear that he was in any way harmed or prejudiced by the felony charge. There is, therefore, no merit in this contention. The appellant also contends that the trial court erred in permitting the introduction of evidence relating to incidents prior to September 7th and to fail to instruct the jury that no consideration be given to these incidents. The appellant's brief argues that these matters should now be resolved in his favor, "in view of the fact that at the very most a misdemeanor could be shown." As pointed out above, the appellant was sentenced for only a misdemeanor.

[3–6] The second contention of the appellant is that there is insufficient evidence to prove an appropriation of the funds with the necessary felonious intent. He concedes the existence of the other three necessary elements of embezzlement, the employment relationship, duties in that relationship which give the defendant some control over the employer's funds, and receipt of the funds. He argues that the evidence as to appropriation is so slight that a matter of law is presented rather than a question of fact for the jury. He relies on People v. Alkow, 1950, 97 Cal.App.2d 797, 218 P.2d 607, in which the court reversed the conviction of theft of an attorney for a corporate collection agency, who had collected a note for the agency and deposited the amount in an agency account, as there was no evidence that he had issued any of the checks in question or that he was an officer of the agency. In the instant case, however, the evidence was not so slight; the deposit slips and carbons were in the appellant's handwriting and the discrepancies between the two could not be satisfactorily explained to the jury. People v. Stanford, 16 Cal.2d 247, 105 P.2d 969; People v. Talbot, 220 Cal. 3, 28 P.2d 1057, the question of whether the taking was with the necessary felonious intent and whether the appellant converted the money to his own use, were proper questions for the jury. People v. Burman, 138 Cal.App.2d 216, 291 P.2d 49; People v. Applegate, 91 Cal.App.2d 163, 204 P.2d 689; People v. Larson, 92 Cal.App. 376, 268 P. 419. The jury did not have to believe that appellant did not take the money or that the discrepancies in the deposit slips and carbons were due to the reasons he stated. They could have believed that he falsified the company's records for his own advantage. Therefore, there is no merit in the appellant's argument that the prosecution should have produced evidence of loss to the Robinson Company or of excessive spending on the part of appellant. His reliance on People v. Rowland, 12 Cal.App. 6, 106 P. 428, is ill placed, as the court there held that there was sufficient proof of the corpus delicti in a situation not too unlike this one where the secretary of a bank failed to indicate on the bank's records that a certain note had been paid. In People v. Grimes, 91 Cal.App.2d 629, 205 P.2d 416, it was held that there was insufficient evidence to draw an inference of embezzlement where the executor of an estate, obtained a sum of money belonging to the estate but didn't deposit it in any account, where there was no duty to deposit such funds in the course of administration. The appellant here, clearly had a duty to record the checks received in the proper books and credit the accounts of the various customers. It is not necessary to show that the books did not balance. People v. Lind, 95 Cal.App. 202, 272 P. 754. Before the verdict can be set aside on appeal it must be clear that on no hypothesis whatsoever is there evidence to support the conclusion reached below. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911.

[7] The third contention of the appellant is that the trial court erroneously instructed the jury as follows: "Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question in this trial, nor is the prosecution or the defense required to produce as exhibits all objects or documents that have been referred to in the testimony or the existence of which may have been suggested by the evidence." This instruction which is couched in terms of "neither the prosecution nor the defense" cannot be said to be prejudicial.

[8–10] The cases cited by appellant on pages 12 to 15 of his brief are not relevant here. No duty rests on the prosecution to call any particular witness or all persons who may know something about the case. People v. Tuthill, 31 Cal.2d 92, 187 P.2d 16; People v. Sullivan, 101 Cal.App.2d 322, 225 P.2d 645; People v. Cordero, 92 Cal.App.2d 196, 206 P.2d 665; People v. Miller, 134 Cal.App.2d 792, 286 P.2d 415. Appellant takes the position that because the CPAs were not called to testify, it should be assumed that their testimony would not corroborate the testimony of Robinson that the audit performed on his books after the appellant's discharge showed that the accounts did not balance. Appellant cites People v. Beal, 116 Cal.App.2d 475, 254 P.2d 100, where there was no independent proof of the alleged rape other than the testimony of the prosecuting witness. In the present situation, there was separate independent testimony that the various checks were mailed to and received by J. L. Robinson Trailer Sales, and were cleared through the respective banks. As pointed out by our Supreme Court in People v. Watson, 46 Cal.2d 818, at page 829, 299 P.2d 243, if the appellant believed the testimony of the witnesses in question would have aided his cause, he should have called them. Furthermore, as the record on appeal does not include instructions refused, it is impossible to tell whether the appellant here requested an instruction as to the presumption of adversity (C.C.P. § 1963, subd. 5 & 6) or an instruction in accordance with Code of Civil Procedure Section 2061, subds. 6 and 7. If he did not request such instructions in the court below, he cannot now complain. People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Grasso, 142 Cal.App.2d 407, 298 P.2d 131. It is a well known rule that all of the instructions given must be considered as a whole; the jury here was properly instructed.

[11, 12] The fourth contention of the appellant is that certain evidence was erroneously admitted. He argues that the books relied upon by the complaining witness, Robinson, should not have been admitted as the appellant was not the only one with the authority to make certain entries. However, the evidence is clear that although on occasion Mr. Robinson or Mrs. Robinson or another employee would make entries, the duties were primarily the appellant's. In People v. Blackman, 127 Cal. 248, 59 P. 573, relied upon by the appellant, the bookkeeping entries were made by someone other than the defendant, the person who had made the entries was dead at the time of trial, and there was no evidence that the defendant was in any way responsible for the books. People v. Hemple, 4 Cal.App. 120, 87 P. 227, cited by the appellant on this point, is also inapplicable. The carbon copies of the deposit slips were properly admitted, as was the letter; the defendant admitted that the deposit slips were in his handwriting and that he had written the letter.

[13] The appellant's final contention is that the conduct of the prosecuting attorney constituted prejudicial misconduct. There is no merit in this contention, as the record reveals that the court properly admonished the prosecution and gave the usual cautionary instructions.

We find no prejudicial error in the record before us, accordingly the judgment and order denying his motion for a new trial must be affirmed.

Judgment and order denying motion for new trial affirmed.

DOOLING and DRAPER, JJ., concur.

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152 Cal.App.2d 103

Dolores R. GONZALEZ, Plaintiff and Respondent,

v.

Guillermo GONZALEZ, etc., et al., Defendants,

Guillermo Gonzalez, also known as William Gonzalez, Defendant and Appellant.

Civ. 22302.

District Court of Appeal, Second District, Division 2, California.

June 25, 1957.

Action for divorce. From an interlocutory judgment granting a divorce to the wife in the Superior Court of Los Angeles County, Clarence E. Johns, J. pro tem., the husband appealed. The District Court of Appeal, Ashburn, J., held that denying a further continuance was not error and that impressing a lien upon the realty awarded the husband as security for payments of alimony and support was not error.

Judgment affirmed.

1. Appeal and Error 🔑966(1)

Continuance 🔑7

Postponements are granted at the discretion of the trial court and such a discretion will not be reversed except upon a clear showing of abuse.

2. Divorce 🔑145

In action for divorce, denying further continuance to husband on the ground that he did not understand English very well and did not understand that the court had continued the case to a specified time was not an abuse of discretion under the circumstances.

3. Divorce 🔑252

Where wife was awarded a divorce on ground of cruelty, she was entitled to as much more than one-half of the community property, as a sound discretion exercised by the trial judge, might indicate. West's Ann.Civ.Code, § 146.

4. Divorce 🔑256

In action for divorce, impressing of a lien upon real property awarded the husband, as security for payments of alimony and support of a minor son, was not error where the husband had stated his intention to sell the property and to go to Mexico. West's Ann.Civ.Code, § 140.

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J. Widoff and J. Edward McCurdy, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

ASHBURN, Justice.

Defendant appeals from an interlocutory judgment of divorce granted to his wife. The disposition of two parcels of real property is the major alleged grievance of appellant. They stood of record in the names of both spouses as joint tenants and were impliedly found to be community property (written findings were waived), and were distributed as such, each party being awarded one parcel. Appellant says that if he had not failed to appear at the trial following a continuance from Friday afternoon to Monday morning and had his attorney been granted a continuance from Monday morning to the afternoon of that day, his testimony (if given) would have produced a different result and therefore there was grievous error in denying that continuance. He raised the point upon motion for new trial, apparently under the heading of accident and surprise which ordinary prudence could not have guarded against.

The trial commenced on the afternoon of Friday, August 3, 1956, at which time defendant was present. The wife then testified that the two parcels of real estate were purchased from earnings of both spouses and, though the deeds ran to them as joint tenants, there was an express oral agreement in each instance that same were and should be community property. At the close of the afternoon the judge announced that he would put the case over to a quarter to eleven o'clock on Monday morning. Defendant understands English well and uses it fluently. There was a court interpreter present who had assisted the wife when testifying. When the judge announced the adjournment the interpreter translated it into Spanish, which is apparently the language defendant claims to know.

Though the case had been continued to 10:45 on Monday morning it was not called until 11:40. At that time defendant's attorney told the court: "Your Honor please, my client, Mr. Gonzalez, although I told him to be here at ten-thirty this morning, apparently something has happened. He has not called and he is not here. I called my office and they called his place of business and he is not there and they did not expect him until afternoon; therefore, I ask the matter be continued over to this afternoon until I can find out about him. The Court: The motion for a continuance will be denied. We will continue on as far as we can." After the evidence of plaintiff and her son had been completed and plaintiff had rested, defendant's counsel addressed the court as follows: "Your Honor please, my client is not here. I don't know what happened to him. The Court: Do you want a continuance to two o'clock? Mr. Gray: I will have to, your Honor please. Mr Marcus: Your Honor, I have been ordered to appear at two o'clock in another matter, and he has not seen fit to appear here this morning. * * * The Court: I don't know whether it will do any good to go over to two o'clock under the circumstances. Mr. Gray: I don't know either. I don't know whether he will be here, but I cannot enter into any stipulation that the matter may be decided on the evidence before the Court. The Court: The record shows your position." The court then announced its ruling, said that the "community property of the parties is awarded as follows" and made division of real estate as above indicated.

Upon motion for new trial defendant appeared through a substituted attorney and presented his own affidavit in which he averred: "That affiant does not understand English very well and for that reason affiant did not understand what the Court said on Friday, August 3, 1956, in regard to the continuance of the case, and affiant did not understand that the Court had continued the case to August 6, 1956, at 10:45 A.M. in Department 50." He then stated that his attorney had said to come see him on Monday but that he thought it was merely for a conference and not for the purpose of appearing in court. No corroborating affidavit of that attorney was presented and the foregoing statement is in conflict with that made by counsel in open court on Friday afternoon. Appellant's affidavit further said: "Affiant did not appear in his attorney's office on August 6, 1956, because affiant was ill and had a dizzy spell when he woke up that morning." Respondent presented an opposing affidavit in which she said that defendant has lived in the United States continuously since 1915, had attended three years of Junior High School and two years of High School and speaks English fluently; that she and defendant were living in the same apartment; that they conversed about the continuance of the hearing on Saturday, August 4th; that defendant was not ill on Monday morning, but worked that day; that after that Monday hearing she asked him why he did not appear in court and "[h]e stated that he did not appear in Court because he did not want to listen to your affiant's testimony, nor would he listen to his son's testimony; that they were telling lines [sic] and that he could send both your affiant and their son Billie to jail, and because he did not want to send them to jail he did not appear in Court."

Concerning the status of the property defendant's affidavit was confined to conclusions, saying: "Affiant further avers that all of the real property is owned by the parties as joint tenants and is joint tenancy property." Also, "that in truth and in fact the two parcels of real property owned by the parties are both owned as joint tenancy property, and title thereto is vested in the parties as joint tenants, and, for that reason it is believed, and affiant therefore alleges, that the said property is not community property, but is the separate property of the parties, as joint tenants, and that the Court would have no jurisdiction to change the status of said property." On the contrary, plaintiff's affidavit reiterated her testimony, saying: "Your affiant alleges that the title to the real property was taken in joint tenancy for convenience only; that she testified in these proceedings that it was understood between the parties that said real property was the community property of the parties; that said property was acquired from the community earnings of both your affiant and the defendant; * * * that her earnings were invested in the community property and pooled with that of the defendant; that as a matter of truth and in fact all of the property acquired by the parties was from their community earnings and is the community property of the plaintiff and defendant."

[1, 2] The briefs herein are unique in that the total number of citations of precedents is exactly one,—Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636, upon which appellant relies. It there competently appeared that plaintiff was physically unable to be present at the trial, that his attendance was essential to his cause, and a refusal of the continuance was held erroneous. That situation bears little resemblance to the one at bar. 12 Cal.Jur.2d § 4, p. 116: "There are three fundamental principles running throughout the decisions on the question of continuance: (1) postponements are granted at the discretion of the trial court; (2) the trial court's determination will not be reversed except upon a clear showing of abuse; and (3) each case must be decided upon its own facts. The trial court has a first-hand knowledge of the circumstances of the case and of all previous proceedings, and is therefore in a better position to determine the propriety of granting the application than is an appellate court. It follows that a litigant has no absolute right to a continuance. The fact, for example, that a party is ill or unavoidably detained does not necessarily compel the court to grant a continuance. This rule applies with equal force where the continuance is requested on the ground that counsel or an essential witness is unable to be present." See also, McElroy v. McElroy, 32 Cal.2d 828, 832, 198 P.2d 683.

[3] Appellant further asserts that the real property awarded to plaintiff is worth $5,000 more than that assigned to him. The evidence does not support this claim, which necessarily goes back to the assertion of error in refusal of the continuance. It also assumes that there was an obligation on the court to divide the property evenly, an erroneous assumption, for plaintiff was awarded a divorce on the ground of cruelty and was entitled to as much more than one-half of the community property as a sound discretion exercised by the trial judge might indicate. Civ.Code, § 146; 16 Cal.Jur.2d § 297, p. 595.

[4] It is further said that the impressing of a lien upon the real property awarded defendant, as security for payments of alimony and support of the minor son, was unnecessary and unduly impairs the value of defendant's property. That it was appropriate appears from testimony that defendant had expressed the intention to sell his property and go to Mexico where he apparently had a woman friend. The son testified that "he said my mother wants the separation and he wants to go to Mexico."

The respondent's affidavit on motion for new trial: "It is true that the defendant had on numerous occasions stated to your affiant that he desired to return to Mexico and would sell the properties and reside there permanently." There was no error in the method adopted by the court for securing the payment of support money. See Civ.Code, § 140; 16 Cal.Jur.2d § 237, p. 527.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

John Jack FISCHER, Defendant and Respondent.*

Cr. 5833.

District Court of Appeal, Second District, Division 3, California,
June 17, 1957.

Rehearing Denied July 10, 1957.

Hearing Granted Aug. 15, 1957.

Proceeding on motion of defendant accused of bookmaking and related offenses to set aside information on ground that he had been committed without reasonable or probable cause. The Superior Court of Los Angeles County, Herbert V. Walker, J., granted motion, and the People appealed. The District Court of Appeal, Shinn, P. J., held that arrest of person seen leaving premises suspected of bookmaking activity was without probable cause, and unlawful, and evidence obtained in illegal search of premises and automobile incident to arrest was inadmissible.

Order affirmed.

1. Criminal Law 🔑238

In determining whether there was probable cause for committing defendant for trial on bookmaking and related charges, rule is applied that there was probable cause if there was evidence which would lead person of ordinary caution and prudence to believe and conscientiously entertain strong suspicion of guilt of accused.

2. Criminal Law 🔑238

Indictment and Information 🔑137(5)

If only evidence produced against person accused of bookmaking and related offenses was incompetent and inadmissible, there did not exist probable cause to hold him to answer and court properly granted motion to set aside information.

3. Criminal Law 🔑238

If fact that defendant was bookmaking and recording bets in the apartment was established by competent and admissible evidence, probable cause was shown for committing defendant for trial on bookmaking and related charges.

4. Arrest 🔑63(4)

Searches and Seizures 🔑7(1)

The fact that officers have made a good guess is not the criterion for determining whether they had reasonable cause for arrest of person; a search is not to be justified simply because it uncovers proof of a suspect's guilt.

5. Arrest 🔑63(4)

The presence of an individual on property which is thought to be the location of some unlawful activity is not sufficient to establish reasonable cause for his arrest in the absence of other circumstances which incriminate him.

6. Arrest 🔑63(4)

Criminal Law 🔑394

Arrest of person seen leaving premises suspected of bookmaking activity was without probable cause, and unlawful, and evidence obtained in unlawful search of premises and automobile incident to illegal arrest was inadmissible in subsequent bookmaking prosecution. West's Ann.Pen. Code, §§ 337a, subds. 1, 2, 4, 995.

7. Searches and Seizures 🔑7(28)

Whether consent to search automobile was voluntary or result of assertion of authority by arresting officers was question of fact to be determined in light of circumstances, where defendant was asked to empty his pockets and place his personal belongings on table, and permission to take automobile keys and look at his automobile was given after defendant had been unlawfully arrested and his apartment had been subjected to an unlawful search.

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* Opinion vacated 317 P.2d 967.

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Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Henry Galen, Los Angeles, for respondent.

SHINN, Presiding Justice.

John Jack Fischer was charged by information in Count I with bookmaking; in Count II with unlawfully keeping and occupying an apartment for the purpose of recording and registering bets on horse races; and in Count III with having recorded and registered a bet or bets on horse races. Penal Code, § 337a, subds. 1, 2 & 4. Upon the preliminary hearing he was committed for trial. He made a motion to set aside the information under section 995 of the Penal Code on the ground that he had been committed without reasonable or probable cause. The motion was granted and the People appeal.

The evidence at the preliminary hearing established the following facts. Frank W. Bridges and James Collins are Los Angeles County sheriff's deputies assigned to the vice detail. On July 21, 1956, Bridges was informed by his captain that bookmaking was being conducted over telephone number Angelus 3-2811 which was listed at 2238 Cowlin Street in East Los Angeles. Bridges, Collins and two other deputies went to that location at about 1:30 p.m.; they did not know defendant and had neither a search warrant nor a warrant for Fischer's arrest. The location consisted of a single story frame duplex containing two apartments. Each apartment had a separate front entrance and rear exit. The officers kept the premises under observation for ten or fifteen minutes; Bridges, Collins and a third deputy watched the front of the building while the other deputy watched the back. No one was seen to enter or leave the premises during this time. Officer Bridges then went to a public telephone booth several hundred feet south of the location and dialed the number given him by his captain. A male voice answered the telephone. Bridges said: "This is Al for Red, I want two to win on Satin Lady in the second." The voice replied: "All right" and then said "Wait a minute, who is this?" Bridges answered: "It is Al for Red." The voice responded: "I don't know what you are talking about." Bridges replied: "Shall I have Red call you?" The male voice said "Yes." Bridges hung up the receiver, called out to Collins, and proceeded towards the duplex. As the officers approached the building they saw defendant coming out the front door of one of the apartments. They identified themselves and arrested Fischer on suspicion of bookmaking. At the time of the arrest, defendant was several feet in front of the door of the apartment and was holding a copy of the National Daily Reporter for July 21st.

The deputies entered the apartment with defendant. On a table in the main room they observed a telephone; the number was Angelus 3–2811. Beside the telephone they saw a small blackboard, a box of chalk and some pencils. (Officer Bridges qualified as an expert witness with reference to bookmaking procedures in Los Angeles County and testified that telephones, blackboards and chalk are commonly used by bookmakers in the conduct of their business.) While the deputies were in the apartment, the telephone rang several times and Bridges answered the calls. He testified as to the details of the conversations and stated his opinion that the callers were attempting to place wagers on horses running at various race tracks that afternoon.

Defendant complied with the officers' request to empty his pockets; he placed some keys on the table. He was asked if any of the keys belonged to his car and he said that they did. The deputies asked what model car he owned and Fischer said he had a Kaiser. Bridges asked if they could look at the car and defendant said "Yes"; he told them it was parked around the corner. Bridges gave the keys to Collins and told him to search defendant's automobile. The car was parked on a side street about 100 feet from the apartment. Collins looked through the window and saw some lined strips of yellow paper protruding from some old newspapers on the floor; the yellow sheets had writing on them but he could not read the writing. These were taken by the officers and were introduced in evidence. Officer Bridges testified that he had made a comparison of the notations on the strips of paper with information obtained from defendant's copy of the National Daily Reporter; he stated his opinion that the strips were betting markers which represented bets on horse races running on July 21st. A handwriting expert testified that he had compared the writing on the betting markers with an exemplar of defendant's handwriting taken at the police station; he gave his opinion that the markers were in Fischer's handwriting.

Shortly after the arrest defendant told the officers that he had been bookmaking on the premises for one day, that he took bets over the telephone and recorded them on the blackboard with chalk, that someone would call him and he would relay the bets, and that he had also written bets down on the strips of paper, but had discontinued doing so shortly before the officers arrived. He later denied to the officers that he was a bookmaker.

[1-3] The question is whether the evience disclosed probable cause for committing defendant for trial. There was probable cause if there was evidence which would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250. If the fact that defendant was bookmaking and recording bets in the apartment was established by competent and admissible evidence, probable cause was shown. Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929. If the only evidence produced against him was incompetent and inadmissible, there did not exist probable cause to hold him to answer and the court properly granted his motion to set aside the information. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23.

The People argue that the search of the apartment was incident to the arrest of defendant and that the arrest was valid because the officers had reasonable cause to believe that Fischer had committed a felony in their presence. Coverstone v. Davies, 38 Cal.2d 315, 320-321, 239 P.2d 876. The attorney general concedes that the search of defendant's automobile cannot be justified upon that ground (see Hernandez v. Superior Court, 143 Cal.App. 2d 20, 299 P.2d 678), but it is argued that the car was searched with Fischer's consent.

We agree with the attorney general that the circumstances warranted a reasonable belief that the premises were being used for bookmaking purposes. The telephone conversation confirmed the information obtained from the captain and it strongly indicated that Bridges was talking to a person who was ready and willing to accept a bet.

Although the conversation was properly to be considered in deciding whether there was reasonable cause for Fischer's arrest (People v. Miller, 143 Cal.App.2d 558, 560-561, 299 P.2d 1010; People v. Ferrera, 149 Cal.App.2d 850, 309 P.2d 533), it was not determinative as to the legality of the arrest. If the officers had reasonable grounds for believing that Fischer was the person who was conducting the bookmaking operation the arrest was valid, a subsequent reasonable search of the apartment was lawful, and the evidence obtained thereby was not to be excluded. (People v.

Guy, 145 Cal.App.2d 481, 302 P.2d 657, and cases cited.) However, we agree with the trial court that the deputies did not have reasonable cause for the arrest.

[4] Although the officers made a good guess, this is not the criterion; a search is not to be justified simply because it uncovers proof of a suspect's guilt. People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Simon, 45 Cal.2d 645, 290 P.2d 531. In the present case the lawfulness of the officers' actions could only be judged on the basis of the information they had received, the telephone conversation and the reasonable inferences to be drawn therefrom at the time of the arrest. People v. Soto, 144 Cal.App.2d 294, 298–299, 301 P.2d 45, and cases cited.

Belief that Fischer was guilty would necessarily rest on the assumption that he was the person with whom Bridges had the conversation. But there was nothing to warrant that assumption other than the fact that defendant had been in the apartment; the officers did not know who the bookmaker was when they went to the location and they admittedly did not know Fischer. They did not know whether there were other persons in the apartment and made no effort to find out. They did not observe any suspicious conduct on the part of defendant before he stepped onto the porch. He had a copy of the National Daily Reporter, but it does not appear that the officers noticed it before the arrest; nor would the mere possession of a publication devoted to the turf justify a belief that it was being used for an illicit purpose. People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974.

[5–6] For aught that the officers knew, defendant could have been inside the apartment for any number of legitimate reasons and with any number of persons. The officers were already hastening toward the apartment apparently prepared to enter it when they first saw defendant. The most that can be said is that defendant was apprehended because he happened to be leaving the premises alone when the officers approached. If two or a half dozen persons had left together the officers would have had no reason for identifying any one of them as the receiver of the telephone call. They merely assumed that defendant had been alone in the apartment. The presence of an individual on property which is thought to be the location of some unlawful activity is not sufficient to establish reasonable cause for his arrest in the absence of other circumstances which incriminate him. People v. Yet Ning Yee, 145 Cal.App.2d 513, 302 P.2d 616, and cases cited.

The cases relied upon by the attorney general are distinguishable. In People v. Miller, 146 Cal.App.2d 444, 304 P.2d 208, the officers learned from a reliable informant that bookmaking was being carried on over a certain telephone number on the premises; after telephoning that number and placing a bet, they entered the premises by lawful means and saw the accused with bookmaking paraphernalia. We held in that case that probable cause for the arrest and search was shown. People v. Miller, supra, 143 Cal.App.2d 558, 299 P.2d 1010 and People v. King, 140 Cal.App.2d 1, 294 P.2d 972 were substantially similar to People v. Miller, supra, 146 Cal.App.2d 444, 304 P.2d 208. In each of these three cases the defendant was arrested when he was found inside the suspected premises and in possession of bookmaking equipment, while in the present case, Fischer was merely seen leaving the premises.

[7] The People seek to justify the search of Fischer's automobile on the ground that he freely consented to it. Fischer contends that permission to search the car was coerced by the officers. Whether consent to a search was voluntary or was the result of an assertion of authority by the arresting officers was a question of fact to be determined in the light of the circumstances. People v. Michael, 45 Cal.2d 751, 290 P.2d 852. Defendant was asked to empty his pockets and place his personal belongings on the table; permission to take the car keys and look at his car was given after Fischer

had been unlawfully arrested and the apartment subjected to an unlawful search. The court below was warranted in its implied determination that Fischer did not voluntarily consent to the search of his car and that the search was therefore unreasonable. People v. Wilson, supra, 145 Cal.App.2d 1, 301 P.2d 974.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

152 Cal.App.2d 56

Oscar K. OSBORNE, Plaintiff and Appellant,

v.

Pat SCHAEFFER, Howard Hornbuckle, ex-Sheriff, County of Santa Clara, State of California, Aetna Casualty and Surety Company, et al., Defendants and Respondents.

Civ. 17285.

District Court of Appeal, First District, Division 2, California.

June 24, 1957.

Action against sheriff and his bonding company for injuries sustained by plaintiff in county jail when he was assaulted by trusty in charge of plaintiff. The Superior Court, Santa Clara County, Byrl R. Salsman, J., sustained demurrers to the complaint and entered judgment thereon and the plaintiff appealed. The District Court of Appeal, Lernhart, J. pro tem., held that although complaint did not use the words "in the official capacity and in virtue of his office" when stating acts of sheriff, allegations that trusty was agent of sheriff, that trusty was incompetent to perform duties entrusted to him, that sheriff knew or should have known of this incompetency, and that sheriff failed to discharge trusty after knowledge of his incompetency, showed a reasonable possibility that such defect could be cured by amendment to state cause of action against sheriff for negligence in supervising county jail, and sustaining of demurrers to the complaint without leave to amend was improper.

Judgment reversed with directions.

Pleading 🔑**225(1)**

Although complaint did not use words "in the official capacity and in virtue of his office" when stating acts of sheriff, allegations that trusty who assaulted plaintiff while he was in jail was agent of sheriff, that trusty was incompetent to perform duties entrusted to him, that sheriff knew or should have known of this incompetency, and that sheriff failed to discharge trusty, showed a reasonable possibility that such defect could be cured by amendment to state cause of action against sheriff for negligence in supervising jail, and sustaining of demurrers to complaint without leave to amend was improper. West's Ann.Code Civ.Proc., §§ 339, subd. 2, 340, subd. 3; West's Ann.Gov.Code, § 26605; West's Ann.Pen.Code, § 4019.5(c).

Brown & Smith, Jacqueline Taber, Oakland, for appellant.

Spencer M. Williams, County Counsel for County of Santa Clara, Robert S. Sturges, Deputy County Counsel, San Jose, Rankin, Oneal, Luckhardt, Center & Hall, C. E. Luckhardt, San Jose, for respondent.

LERNHART, Justice pro tem.

This is an appeal from a judgment entered in the Superior Court of Santa Clara County. The complaint in this action was filed December 6, 1955. A first amended complaint was filed February 27, 1956. The defendants demurred and their demurrers were sustained without leave to amend. Judgment was entered thereon.

Appellant, Oscar K. Osborne, sustained injuries when he was assaulted in the Santa Clara County Jail on November 27, 1954. The complaint alleges that he was assaulted by Pat Shaeffer, a trusty in charge of appellant. Howard Hornbuckle was sheriff of said county at said time.

On February 24, 1955, within 90 days of the assault, appellant filed a claim for his injuries with Howard Hornbuckle. The same claim was filed with G. E. Tarleton, County Clerk of Santa Clara County. On July 5, 1955, the Board of Supervisors denied the claim.

A complaint based on this claim was filed on December 6, 1955. The defendants in that action were Pat Shaeffer; Howard Hornbuckle, ex-sheriff of the County of Santa Clara; the County of Santa Clara; The Aetna Casualty and Surety Company; Ohio Casualty Insurance Company; and several does. The complaint was amended by a first amended complaint, filed February 27, 1956. The defendants were only the former sheriff and his bonding company.

Both defendants filed a demurrer to the amended complaint on the ground that the action was barred by Section 340(3), Code of Civil Procedure.

The court sustained the demurrers without leave to amend and entered judgment thereon. This appeal is taken from that judgment.

Appellant's first contention is that under Section 339(2) of the Code of Civil Procedure the statute of limitations for the commencement of an action of this nature is two years. The section provides:

Section 339 (two years)

> "2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape."

Appellant argues that Code of Civil Procedure Section 340(3) provides a one-year statute of limitations for assault actions. He states that this is not an action for assault but one for the sheriff's own negligent conduct in failing to properly supervise and staff the office of the county jail.

Respondents concede that if Hornbuckle was acting in his official capacity and in virtue of his office in supervising the jail personnel, liability for his acts would be subject to the two year statute of limitations. They argue that sufficient facts on which to base that conclusion have not been alleged by appellant. It is nowhere stated that the acts were performed as official acts or under color of the sheriff's office. They cite Filarski v. Covey, 75 Cal.App. 353, 356–357, 242 P. 874, 875, where the court said that,

> "[While] a sheriff is liable for the acts of his deputies when acting in an official capacity, because the acts are really his acts, it is also the law that the sheriff is not liable for the acts of his deputies unless the acts being performed are in the line of his official duties and under color of office."

Respondents also cite People v. Beach, 49 Colo. 516, 113 P. 513, 37 L.R.A.,N.S., 873, and Clement v. Dunn, 114 Cal.App. 60, 299 P. 545, in support of their contention that the complaint is defective in not showing the act as an official one.

Appellant argues that these cases may be distinguished since they do not involve an act done in administering the affairs of a jail. It is contended that an act performed in the administration of a jail is official since the sheriff is acting under an obligation imposed on him by Government Code, Section 26605. That section states that "The sheriff shall take charge of and keep the county jail and the prisoners in it." It is argued that this law makes every act of a sheriff in the administration of a jail "an act in his official capacity." Appellant states that the court takes judicial notice of this law, and therefore that the code section is a part of the pleadings.

Penal Code, Section 4019.5(c) is cited by respondents in support of their contention that the acts were not official. However, as pointed out by appellant, the section prohibits a sheriff from delegating to a prisoner the right to punish another prisoner. There was no allegation that such a right was delegated.

It is appellant's contention that the sustaining of the demurrer was erroneous because the statute of limitations had not run. He also contends that the sustaining of the demurrer without leave to amend was an abuse of discretion since sufficient facts exist on which an amended complaint could be stated.

It is the court's conclusion that the first amended complaint does, however imperfectly, state facts sufficient to show that the acts complained of were official in character and in virtue of the office. The complaint alleges that the deputy sheriffs were at all times acting within the scope of their authority. It states that Pat Shaeffer was a trusty and agent of the deputy sheriff and the sheriff of the county and was at all times acting within the scope of that agency. It alleges that such agents were in charge of appellant when he was confined at the county jail. The complaint also alleges that Pat Shaeffer and Second Doe were incompetent to perform the duties entrusted to them by the deputy sheriffs and by the sheriff and that the deputy sheriff and sheriff knew or should have known in the exercise of ordinary care of this incompetency and unfitness. It then alleges that the sheriff failed to exercise due care in the selection, appointment and supervision of the deputy sheriffs and that he failed to suspend or to secure the discharge of the deputy sheriffs and the trusty after knowledge and notice of their inefficiency and incompetency.

While the complaint does not use the words "in his official capacity and in virtue of his office" when stating the acts of the sheriff, the above allegations combined with Government Code, Section 26605 provide an allegation of the official character of the acts sufficient to show a reasonable possibility that such defect could be cured by an amendment and that leave to amend should have been granted. The judgment is reversed, with directions to the trial court to grant leave to plaintiff to amend his amended complaint.

DOOLING and DRAPER, JJ., concur.

151 Cal.App.2d 759

J. B. ASKEW, as Director of Public Health of the County of San Diego, and County of San Diego, Plaintiffs and Respondents.

v.

Merle E. PARKER, The Foundation For Divine Meditation, Inc., a California corporation, The Foundation for Divine Meditation, an unincorporated association, National Institute of Christian Healing, Academy of Self Attainment, et al., Defendants and Appellants.

Civ. 5444.

District Court of Appeal, Fourth District, California.

June 18, 1957.

Hearing Denied Aug. 13, 1957.

The Director of Public Health for the County of San Diego and the County of San Diego brought action against corporation owning swimming pool, its chief executive officer, and others to enjoin them from preventing the Director of Public Health and the county from inspecting the pool pursuant to the Health and Safety Code. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment adverse to the corporation, its chief executive officer and others, and they appealed. The District Court of Appeal, Griffin, J., held that where owner of artificially constructed swimming pool sent out about 300 to 400 general written invitations by mail to all post-office box holders and R.F.D. box holders, inviting all teen-age children in the community to use the pool free of charge, and over 100 children registered to use the pool, and during summer season the pool was used by 40 to 60 of the children every day except Saturdays and Sundays, the pool was a "public swimming pool" subject to public health inspection under the Health and Safety Code.

Judgment affirmed.

1. Health ⚿**28**

A swimming pool may be a "public swimming pool" within meaning of provision of the Health and Safety Code that the State Department of Public Health has supervision of sanitation, healthfulness, and safety of "public swimming pools," though all persons do not have a right to be admitted, and though certain persons can be legally excluded from it, and whether a charge is made for admission is not necessarily a determining factor. West's Ann. Health & Safety Code, §§ 24100, 24101.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Swimming Pool".

2. Health ⚷28

A "public swimming pool" within meaning of provision of the Health and Safety Code that the State Department of Public Health has supervision of sanitation, healthfulness, and safety of "public swimming pools" is any artificially constructed pool, which is commonly and regularly used by many persons in a community pursuant to a general invitation issued to a large or indeterminate group, such as an entire community, as opposed to an invitation to a specific occasion or occasions. West's Ann. Health & Safety Code, §§ 24100, 24101.

3. Health ⚷28

It is the nature and extent of the use made of a swimming pool which determines its character and whether it should be subjected to public health inspection under the Health and Safety Code as a "public swimming pool." West's Ann.Health & Safety Code, §§ 24100, 24101.

4. Statutes ⚷219

The administrative interpretation of a statute will be accorded respect by the courts and will be followed if not clearly erroneous.

5. Health ⚷28

Where owner of artificially constructed swimming pool sent out about 300 to 400 general written invitations by mail to all post-office box holders and R.F.D. box holders, inviting all teen-age children in the community to use the pool free of charge, and over 100 children registered to use the pool, and during summer season the pool was used by 40 to 60 of the children every day except Saturdays and Sundays, the pool was a "public swimming pool" subject to public health inspection under the Health and Safety Code. West's Ann.Health & Safety Code, §§ 24100, 24101; West's Ann. Civ.Code, § 51.

◆

M. L. Campbell, National City, for appellants.

James Don Keller, Dist. Atty. and County Counsel, by Joseph B. Harvey, Deputy County Atty., San Diego, for respondents.

GRIFFIN, Justice.

This is an action by plaintiffs and respondents J. B. Askew, as Director of Public Health of the County of San Diego, and County of San Diego against defendants and appellants Merle E. Parker, The Foundation for Divine Meditation, Inc., et al., enjoining the defendants from preventing plaintiffs from inspecting the swimming pool on defendants' premises, pursuant to section 24104 of the Health and Safety Code.

Defendants defended their right to prevent the county sanitarians from such inspection on the ground that the pool is private and therefore not within the scope of the cited section. It is further claimed that the water in the pool was frequently changed; that it appeared clear and clean and that defendant Parker, before the pool was placed in use, had taken a sample of the water to a private laboratory for test purposes and it was found free from harmful bacteria.

Defendant Parker is the chief executive officer of the corporation named. It owns the real property upon which the swimming pool was constructed. It was 50x75 feet in dimension and built during the 1954 summer season. On June 11, 1955, defendants sent out about 300 to 400 general written invitations, by mail, to all post-office box holders and R.F.D. box holders, through the U. S. Post Office at Valley Center, to all the teen-age children in that community, to use the pool free of charge. Over 100 of these children registered to use the pool. During the summer season of 1955 it was used by 40 to 60 of these children every day except

Saturdays and Sundays. The pool was fenced and no persons were admitted except those who could qualify under the general invitations sent out. Two life guards or instructors were employed and paid by the church. On June 16, 1955, two sanitarians of plaintiffs attempted to obtain information concerning the nature of the swimming pool operation. Defendants refused to cooperate. A notice was posted on the property by defendants reciting:

> "I personally, and the organization I head, refuse to recognize any so-called 'health department' which does not have upon its board representatives of ALL of the licensed healing arts * * * viz: Chiropractors, Naturopaths, Osteopaths, and Christian Science Practitioners, as well as the M.D.'s whose aim it is to 'outlaw' all branches of healing not dealing in drugs." Such representatives were directed to remain away until some court directed such an entry.

On September 1, 1956, while defendants were again operating the pool, as before, plaintiffs' agents entered the premises and asked permission of defendants to take a sample of the swimming pool water to make a bacterial analysis. The request was refused, although the pool was then being used pursuant to the public invitation above mentioned. After a hearing the court found that under the conditions existing the defendants were operating a public swimming pool within the meaning of the Health and Safety Code, and granted the injunction for which plaintiffs prayed.

The principal question is the sufficiency of the evidence to support this finding. Section 24100 of the Health and Safety Code provides that: "'Public swimming pool,' as used in this article, means any public swimming pool, bathhouse, public swimming and bathing place and all related appurtenances." Section 24101 provides that "The State Department of Public Health has supervision of sanitation, healthfulness, and safety of public swimming pools." Defendants quote Black's Law Dictionary defining "Public" as "Open to all; * * * Common to all or many; * * * open to common use." They also cite section 51 of the Civil Code. They claim that before a swimming pool can be classified as public it must be open to all, and is not a public swimming pool unless a monetary consideration is exacted; that the courts and the legislature are gradually whittling away our civil liberties, and since the legislature has not seen fit to legislate and require inspection of private swimming pools, the courts should not, through decisions, add additional burdens to such owners.

The term "public" is a term of most varied and indefinite connotation, a convertible term, and does not have a fixed or definite meaning. When the word "public" is employed with its ordinary signification it is in terms of people; but the word is used variously, and depends for its meaning on the subjects to which it is applied, and must be interpreted in each case according to use and intent. Hence, we must turn to the statute itself to determine its meaning by considering the evil the legislature intended to remedy by its enactment, by considering the interpretation it has received, and by considering other statutes similar in nature. Turning to the statute in question, it is readily apparent that we are here concerned with a public health statute enacted for the purpose of protecting the citizens of California from the dangers which may easily lurk in contaminated waters or improperly equipped and maintained swimming pools. A brief glance at the regulations of the State Department of Public Health indicates the wide variety of dangers which may be present in uninspected pools. (See regulations found in Title 17, California Administrative Code, Chapter 5, Subchapter 1, Group 6.)

[1] The evident purpose of such rules is to protect persons who are using swimming pools which are used by many persons on a reasonably constant basis. In such a situation the word "public" must be given as broad a definition as is necessary to provide the protection to the public which the

legislature sought to provide. (3 Sutherland on Statutory Construction, 3rd Ed., Sec. 7202, p. 397.) A pool may be public although all persons do not have a right to be admitted, and a pool may be public even though certain persons can be legally excluded from it. Whether a charge is made for admission is not necessarily a determining factor. The public health is not particularly affected by the transfer of money from patron to operator, but it is affected by the physical contact of many persons with a particular swimming pool unless precautions are taken. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729.

[2, 3] We conclude that a "public swimming pool", within the meaning of the statute here involved, is any artificially constructed pool which is commonly and regularly used by many persons in a community pursuant to a general invitation issued to a large or indeterminate group, such as an entire community, as opposed to an invitation to a specific occasion or occasions. It is the nature and extent of the use made of a swimming pool which determines its character and whether it should be subjected to public health inspection. People v. Whelpton, 99 Cal.App.2d 828, 831, 222 P.2d 935; City of Chicago v. McGuire, 185 Ill.App. 589.

[4] Under the California Administrative Code, supra, the Department of Public Health has assumed jurisdiction over the inspection of swimming pools in the Y.M.C.A., clubs, churches, auto courts, hotels and motels, schools and other such pools used by many persons on a regular basis, even though no separate charge is made for its use and even though certain classes of the public may be excluded. The administrative interpretation of the statute will be accorded respect by the courts and will be followed if not clearly erroneous. Bodinson Manufacturing Co. v. California Employment Commission, 17 Cal.2d 321, 325, 109 P.2d 935; County of Los Angeles v. Superior Court, 17 Cal.2d 707, 712, 112 P.2d 10.

[5] We conclude that the purposes for which this pool was being used constituted it a public swimming pool within the meaning of the code section. The findings of the court in this respect have evidentiary support.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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151 Cal.App.2d 741

Myrtle KESSINGER, Plaintiff and Appellant,

v.

ORGANIC FERTILIZERS, Inc., Leslie E. Johnson, and Neil Andrews, Defendants and Respondents.

Leslie E. JOHNSON and Organic Fertilizers, Inc., a California Corporation, Plaintiffs and Respondents,

v.

Myrtle KESSINGER (sometimes known as Myrtle M. Kessinger), Defendant and Appellant.

Civ. 22226.

District Court of Appeal, Second District, Division 1, California.

June 18, 1957.

Rehearing Denied July 16, 1957.

Hearing Denied Aug. 13, 1957.

Actions between landlord who had leased worm farm in her back yard to tenant, such tenant, its corporate assignee and others, respecting rights and obligations of the parties. From a judgment rendered by the Superior Court of Los Angeles County, Kurtz Kauffman, J., and from order denying motion for new trial, the landlord appealed. The District Court of Appeal, Fourt, J., held, inter alia, that where proposal, arrived at at corporate directors meeting, as to division of certain properties between corporation and plaintiff, one of its directors who had leased certain property to the corporation, and for cancellation of the lease, was not to become effective unless made subject of written contract attached to minutes, there was no valid adoption of the proposal and the director-landlord could have no rights thereunder where it was not so reduced to writing.

Affirmed.

1. Landlord and Tenant 🔑49(2)

In actions between landlord who leased worm farm in her back yard to tenant, such tenant, and its corporate assignee of which both landlord and tenant were directors, wherein landlord sought to recover, inter alia, liquidated damages for breach of agreement, evidence sustained trial court's finding that board of directors had not canceled the lease.

2. Corporations 🔑298(7)

Where proposal, arrived at at corporate directors meeting, as to division of certain properties between corporation and one of its directors who had leased certain property to the corporation, and for cancellation of the lease, was not to become effective unless made subject of written contract and attached to minutes, there was no valid adoption of the proposal and the director-landlord could have no rights thereunder where it was not so reduced to writing.

3. Estoppel 🔑90(1)

Landlord and Tenant 🔑161(1)

Where landlord leased land to tenants who also leased from another adjoining land, access to which could be gained only by way of road over landlord's property, and landlord acquiesced in use of such road to get to the adjoining leased premises, landlord's refusal to allow removal, over such road, of personalty which had been located on the adjoining land, when tenants were in default in payment of rent, constituted conversion, irrespective of fact that she had never granted them a formal right of way with respect to such adjoining land, and landlord, by her acquiescence, was estopped to deny that she had given such right of way.

4. Estoppel 🔑115

Where defendant raised issue which invited application of estoppel doctrine, it was not necessary that plaintiff have pleaded it to rely upon it.

5. Trial 🔑393(1)

It is duty of trial judge to see that findings are in conformity with his view of facts and law. West's Ann.Superior Court Rules, rule 19.

6. Trial 🔑393(2)

Trial court's action, after it had decided case and after clerk had mailed order reflecting court's decision to both parties, in inviting counsel for prevailing party into chambers without inviting adversary, to check memorandum sent by clerk against his own notes and to discuss the preparation of findings, was proper. West's Ann. Superior Court Rules, rule 19.

7. Appeal and Error 🔑1050(4)

In actions between landlord and tenants, wherein, when tenants' counsel exhibited to landlord's counsel a copy of demand served on landlord by tenants, another copy of which had been attached to the tenants' complaint, landlord's counsel stated that he did not know whether he had ever had the original, landlord was not prejudiced by the allowance of the copy in evidence.

8. Appeal and Error 🔑1050(4)

Where adversary's counsel stated that he did not think he had original of a letter which had been written to the adversary, he was in no position to complain of admission of copy thereof as secondary evidence as no prejudice could result to him from such admission.

◆

Anderson & Howard, by John W. Howard, Arcadia, for appellant.

Paul Barksdale d'Orr, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by Myrtle Kessinger from a judgment in two actions, in one of which she was the plaintiff and in the other of which she was a defendant, which actions were consolidated for trial.

The suit in which Myrtle Kessinger was the plaintiff and Organic Fertilizers, Inc., Leslie E. Johnson and Neil Andrews were the defendants, was filed in the Pasadena Branch of the Superior Court of Los Angeles County on August 12, 1954. The action in which Organic Fertilizers, Inc., hereinafter referred to as the "Corporation," and Leslie E. Johnson, hereinafter referred to as "Johnson," were the plaintiffs and Myrtle Kessinger and the Bank of America National Trust & Savings Assocation were the defendants, was filed on August 13, 1954, in the Los Angeles County Superior Court.

A resume of the facts of the case as developed by the evidence is as follows:

On August 1, 1953, and for several years theretofore, appellant had been the owner of certain property located on 8th Avenue in Arcadia, California, upon which property she had conducted a worm farm business since 1946. A month or so before August 1, 1953, Johnson entered into negotiations with appellant for a lease of the worm farm which occupied the rear portion of appellant's lot on 8th Avenue. Both parties retained the services of the attorneys who represent the appellant in this appeal, and a proposed rough draft of the lease was prepared and submitted to each of the parties. Johnson took his copy, and after some changes and modifications were made and it was rewritten, the lease was submitted by him to appellant on August 1, 1953. On that date the lease was executed as rewritten.

The lease was for a period or term of ten years and provided, among other things, for a payment of $500 per month as rental to the appellant, the expenditure of monies by the lessee for some permanent improvements on the property and for the accumulation of a fund from the sale of merchandise by the lessee, to be deposited in a bank in Arcadia, with the joint signatures of Johnson and appellant required for the withdrawal of said monies therefrom. All of the accumulations in such fund, above the expenditures for permanent improvements and the payment of certain operating costs, were subject, up to the amount of $12,000 to the following provision:

"In the event that the lessee shall breach this agreement, or shall terminate this lease for any reason other than the act or fault of the lessor, then the entire fund in said joint special account as of the date of said breach or termination prior to the end of the ten-year period shall become the property of the lessor, and shall constitute liquidated damages as between the parties for said breach of the covenants, or for the termination of said lease."

The lease also provided that the lessee was to maintain an inventory of worms in beds at a level not lower than the inventory attached to the lease, and upon termination, to return the worm beds to their original condition, together with all equipment and structures, plus any others erected upon the property during the lease term.

The area leased was in fact but a large lot lying back of appellant's residence, and was reached by a driveway running into the property from 8th Avenue, which bounded the front of appellant's property.

At about the same time the lease was executed, appellant sold to Johnson approximately 3,500 cubic feet of worm manure in beds and piled on appellant's lot, at the agreed value of $1 per cubic foot.

Contiguous to the appellant's property on the north was a lot owned by a Mrs. Null. The two lots were separated by an imaginary line, and the Null lot was accessible to vehicles only by the driveway on the appellant's lot. There was no practical ingress or egress to the Null lot by vehicles except by the driveway on the appellant's property, as indicated.

The Corporation was organized and on September 3, 1953, the lease and other properties sold by appellant to Johnson were transferred to the Corporation with appellant's written recognition and consent. Johnson was not released from his obligations under the terms of the assignment. The Corporation then operated the business of the worm farm, raising and marketing the worms for soil aeration and fish bait, and processing and selling the worm manure under the name "Onagra" as high-grade, organic plant food.

Johnson became the secretary, general manager, and a director of the Corporation; appellant became a shareholder and one of its directors, as did Neil Andrews and two other men, Victor Covell and Rex King-Morgan. Appellant was employed by the Corporation to superintend the worm culture for eight and one-half months between August 1, 1953 and August 1, 1954, at a rate of from $300 to $350 per month.

On April 16, 1954, the Corporation entered into a written lease of the Null property and installed worm beds on it, as the worm beds on the appellant's property had grown prolific, and thereafter the Corporation farmed the two lots as a joint operation, crossing back and forth across the line between the two lots and using the driveway on appellant's lot in producing and harvesting the worms and worm manure on both lots.

During approximately the one year of the Corporation's operation of the business it paid appellant $500 per month rental, expended about $1,956 in improvements on her property and had accumulated on August 8, 1954, in the "liquidated damages" account in the Bank of America, kept separate from the other corporate funds, the net amount of $4,439.30.

In July of 1954, difficulties apparently arose in the Corporation and negotiations were opened between the representatives of the corporation and appellant to the end that there might be a settlement of their troubles. On July 31, 1954, in the evening, there was an informal meeting of some of the directors. Appellant and Johnson were each present and acting as directors, and each participated in the discussions and negotiations. There was a conflict in the testimony as to which directors were actually present at the meeting. There was a dispute as to whether the meeting was regularly noticed and called, or whether it was a consent meeting. There were no formal signed minutes of the session. The secretary did, however, make a memorandum of what took place at the meeting, shortly after the session adjourned, wherein he set forth the substance of the proposals which were to be laid before another meeting of the board of directors, with a contract of settlement and cancellation which might be attached and submitted for its approval. There was much discussion at the meeting of the directors of the settlement terms and conditions. Appellant stated that she "would like to have the Null farm, which is adjoining mine". A proposal was made by the directors to the appellant as to certain divisions of the properties in question, cancellation of the lease and continued use of the premises by the Corporation until October 1, 1954. The proposal was not to become effective unless made the subject of a written contract to be attached to the minutes of the Board of Directors and mutually executed by the parties. The appellant stated to the meeting that she could go no further until she had discussed the matter with her attorney and a written agreement drawn; that "she would not agree to anything until a contract was drawn up and approved by her attorney Mr. Howard." No mention of Johnson, the original lessee, was made in the proposal of July 31, 1954. The attorney for the Corporation prepared a draft of a contract on August 1, 1954, which named all of the parties to the lease, and contained the several provisions and agreements set out in the proposal. Andrews, the principal stockholder of the Corporation, signed this document. The draft of the contract was submitted to the attorneys for the appellant. The written draft of the proposed contract provided, among other things, that the lease was terminated as of midnight, July 31, 1954. There were no provisions, however, for an escrow nor for the publication of any notice under the Bulk Sales Law and no provisions for a cancellation of the lease which could be recorded to offset the recordation of the original lease. Upon ascertaining the omissions or deficiencies in the draft as submitted, appellant's attorneys prepared additions to it to correct the matters mentioned, and on August 4, 1954, appellant submitted the written draft with the additions prepared by her attorneys to the Corporation which, on August 5, 1954, rejected the counter-proposal and advised appellant that her requests were unacceptable and that the lessees would continue on under the lease.

Johnson had been on the worm farm, engaged in the business of the Corporation, each working day of August, and was so engaged on August 6, 1954, when appellant served Johnson and the Corporation a three-day "Notice to Pay Rent or Quit" and surrender the premises. The notice so served also contained the following statement: "The undersigned as a landlord, hereby declares a forfeiture of the lease and agreement under which you occupy the hereinbelow described property as of the 1st day of August, 1954". The notice further recited that the rent due on August 1, 1954, in the sum of $500.00 had not been paid and was due and owing.

The lease itself contained the following provision:

"11. In the event that Lessee shall breach any of the terms, covenants and conditions herein contained, or in the event the Lessee shall fail to perform the terms, covenants and conditions herein required, and said breach or failure shall constitute cause for forfeiture of this lease, then in that event Lessor shall notify Lessee in writing of said breach or failure by posting notice of breach or failure in the United States mail, addressed to Lessee at 1210 8th Avenue, Arcadia, California, and the Lessee shall then have thirty (30) days after date of said posting in which to comply with the terms, covenants and conditions herein set forth."

The lessees were never notified of any claimed breach and no notice pursuant to the provisions of the lease was ever served upon them, nor was the Corporation in default on August 6, 1954, excepting as to the payment of the rent payable on August 1, 1954.

The lessees elected, under the three-day notice of August 6, 1954, to quit and surrender up the premises to the appellant and on August 7th, started to remove the Corporation property from the worm farm, leaving on the appellant's property a list or inventory of what was taken. On August 8, 1954, Johnson, acting for himself as one of the lessees and as an officer of the Corporation, appeared at the property with trucks and loaders intending to take off the piled fertilizer, equipment, excess inventory of worms and other personal property of the Corporation which was located on the appellant's lot and on the Null lot. Appellant placed a "No Trespassing" sign on the entrance to the worm farm, which was removed by Johnson, who began loading. Appellant, after telephoning her attorney and securing his immediate personal appearance and collaboration, thereupon blocked the only ingress-egress to the two lots and drove the lessees and their haulers from the premises and out of the driveway, telling them to remove nothing and threatening to call the officers of the law unless they left immediately. On August 9, 1954, the lessees served upon appellant a notice and demand in writing to the effect that they be permitted and allowed to remove their personal property from the lots, also demanding that she sign a check, which with Johnson's signature would enable the Corporation to withdraw its money on deposit at the Bank of America, and held as "liquidated damages". The appellant ignored the lessees' notice and demand and relinquished nothing, neither the money nor the property of the Corporation.

On August 12, and 13, 1954, when the complaints were filed, $4,439.30 was on deposit in the joint signature account and $241.90 was later added to the account by appellant.

Appellant, in her action, sought damages for breach of lease, rental, forfeiture of lease and an order transferring to her the funds in the joint account in the Bank of

America. The Corporation, in its action, sought the value of the properties claimed by it and located on both lots, asserting that the appellant's actions on August 8, 1954, amounted to a conversion of their properties. They also sought to quiet title in the Corporation to the fund in the Bank of America.

Both actions were tried as a single case and the cause was submitted, and on February 24, 1956, a memorandum prepared by the clerk, which indicated on its face that it was not a minute order, nor a copy of a minute order, but was a memorandum reflecting the order of the court as of that date, was mailed to counsel for both parties. The memorandum set forth that judgment would be for the Corporation and for Johnson and Andrews, and against Myrtle Kessinger, and fixed the damages in certain amounts and provided for the return of the money deposited in the special bank account. It was further set forth that the court found that the Corporation and Kessinger had negotiated for a cancellation of the lease, but a final agreement was never reached, and that when Kessinger served her notice to quit, the Corporation had the right to quit the premises and remove all of its assets, and the refusal of Kessinger to permit the Corporation so to do constituted a conversion. The attorney for the Corporation was directed to prepare the findings and judgment to cover all of the issues in the consolidated trial. Upon receipt of the memorandum from the clerk, the attorney for the Corporation called the judge on the telephone regarding the findings to be drawn, and was thereupon invited by the judge to his chambers. In chambers, the judge checked the memorandum sent out by the clerk against his own notes kept at the time of the trial and thereupon instructed counsel on the items to be carried into the findings. The judge advised counsel that he had overlooked some matters which should be included in the findings of fact and the judgment. There was no discussion or talk of the merits of the case. Counsel for the Corporation immediately advised the attorney for appellant, by letter, of the substance of the meeting between the judge and himself. At the motion for a new trial, the question of the propriety of the meeting between counsel and the judge was urged by the attorney for appellant. At that time the judge stated:

"The Court: Ordinarily, I wouldn't answer this ridiculous statement of counsel that there was any misconduct, but I think I should answer it in this respect: Of course, how is counsel going to know how to prepare the findings unless the court tells counsel how to prepare the findings? The decision had already been made. If this had been before the case was decided, why, of course, it is a serious matter, and I never talk to counsel before a decision is made unless the other counsel is present. But the decision was made, and Mr. d'Orr called me up about the findings, and I told him to come up and I would tell him what to put in the findings, and after I went over my notes which I have here, there were one or two items which were not covered in the minute order, and I told him what to put in as to those items. That is all there is to it. The findings are the Court's findings, and they are not the findings of the attorney, but the Court's findings. It is the duty of the Court to prepare findings. That is it. That is what happened. If the findings are wrong in any respect why, of course, the Court can at this time correct them, because you are making a motion for a new trial, and if the Court has made any mistake in any respect, why, I would be happy to correct it."

The judgment, as signed, provided that the appellant take nothing; that the lease was terminated on August 8, 1954; it awarded the Corporation $5,680.00 as damages for the conversion by appellant of its worm farm property, less $117.00 rental due her for the first seven days of August, 1954, plus interest on the net sum at the legal rate; quieted title in the Corporation to the fund in the bank amounting to $4,691.20, and held appellant to have no interest therein; awarded the Corporation interest on the funds withheld; ordered the Bank of America to deliver the fund to the Corporation; enjoined appellant from interfering with such delivery and awarded costs to the Corporation, Johnson, Andrews and the Bank.

Appellant contends that (1) the lease was cancelled by the Board of Directors of the Corporation on July 31, 1954; (2) there was a waiver of the defense of lack of authority of the Corporation to enter into the contract by the failure to plead such defense; (3) the Corporation is estopped to raise the defense of lack of authority to enter into the contract; (4) there was no conversion of the Corporation's property on the Null property; (5) there was a violation of the rules of professional conduct; (6) secondary evidence of writings was introduced without notice to produce the original, and (7) it was error to permit the witness Johnson to use notes of a memorandum and then to restrict appellant's right to cross-examine the witness upon the memorandum.

[1, 2] As to the first contention, suffice it to say that the testimony was conflicting, and the judge saw fit to believe those witnesses whose testimony indicated that there was no agreement concluded at the meeting of July 31, 1954, and by the same token, there was no cancellation or surrender of the lease at that meeting, and no contract thereafter was approved or executed by the Corporation. Finding, as the court did, upon substantial evidence, the rule of law is well set forth in Spinney v. Downing, 108 Cal. 666, at pages 668–669, 41 P. 797, at page 798, where the court said: "It is a general rule, to which this case presents no exceptions, that, when it is a part of the understanding between the parties that the terms of their compact are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other. Ambler v. Whipple, 20 Wall. 546, [22 L.Ed. 403]; Fuller v. Reed, 38 Cal. 99; Morrill v. Tehama etc. Co., 10 Nev. 125. The case last cited is much in point, the facts not being essentially dissimilar to those of the case at bar. In that case the parties agreed upon the terms of a contract for the sale and delivery of a certain quantity of wood by plaintiff to defendant, but it was understood that the contract should be put in writing and signed by both parties. It was accordingly reduced to writing, and was duly executed by defendant, but was not signed by plaintiff, nor did the latter give a bond as was required for the faithful performance of the contract. He did, however, commence at once to deliver the wood, and continued to deliver it until stopped by the defendant. He brought an action for the breach of the contract, and in passing upon the case on appeal the supreme court of Nevada say: 'From the facts thus found, we think, independent of the giving of the bond, that the contract declared on was never completed. It is true the parties verbally agreed to the terms of the contract as stated in the complaint, but it was to be reduced to writing and signed by both parties. And it was signed by McDonald as the agent for defendant, but the plaintiff, for what reason does not appear, failed to sign it at the same time. True, four days afterward he went to Waters' office for the purpose of signing it, and, failing to find it, proceeded to act under its terms. But the contract thus prepared was to be signed by both parties; it contained mutual obligations, each of which being the consideration of the other, * * * and, as the plaintiff failed thus to sign it, no reciprocal assent thereto can be implied. There is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense. 1 Pars.Cont. 475. It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto, in any other or different mode, will not be pre-

sumed. Notwithstanding the instrument declared upon was fully executed on the part of defendant, the contract was still incomplete and neither party bound thereby.'" See, also, Sesma v. Ellis, 38 Cal. App.2d 139, 100 P.2d 816; Sam Aftergut Co. v. Mulvihill, 25 Cal.App. 784, 145 P. 728; Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832; Mercantile Trust Co. v. Sunset Road Oil Company, 176 Cal. 461, 168 P. 1037; Dexter v. Ankiewicz, 26 Cal.App.2d 326, 79 P.2d 400; Durst v. Jolly, 35 Cal.App. 184, 169 P. 449.

As to the second and third contentions, the trial court held, and we believe properly so, that there was no contract made between the directors and the appellant on July 31, 1954, and consequently, there is no merit whatsoever to such contentions.

[3] The fourth contention of appellant, reduced to very simple terms, is that since she had not specifically granted to the lessees in the lease of August 1, 1953, a right-of-way or easement to use the driveway for the purposes of ingress and egress from the Null lot, she could not have converted the lessees' property on the Null lot, or, in other words as counsel for the respondents has put it:

"Irrespective of the *facts*, since the lessees had no written road-permit from me in hand, valid on August 8, 1954, to drive back to the Null lot over my driveway (although if they drove back to the Kessinger lot, the truck would also be at the Null lot), my expulsion of the lessees from the driveway amounted to a conversion of the property on the Kessinger lot only."

The court, in Zaslow v. Kroenert, 29 Cal.2d 541, at pages 549–550, 176 P.2d 1, 6, said, in determining what was necessary to establish a conversion:

"Stated generally, 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' [Citing cases.] The liability of one in possession of real property for the conversion of personal property which he finds upon it, depends, in most cases, upon a determination of whether the conduct of the defendant indicates an assumption of control or ownership over the goods. It is clear that, under some circumstances, refusal of one in possession of real property to permit, upon demand, the owner of chattels which were left there to remove his goods, constitutes conversion. [Citing cases.] * **

"* * * To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property."

The trial judge believed from the evidence that appellant was not just intermeddling or interfering in an unsubstantial way with the Corporation's property, but rather she was exercising dominion over, and assumed control of the property in question, and certainly prevented the true owners from taking possession of the same. In the case of Gruber v. Pacific States Sav. & Loan Co., 13 Cal.2d 144 at pages 147–149, 88 P.2d 137, at pages 139, 140, the court said: "Plaintiff was not required to resort to physical violence to remove his property over the defendant's opposition thereto. In a somewhat analogous situation, it was held in Donoghue v. Kremmel, 121 Cal.App. 208, 8 P.2d 918, 919 that where a lessor told the lessee to keep out of the demised premises and refused him permission to enter, a constructive eviction resulted and that there was no real difference between physically removing the lessee and preventing his entry. It was further declared that the lessee was 'not obliged, nor is he encouraged by law, to wage a deadly conflict to obtain entry to the demised premises'. The defendant's refusal in the instant case to permit the plaintiff to have access to his equipment or to remove the same while an arrearage in rent existed constituted an improper and wrongful exercise of dominion over the plaintiff's property in violation of his rights as owner and, as shall presently be shown, amounted to a conversion rendering defendant liable for whatever damage resulted therefrom—here, the market value of such equipment all of which, as indicated, was ultimately lost to the plaintiff.

"As stated, the fact that plaintiff was in arrears in his payment of the rent of the demised real property did not warrant defendant's exercise of dominion over plaintiff's personal property located on the premises. Adequate remedies exist to protect a lessor in such a situation. But, it is definitely settled in this state that a landlord has no lien on the tenant's property for unpaid rent. [Citing cases.] It is not claimed that any was here reserved. Nor do we think that a manual taking or destruction is essential to a conversion. In 2 Tiffany, Landlord and Tenant, page 1673, the following appears: 'The landlord is, it has been held, guilty of conversion if he refuses to allow the tenant to remove his goods during the tenancy, or at a subsequent time when the latter has a legal right to do so. * * *'

"It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. [Citing cases.] In the case last above cited [Hull v. Laugharn, 3 Cal.App.2d 310, 315, 39 P.2d 478], the rule is thus stated: 'Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. * * * Dominion is defined in law lexicons as "perfect or complete property or ownership in a thing" (Bouvier's Law Dict.); "complete ownership; absolute property" (Anderson's Dict. of Law); and "ownership or right to property" (Black's Law Dict.)' The acts of the defendant's watchman and assistant cashier, in the immediate proximity of the equipment and elsewhere, in refusing to permit plaintiff to remove any portion thereof in furtherance of the written threat to sell all of the equipment, obviously precluded the plaintiff from using and enjoying his 'complete property or ownership' of such equipment and definitely constituted an 'interference' with plaintiff's 'dominion over the property' within the meaning of the authorities.

"As stated above, it is not necessary that there be an actual manual taking of the property. In McCaffey Canning Co. v. Bank of America, 109 Cal.App. 415, 424, 294 P. 45, 48 it is stated, among other things, that 'Any wrongful assumption of authority over chattels, inconsistent with another's right of possession or subversive of his vested interest therein, amounts to conversion. * * * An unjustified claim of title may amount to conversion * * *.'

"In Dodge v. Meyer, 61 Cal. 405, 420, the rule is stated in the following form: '"The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, this is in law a conversion." * * * It is contended that Meyer never had possession of the wheat, never handled it, and therefore did not convert it. Some of the cases just above cited expressly held that this is not necessary. To these we add Connah v. Hale, 23 Wend., N.Y., 462, where it was held that to constitute a tortious taking it was not necessary that there should be an actual manucaption of the goods. A mere claim of dominion, an intention intimated to interfere with goods under a pretense of right or authority, amounts to a constructive trespass, and no demand is necessary before bringing an action of trover.'

"Lowe v. Ozmun, 3 Cal.App. 387, 394, 86 P. 729, quotes the foregoing as the rule in this state. We repeat that the acts and conduct of the defendant, operating through its agents, improperly and wrongfully interfered with plaintiff's absolute ownership of and dominion over his equipment and constituted a conversion thereof which ultimately reacted to plaintiff's financial detriment."

In the case of Pearl v. Figoni, 49 Cal. App.2d 662, 122 P.2d 385, Pearl had rented a house from Figoni and was two months in default in the rent, when Mrs. Pearl, with a moving van, went to the house to remove their furnishings. They were met by Figoni, who repeatedly made such statements as: "'No, don't move anything because you still owe me rent'; 'You cannot do it'; 'They owe me the money and you cannot touch anything'; 'You cannot move'; 'No, you can not take a thing'; 'No, don't take a thing'; 'Not one stick of furniture goes out of here, and if it does, I call the law.'"

Much of the language used in the Pearl case is similar in nature to the language of appellant on August 8, 1954, when she directed the respondents to leave the property. The court in the Pearl case held that the matter was controlled by the Gruber case, supra, and affirmed the judgment for the plaintiffs. See, also, Mears v. Crocker First Nat. Bank, 84 Cal.App.2d 637, 191 P.2d 501; Edwards v. Jenkins, 214 Cal. 713, 7 P.2d 702; Wolfe v. Willard H. George, Inc., 110 Cal.App. 532, 294 P. 436; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283; 148 A.L.R. 650.

Under the circumstances of this particular case, we believe the fact that some of the Corporation's property was on the Null lot, in which the appellant had no legal interest, does not necessarily preclude her from being guilty of conversion of the Corporation's property on that lot. She not only exercised and assumed dominion over the property of the Corporation on the Null lot, but she held it, and at the time of the trial, still held it. The Corporation had the lot leased from the Nulls and the personal property thereon belonged to it. The appellant had no right of dominion over the Null lot, nor anything on it. If all of the other requirements of a conversion are present, it is immaterial that the property in question at the time of the conversion may be in the actual possession of a third party. Brinkley-Douglas F. Co. v. Silman, 33 Cal.App. 643, 166 P. 371.

[4] Furthermore, the appellant in this case had, for months, acquiesced and participated in the lessees' use of the driveway to farm both lots. She participated in the farming activities actively, and knew that the Null lot was farmed from the driveway on her property. She knew the value of the Null farm, and even mentioned at the director's meeting that she would like to have it for herself. The very notice which she gave to the Corporation to quit provided, in substance, that the Corporation would have three days within which to pay or quit, and apparently, had the Corporation not been stopped by her, the property of the Corporation would have been removed from both lots within the three-day period. The appellant raised the issue which invited the application of the doctrine of estoppel, and under such circumstances it is not necessary that the plaintiff plead estoppel. Bank of America N. T. & S. A. v. National Funding Corp., 45 Cal. App.2d 320, 332, 114 P.2d 49; Corporation of American v. Harris, 5 Cal.App.2d 452, 43 P.2d 307.

Coming to the contention that there was a breach of ethics by counsel for the respondent and the trial judge, it would be a strange situation, indeed, if a trial judge, after deciding a case on the merits, were to be precluded from directing what the findings should contain. Rule 19 of the Rules for Superior Courts provides, in part, as follows: "When written findings of fact and conclusions of law are required, counsel for the prevailing party shall, within ten (10) days after announcement of decision, unless otherwise ordered, prepare, serve and submit to the court proposed written findings of fact and conclusions of law together with the proposed judgment or decree."

[5, 6] It is the duty of the trial judge to see to it that the findings are in conformity with his views of the facts and the law in the case. The appellate courts have repeatedly held that the trial judge may cause

the findings to be changed, revised or rewritten, and he may discard everything by way of proposed findings presented to him by counsel and draw his own. Certainly, if he can as indicated direct in the first instance what the findings shall contain, we see nothing unethical or wrong in the judge's advising counsel what to put in the findings, as was done in this instance.

[7] The next contention is to the effect that there was secondary evidence of writings introduced without any notice to produce. The first of such instances which deserves any consideration at all involved the notice and demand of the lessees served upon appellant on August 9, 1954, after the Corporation had been excluded from the properties the day before, wherein the Corporation demanded the right to remove its property from the lots. Upon there having been exhibited to him the copy of the notice, counsel for the appellant hesitated as to whether he had the original thereof, and pretended apparently that he did not "even recognize the document". After considerable evasiveness and failing to give a straight-forward yes or no answer as to whether he had the original of the notice, he said, "I don't know that I ever had the original." The court then said, "I will take your answer to mean that you don't have the original." Counsel for appellant replied, "I will make the statement that I don't know that I ever had the original of this document." The court then observed that the lessees had alleged in their complaint, and the lessor had admitted in her answer, that said Notice and Demand of August 9, 1954, was served upon her, and ruled that such facts, "together with the evidence introduced so far, * * * lays a sufficient foundation for the introduction of this document."

A copy of the notice was attached to the complaint and surely, counsel could not contend that he was taken by surprise or that any prejudicial error resulted from the introduction of the copy of such notice.

[8] With reference to a copy of a letter which had been written, counsel for appellant was asked if he had the original, to which he replied, "I don't think so." The court permitted the copy of the letter in question to be introduced. The correct rule is stated in Silveyra v. Harper, 82 Cal.App.2d 761, at page 768, 187 P.2d 83, at page 87, where the court said:

> "When respondent's counsel, during the trial demanded the production of a document, appellant's counsel did not complain that he needed further time to secure the document, or that he had been taken by surprise and damaged by this late request, but took the position that 'there never was any such document' and 'there is no such document.' In other words, appellant's position was that no such document had ever been executed. How appellant could have been prejudiced by not being given reasonable notice to produce a document appellant claimed did not exist does not appear. Obviously, no prejudice could have resulted and it was not eror to admit secondary evidence of the contents of the contract. See, generally, IV Wigmore on Evidence, 3rd ed., § 1208, p. 375; Jones v. Jones, 38 Cal. 584; Burke v. Table Mountain Water Co., 12 Cal. 403."

The other instance of a copy being introduced is so trifling as to merit no consideration here.

Coming to the last contention that the witness used a memorandum to testify from and that appellant was not then permitted to cross-examine the witness on such memorandum, the record of the case does not bear out appellant's assertion. The witness Johnson had before him a "work-sheet or rough inventory" and also a "summary" thereof, both of which he had made. Counsel for the appellant was shown a copy of the "work-sheet or rough inventory" and was offered a copy of the "summary". Johnson testified and used the work-sheet, but not the summary, when he testified, and when respondents' counsel offered the summary in evidence, it was refused admission upon objection from the appellant. The court ruled, at the request of the attorney for the appellant, that it might be marked for identification; however, the clerk did not physically mark it at the time. When appellant's counsel started his cross-examination of Johnson, he inquired as to whether the summary had been "turned in to the Court", and received a negative answer, the court saying further that it was not in evidence and there was no reason to admit it for identification. Counsel then proceeded into a long and searching cross-examination, and during such examination never once indicated that he was handicapped in any way because of the court's ruling.

As to the fund for "liquidated damages" in the bank account, the Corporation had judgment quieting its title to the fund accumulated. That feature of the case is controlled by such authorities as section 1670, Civil Code, A–1 Garage v. Lange Investment Co., 6 Cal.App.2d 593, 44 P.2d 681 section 1671, Civil Code and Sprague v. Fauver, 71 Cal.App.2d 333, 162 P.2d 865.

We find no prejudicial error in any of the contentions of appellant.

The judgment is affirmed.

WHITE, P. J. and DORAN, J., concur.

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152 Cal.App.2d 93

Ralph HAGIN, Plaintiff and Appellant,

v.

PACIFIC GAS and ELECTRIC COMPANY, Defendant and Respondent.

Civ. 17264.

District Court of Appeal, First District, Division 1, California.

As Modified June 25, 1957.

Action for recovery on a claim for unpaid wages allegedly due plaintiff by defendant, together with statutory penalties for willful failure to pay said wages at time of plaintiff's discharge. The Superior Court, Alameda County, James R. Agee, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Bray, J., held that where plaintiff's right to unpaid expenses depended entirely upon proper interpretation of collective bargaining agreement entered into between union of which plaintiff was a member, and defendant, and portion of such agreement dealing with expenses did not appear to state when they were payable, but the agreement provided that grievances involving interpretation of terms should be determined by grievance procedure, plaintiff, before bringing suit, was required to exhaust administrative remedy provided by the contract, and until he did so, he could not maintain his action.

Judgment affirmed.

1. Labor Relations 🔑416

In cases involving collective bargaining agreements, when it is provided that a dispute may be referred to arbitration, either party has an option to arbitrate if he so desires, but should he desire to litigate, he must first submit to arbitration and exhaust that remedy.

2. Labor Relations 🔑1473, 1474

Where plaintiff's right to unpaid expenses depended entirely upon proper interpretation of collective bargaining agreement entered into between union of which plaintiff was a member, and defendant, and portion of such agreement dealing with expenses did not appear to state when they were payable, but the agreement provided that grievances involving interpretation of terms should be determined by grievance procedure, plaintiff, before bringing suit, was required to exhaust administrative remedy provided by the contract, and until he did so, he could not maintain his action for unpaid wages and statutory penalties for willful failure to pay said wages at time of his discharge. West's Ann.Labor Code, §§ 201, 203.

3. Judgment ⚷181(2)

Test of power to grant a summary judgment is whether affidavits submitted in support thereof show there are no triable issues of fact presented. West's Ann.Code Civ. Proc. § 437c.

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Haley, Schenone & Tucker, Hayward, for appellant.

Richard H. Peterson, Malcolm H. Furbush, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a portion of the judgment on an order granting summary judgment in favor of defendant, presenting solely the question of whether there were issuable questions of fact in the case.

Record.

The complaint contained two counts. However, the appeal applies only to the court's action on the first count. It sought recovery on a claim for unpaid wages allegedly due plaintiff by defendant, together with statutory penalties for wilful failure to pay said wages at the time of plaintiff's discharge. It alleged plaintiff's employment by defendant; that defendant had entered into a contract with the International Brotherhood of Electrical Workers, Local No. 1245, which contract was for plaintiff's benefit as a member in good standing. Plaintiff was discharged on March 3, 1954, at which time the sum of $455.14 became payable to him for wages under the terms of the contract. Plaintiff demanded payment. Defendant paid $409.01 of which latter amount $63 was not disputed as being due plaintiff, but was withheld until March 30, 1954. Defendant refuses to pay the balance of $46.43. The court asks judgment for $46.43 plus a penalty under section 203, Labor Code, of $723.78 (30 days wages).[1] Defendant answered, admitting plaintiff's employment and discharge but denying substantially all the other allegations of the complaint. As a separate defense defendant incorporated its collective bargaining agreement with the I. B. O. E. W. local and alleged that said agreement set forth the exclusive procedure to resolve grievances and disputes between defendant and the union's members; that at the time of plaintiff's discharge defendant paid plaintiff his wages in full after deductions had been made for board and lodging furnished plaintiff by defendant, which deductions defendant claimed were proper and which plaintiff claimed under section 301.1 of said agreement were improper; that there was thereby presented a dispute involving the agreement's interpretation; that defendant filed a grievance with the union concerning plaintiff's discharge; that pursuant to the agreement the union referred the grievance to the investigating committee; that said committee reached a decision that defendant was justified under said agreement in discharging plaintiff; that under said agreement said decision is binding on defendant, the union and plaintiff; that the grievance was processed through the several steps of the grievance procedure set forth in the agreement, up to the review committee; that before that committee could consider the grievance the union withdrew it, thereby ending the grievance.

Defendant accompanied its motion for summary judgment with the affidavit of its director of industrial relations in its personnel department, in which he stated that the collective bargaining agreement upon which plaintiff based his action established a grievance procedure for determining (a) interpretation of the terms of the agreement, (b) discharge of an employee, (c) whether or not a question is a proper subject for the grievance procedure, and then detailed the procedure taken in having the grievance with plaintiff processed to the point where after the joint grievance committee referred it to the review committee it was withdrawn

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[1] That section provides that for wilful failure to pay wages due an employee on discharge, the wages of the employee shall continue as a penalty from the due date thereof until paid or until an action therefor is commenced, not to continue for more than 30 days.

"without prejudice." Plaintiff filed an affidavit giving the detail of his claim for wages. It showed that on discharge plaintiff demanded $498.37 which he claimed was due him. Defendant withheld $37.75 for room and board and only allowed $5.18 for expenses, paying defendant $383.76, leaving a balance of $114.61 claimed by plaintiff. Approximately 16 days after discharge defendant paid plaintiff $5.18 and plaintiff made several further demands for payment. Twenty-seven days after discharge defendant paid plaintiff an additional $63. Thus at the time of filing suit plaintiff had been paid all of his claims except $46.43. Admittedly this sum is for expenses which plaintiff claims he is entitled to under the collective bargaining agreement and which defendant denies he is entitled to thereunder. Plaintiff further states that he filed a claim for the amount due him with the Division of Labor Law Enforcement, which dismissed it without prejudice. The affidavit stated plaintiff had not requested the union to act and that when he found out that the union had made the withholding of his wages the subject of a grievance, he wrote the union that he would not be bound by any decision rendered. The union thereupon withdrew the grievance. Plaintiff did not deny the statements in defendant's affidavit as to the matters required by the agreement to be submitted to the grievance committee. He could not because section 102.6 of the agreement so provides.

Necessity to Submit Grievance.

[1] The rule stated in Williams v. Pacific Elec. Ry. Co., 147 Cal.App.2d 1, 304 P.2d 715, 717, seems to be well settled in California. That rule is: "It has been held in cases involving collective bargaining agreements that when it is provided that a dispute *may* be referred to arbitration, either party has an option to arbitrate if he so desires but, should he desire to litigate, he must first submit to arbitration and exhaust that remedy." See also Cone v. Union Oil Co., 129 Cal.App.2d 558, at page 562, 277 P.2d 464, at page 467, where as here the complaint and the affidavits showed "that plaintiff and the Union on her behalf have failed and neglected to pursue and exhaust the remedies given by the collective bargaining agreement, namely, the grievance and arbitration procedures provided therein, and that the Company was in no way in default or at fault in this regard." The reviewing court upheld the granting of a summary judgment against the plaintiff. The court stated, 129 Cal.App.2d at page 563, 277 P.2d at page 468: "It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies."

[2] The right to the unpaid $46.43 for expenses depends entirely upon the proper interpretation of the collective bargaining agreement. The right to a penalty under section 203 depends primarily upon the question of whether under the agreement expenses like wages are payable on discharge. Title 301 of the agreement dealing with expenses does not appear to state when they are payable. Nevertheless plaintiff is required to submit this question to the administrative procedure under the provisions of Title 102.6:

> "Grievances on the following enumerated subjects shall be determined by the grievance procedure established herein:
>
> "(a) Interpretation or application of any of the terms of this Agreement; * * *.
>
> "(c) Disputes as to whether a matter is a proper subject for the grievance procedure."

Thus it is clear that plaintiff before bringing suit was required to exhaust the administrative remedy provided by the contract. Plaintiff erroneously contends that section 102.15 of the agreement gives him the right to bring suit on a grievance without first submitting the grievance to the arbitration committee established by the agreement. This section provides: "Notwithstanding anything elsewhere contained in this Agreement, any individual employee shall have the right at any time to present grievances to Company and to have such grievances adjusted without the intervention of Union, provided that the adjustment shall not be inconsistent with the terms of this Agreement, and provided, further, that Union shall be given an opportunity to be present at such adjustment." This section is the same as the provisions found in 29 U.S.C.A. § 159(a) and was undoubtedly included in the agreement to reflect the federal provision. However, the above provisions and Hughes Tool Co. v. National Labor Relations Board, 5 Cir., 1945, 147 F.2d 69, cited by plaintiff, do not stand for the proposition that an employee may by-pass the grievance procedure, but, on the contrary, seems to indicate that an employee as an individual may prosecute his grievance through the entire *grievance procedure* without the intervention of the union. The Hughes case did not involve the question of an individual employee but rather the question of whether a union which had been certified as the exclusive bargaining agent must prosecute a grievance of an employee who is a member of another union. In Cone v. Union Oil Co., supra, after stating the general rule hereinbefore mentioned that parties to a collective bargaining agreement must exhaust their internal remedies before appealing to the courts, the court said, 129 Cal.App.2d at page 564, 277 P.2d at page 468: "This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Citation.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Citations.]"

Plaintiff further contends that the payment of the $63 to him 27 days after his discharge conclusively shows that he was not paid his wages in full when discharged, as required by section 201, Labor Code, and therefore an issue of fact has arisen as to whether the failure to pay at time of discharge was wilful in order to determine whether he is entitled in this action to the penalty provided by section 203.

[3] In his affidavit plaintiff states that this $63 was "of the expenses withheld." Its payment 27 days after discharge is no evidence that the payment was wilfully withheld. Thus, whether it was payable immediately on discharge (if it were not, sections 201 and 203 could not apply—see Sayre v. Western Bowl, 76 Cal.App.2d 793, 799, 174 P.2d 466, where it was held in effect that the provisions of section 201 did not apply to a situation where a sum was due to plaintiff as a "bonus" but under the contract of employment it was not payable immediately on his discharge) depends upon an interpretation of the contract which requires the submission of the question to the administrative procedure. The test of the power to grant a summary judgment is whether the affidavits show that there are no triable issues of fact presented. Code Civ.Proc., § 437c; Cone v. Union Oil Co., supra, 129 Cal.App 2d 558, 562, 277 P.2d 464; Gillespie v. Hagan, 94 Cal.App.2d 566, 571, 211 P.2d 9; Werner v. Sargeant, 121 Cal.App.2d 833, 837, 264 P.2d 217. Until plaintiff exhausted his administrative remedy under

the contract there could be no issues of fact triable by a court.

The judgment is affirmed.

PETERS, P. J., concurs.

FRED B. WOOD, J., deeming himself disqualified, did not participate in the decision in this case.

151 Cal.App.2d 784

Harold P. BALLF, Petitioner and Appellant,

v.

The PUBLIC WELFARE DEPARTMENT OF the CITY AND COUNTY OF SAN FRANCISCO, State of California, and Ronald H. Born, director thereof, and The Civil Service Commission of the City and County of San Francisco, State of California, and individual members thereof, Francis P. Walsh, William A. Lahanier, and Charles T. McDonough, and The Retirement Board of the City and County of San Francisco Employees' Retirement System, and Ira G. Thompson, Secretary thereof, Respondents.

No. 17310.

District Court of Appeal, First District,
Division 1, California.

June 19, 1957.

Rehearing Denied July 19, 1957.

Hearing Denied Aug. 13, 1957.

Mandamus proceeding to compel restoration of petitioner to civil service employment in the city and county of San Francisco. From a portion of a judgment of the Superior Court, City and County of San Francisco, Theresa Meikle, J., the petitioner appealed. The District Court of Appeal, Bray, J., held, inter alia, that under provision of San Francisco charter that all employees shall continue to be residents during incumbency of office or employment, where employee in public welfare department while on military leave received education leave and, while attending university, moved to another county where he became part owner of property on which he lived and he requested cancellation of his San Francisco voting registration and had no domicile or mailing address in San Francisco, such employee was properly found to be an "incumbent during incumbency of employment" and hence residential requirement had to be complied with.

Affirmed.

1. Municipal Corporations 🔑213

Under provision of San Francisco charter that all employees shall continue to be residents during incumbency of office or employment, where employee in public welfare department while on military leave received education leave and, while attending university, moved to another county where he became part owner of property on which he lived, and he requested cancellation of his San Francisco voting registration and had no domicile or mailing address in San Francisco, such employee was properly found to be an "incumbent during incumbency of employment" and hence residential requirement had to be complied with.

2. Municipal Corporations 🔑217(3)

Fact that a person is on leave from his "employment" makes him no less an employee within charter provision requiring residence as prerequisite to maintaining employment.

3. Domicile 🔑1

A residence is primarily a matter of intent.

4. Domicile 🔑1

In determining residence, courts look to a person's actions as well as to his statement of intent, and one of important acts to be considered is where he has registered to vote, and while not conclusive of question, his registration is of considerable importance.

5. Mandamus 🔑187(9)

On appeal from judgment denying writ of mandate to compel public welfare department of city and county of San Francisco to restore petitioner to prior civil service employment, the District Court of Appeal does not pass upon credibility of a witness nor upon weight of evidence, but its function is to determine whether there was substantial evidence to support finding of trial court.

6. Municipal Corporations 🔑213

Under San Francisco charter providing that all employees shall continue to be residents during incumbency of office or employment and defining "resident" as one actually maintaining an abode in San Francisco and providing certain exceptions, an employee in public welfare department who had moved to another county pursuant to leave to attend university and there became part owner of property on which he lived and who canceled his San Francisco voting registration was not precluded from being dismissed on ground that charter definition excludes any requirement that he maintain a legal residence there as distinguished from requirement that he maintain his place of abode there.

7. Municipal Corporations 🔑213

In determining whether employee in public welfare department could be dismissed under provision of San Francisco charter requiring employee to be a resident during incumbency of office or employment, employee's buying a home and registering to vote in another county where he was attending university while on educational leave are strong circumstances which the trier of fact of residence may consider as overcoming employee's claim that he did not intend to change his residence.

8. Municipal Corporations 🔑218(2)

Under San Francisco charter providing that all employees shall continue to be residents during incumbency of office or employment, and upon ceasing to be such resident shall be "removed from office or employment", quoted words could not be construed as not meaning "dismissal" but only a temporary removal until such time as employee might again become a resident, since such interpretation would leave civil service system in great confusion and no permanent appointment to fill position of "removed" employee could be made.

See publication Words and Phrases, for other judicial constructions and definitions of "Removed from Office or Employment".

◆

Harold P. Ballf, Walnut Creek, appellant, in pro. per.

Dion R. Holm, City Atty. of City and County of San Francisco, Bernard J. Ward, Deputy City Atty. of City and County of San Francisco, for respondents.

BRAY, Justice.

Petitioner appeals from the portion of the judgment of the superior court denying a writ of mandate to compel respondents to restore him to his prior civil service employment in the City and County of San Francisco.[1]

Question Presented.

Did petitioner cease to be a resident of San Francisco and thereby provide cause for his dismissal under the charter?

Facts.

Petitioner was employed in 1933 as a civil service employee of San Francisco, working until 1937 as an employee of the Public Utilities Commission. From 1937 to 1940 he worked for the Public Welfare Department, classified as General Clerk-Typist B-512. It is his later dismissal from this position which is the basis of this appeal. From 1940 to 1949 he was on military leave, being on active duty with the army. While still on such leave he applied for and received educational leave under rule 31.3 of the Civil Service Commission, for the period August 1, 1949, to July 31, 1953. November 9, 1949, the Civil Service Commission filled his vacancy by an appointment "vice Mr. Ballf." While on this leave petitioner attended the University of California at Berkeley where he received a general secondary credential for teaching and a M.A. in education. July 9, 1953, he requested an extension of his educational leave for 36 months commencing August 1, 1953, to pursue his studies to obtain a Ph.D. The Civil Service Commission did not act on the request. Instead, it directed the Director of Public Welfare to initiate dismissal proceedings under section 7 of the charter (residence requirement) if petitioner did not resign.

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[1] The judgment also decreed that he is entitled to exercise his option as a member of the Retirement System as to his rights in accord with the provisions of section 165.2 of the charter. Obviously he does not appeal from that portion of the judgment.

Pursuant to section 154 of the charter a public hearing was held before the appointing officer of the department in which petitioner was employed (the Director of Public Welfare). The charges against petitioner were:

1. Insubordinate inattention to duties because of failure to return from educational leave.

2. Loss of residence as required under section 7 of the charter of the City and County of San Francisco.

3. Violation of the terms of the educational leave.

(a) Failure to maintain a full curriculum in the University of California.

(b) Failure to present proof of attendance at the end of the various school terms in accordance with the provisions of rule 31.3, Civil Service Commission.

(c) Mr. Ballf had not used his educational leave entirely for educational purposes, but during the summer vacation had been on military duty and other things which are not for the purpose for which the educational leave was granted.

The director found all charges against petitioner true and dismissed him from service. On appeal, the Civil Service Commission sustained the director. Petitioner applied to the superior court for a writ of certiorari and an administrative writ of mandamus. After a hearing and a review of the transcript of the administrative proceedings the court denied the writs but held that petitioner had sufficient service to exercise his option to remain a member of the city and county's retirement system.

Residence.

The most serious question concerns the charge of loss of residence in San Francisco. Section 7 of the charter provides: "* * * All employees * * * shall continue to be a resident of the city and county during incumbency of office or employment, and upon ceasing to be such resident, shall be removed from office or employment; * * *. A 'resident' within the intent and purpose of this section, means one who actually lives within the city and county and maintains an abode therein, where such resident with his family, if any, customarily spends the night, provided, however, that residence outside the confines of the city and county for a period not to exceed three months in any calendar year, or absence of a resident from the city and county upon any bona fide journey, whether for business or pleasure and for whatever length of time, or absence of a resident while in the performance of any duties as an elected or appointed official or employee of the State of California or the government of the United States, shall not be within the contemplation of this section. * * *"

[1, 2] While attending the university petitioner moved from San Francisco to Walnut Creek, Contra Costa County. There he became part owner of the property on which he lived. In April, 1950, he requested cancellation of his San Francisco voting registration and registered to vote in Contra Costa County. Petitioner testified that although he still considered San Francisco his residence he had no domicile nor mailing address in San Francisco.

The director found that petitioner was an "incumbent during incumbency of employment." Obviously "incumbency of office" pertains to an office or benefice. See Leymel v. Johnson, 1930, 105 Cal.App. 694, 288 P. 858, and Curtin v. State of California, 61 Cal.App. 377, 214 P. 1030. The latter case quotes from a statement by Chief Justice Marshall: "Although an office is an employment, it does not follow that every employment is an office." 61 Cal.App. at page 386, 214 P. at page 1033. Petitioner's position as general clerk-typist was not an "office" but an "employment." Actually it makes no difference whether petitioner was in the incumbency of employment or as a more logical construction requires, was in "employment." Either way he was required to remain a resident of San Francisco. The fact that a person is on leave from his "employment" makes him no less an employee. As a matter of fact, petitioner claims to be an employee. He has to be in order to assert the rights claimed by him. Petitioner's right to educational leave is dependent upon his being an employee. Rule 31.3 of the Civil Service Commission provides that educational leave may be granted to a veteran "who holds permanent civil service status as an officer or *employee* * * *." (Emphasis added.) That petitioner was holding his "employment" is well illustrated by the fact that any time he desired to terminate his leave he could have returned to his position as a matter of right and the person holding it "vice Mr. Ballf" would have had to give it up. For all purposes he was an employee of the department except that his leave temporarily excused him from performing his actual duties. See Thompson v. Young, D.C., 63 F.Supp. 890, 891 (D.C. 1945). We can see no construction of the section other than the one given it by the director, the Civil Service Commission, and the superior court, namely, that even though on leave, the residential requirement must be complied with.

[3–5] Truly, as petitioner says, residence is primarily a matter of intent. He claims he never intended to cease to be a resident of San Francisco. In determining residence, however, the courts look to a person's actions as well as to his statement of intent. One of the important acts to be considered is where he has registered to vote. While not conclusive of the question, his registration is of considerable importance. See Gallagher v. United States, D.C., 66 F.Supp. 743, 744, holding that "voting" is important evidence on the issue of "domicile" but not necessarily decisive. In this type of proceeding we do not pass upon the credibility of a witness nor upon the weight of the evidence. Our function is to determine whether there was substantial evidence to support the finding of the trial court.[2] Petitioner's change of registration and his lack of a domicile or mailing address in San Francisco constitute substantial support for the court's finding and that of the director that petitioner is not and did not continue to be a resident of San Francisco within the meaning of section 7.

[6, 7] For the same reason there is substantial support for the implied finding that petitioner's change of residence does not come within the exceptions provided by the section. Certainly, absence from the city for the term of his educational leave is excused, but nevertheless the employee must maintain himself as a "resident" there.[3] Petitioner contends that the defini-

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[2] For the scope of review of both the superior court and this court in this type of case, see La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Corcoran v. S. F., etc., Retirement System, 114 Cal.App.2d 738, 251 P.2d 59; 3 Witkin, California Procedure, 2489–2490.

[3] Although there is no direct provision on the subject in the charter, excuse from maintaining his place of abode there necessarily follows from the authorization to grant an employee educational leave. This is well shown by the fact that were the holder of the leave to attend an educational institution in the East or South it would be physically impossible for him to return to San Francisco each night.

tion of "resident" as given in section 7 excludes any requirement that he maintain a legal residence there as distinguished from the requirement that he maintain his place of abode there, and that as a result of his leave excusing him from the latter, he cannot be dismissed from his employment. However, taking section 7 as a whole it is obvious that the definition of "resident" there given was not intended to be limited by that definition. In addition to merely maintaining his place of abode in San Francisco the employee is required to maintain his residence there, although there is no requirement that in addition to being a resident he must also be a voter. The reference to abode amplifies the requirement of residence. It undoubtedly was inserted to prevent the following situation which could well occur without it. An employee maintaining his legal residence in the city and perhaps, even being registered to vote there, nevertheless could with his family live the greater portion of the year in some nearby locality. Section 7, therefore, requires that in addition to being a resident of the city he must with his family live there at all times other than as excepted by the section.[4] We see no escape from holding that section 7 while impliedly permitting a change of place of abode by an employee on educational leave does not permit a change of residence. We do not hold that buying a home and registering to vote in another county as a matter of law compels the conclusion that the employee has changed his residence where he claims that he had no intention of so doing. However, they are strong circumstances which the trier of the fact of residence (here, the director in the first instance, and the superior court on review) may consider (and here did) as overcoming the employee's claim that he did not intend to change his residence.[5] See Warren v. Warren, 127 Cal.App. 231, 240, 15 P.2d 556, for right of the trier of fact to determine that a person's acts may control over his statement of intention.

[8] Petitioner contends that the words in section 7, "removal from such office or employment" for ceasing to be a "resident" does not mean "dismissal," but only a temporary removal until such time as the employee might again become a resident. There is no merit in such contention. Such an interpretation would leave the civil service system in great confusion. No permanent appointment to fill the position of the "removed" employee could be made.

As there is substantial evidence to support the finding of the director and of the superior court that petitioner was no longer a resident of San Francisco and that his discharge from employment on that ground was proper, we see no reason for considering the other grounds upon which his discharge was based.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

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[4] Such as a temporary abode elsewhere for the limited time provided, or remaining away while on a journey, or working for the state or government. Although not expressed, educational leave also provides an exception.

[5] In his affidavit of registration the affiant swears that he has been a *resident* of the county where he is registering for 90 days next preceding the next election and will be an "elector" of that county at said election. Election Code § 230. Section 20 provides that an "elector" means any person who qualifies under section 1, article II, Constitution. That section requires that the person be a "resident" of the county for 90 days next preceding the next election. Also section 230, Election Code, requires the person to state the county in which he is presently registered and to "request that said registration be canceled."

151 Cal.App.2d 623

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lloyd R. MASSEY et al., Defendants, Thomas Reynolds, Appellant.

Cr. 5407.

District Court of Appeal, Second District, Division 1, California.

June 11, 1957.

Rehearing Denied July 10, 1957.

Hearing Denied Aug. 8, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, David Coleman, J., of grand theft, and he appealed. The District Court of Appeal, White, P. J., held that the conviction was sustained by the evidence.

Affirmed.

1. Criminal Law 🔑428

Fact of conspiracy cannot be proved by evidence of extra-judicial statements of co-conspirator.

2. Criminal Law 🔑427(5)

For purpose of permitting introduction of evidence of extra-judicial acts and declarations of conspirator, conspiracy need be proved only to extent of producing prima facie evidence of fact and need not be established by preponderance of evidence, as in civil action, or beyond reasonable doubt, as in criminal action.

3. Indictment and Information 🔑55

Sufficiency of indictment was not to be tested by rigorous rules of common law or by rules existent prior to 1927 and 1929 amendments to statutes governing pleadings in criminal cases. West's Ann.Pen. Code, §§ 870, 925, 952.

4. Indictment and Information 🔑1

Sole purpose of an indictment or information is simply to inform the accused of the charge which he must meet at trial, and he is entitled to notice of offense of which he is charged but not to particular circumstances thereof. West's Ann.Pen. Code, § 952.

5. Larceny 🔑30(1)

The Penal Code section relating to statement of offense and the Penal Code section reciting essential allegations of pleading charging theft are complementary to, rather than irreconcilable with, each other; and grand theft indictment merely charging taking of property of value in excess of $200 was sufficient, notwithstanding defendant's contention that it failed to sufficiently describe property taken. West's Ann.Pen.Code, §§ 952, 967.

6. Criminal Law 🔑1186(4)

Even a defective information or indictment will not result in reversal unless substantial right of defendant on merits is adversely affected. West's Ann.Pen.Code, § 960.

7. Criminal Law 🔑1163(1)

Appellant must not only show error but that such error prejudiced his substantial rights and militated against his receiving a fair trial.

8. Criminal Law 🔑260(11), 1159(2)

Before reviewing court can set aside verdict or decision arrived at by duly constituted arbiter of facts upon ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

9. Criminal Law 🔑1144(13)

Reviewing court must assume in favor of verdict existence of every fact which trier of facts could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict.

10. Criminal Law 🔑1159(1)

If circumstances reasonably justify verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination.

11. Criminal Law 🔑1159(2)

It is the trier of facts who must be persuaded beyond reasonable doubt of guilt of accused, and reviewing court's function is merely to determine whether there is evidence, contradicted or uncontradicted, which, if believed, is of sufficient substantiality to justify conviction.

12. Conspiracy 🔑43(12)

Conspiracy need not be pleaded in indictment or information if evidence actually shows existence of one.

13. Conspiracy 🔑23

A conspiracy is established when it is shown that there was an agreement between two or more persons to commit crime and that act was done in California to effect object of agreement. West's Ann. Pen.Code, §§ 182, 184.

14. Conspiracy 🔑47

A conspiracy cannot be established by evidence raising suspicion or evidence of mere association of parties, and there must be evidence of some participation or interest in commission of offense, as well as guilty knowledge of formation and existence of common unlawful design. West's Ann.Pen.Code, §§ 182, 184.

15. Conspiracy 🔑47

Direct evidence is not required to establish conspiracy, and circumstantial evidence may be relied upon. West's Ann. Pen.Code, §§ 182, 184.

16. Conspiracy 🔑45

When it is shown that a conspiracy was already in existence, evidence of close association and constant contact is not totally irrelevant, if it tends to show that, by reason of association, acts, apparently disconnected, have some relation and were being committed in furtherance of conspiracy. West's Ann.Pen.Code, §§ 182, 184.

17. Conspiracy 🔑41

After a conspiracy to commit an unlawful act is established, every act of each member of conspiracy in furtherance of their original plan is, in contemplation of law, act of all of them.

18. Criminal Law 🔑408

Courts favor the settlement of disputes involving liability; but, in criminal cases, facts and circumstances under which compromise of civil liability was made may be considered by trier of facts in connection with whether such conduct was occasioned by consciousness of guilt.

19. Criminal Law 🔑1144(13)

On appeal from judgment of conviction in criminal case, reviewing court is required to review evidence in light most favorable to prosecution and determine whether there is substantial evidence, contradicted or uncontradicted, to sustain conclusion reached by duly authorized arbiter of facts.

20. Criminal Law 🔑881(4)
Embezzlement 🔑1
False Pretenses 🔑1
Larceny 🔑1

Offense of grand theft, as defined in Penal Code section, includes crimes of larceny, embezzlement, and obtaining money by false pretenses, and judgment of conviction of grand theft, based on general verdict of guilty, can be sustained only if evidence discloses elements of one of the consolidated offenses. West's Ann.Pen. Code, § 484.

21. False Pretenses 🔑4

Elements of crime of grand theft on theory of fraud committed by false pretenses are: (1) an intent to defraud, (2) an actual fraud committed, (3) use of false pretenses to perpetrate fraud, and (4) reliance upon fraudulent representations in parting with money or other property. West's Ann.Pen.Code, § 484.

22. False Pretenses 🔑4

"False pretense" includes elements of trick, cunning, dissembling and unfair ways by which another is deceived. West's Ann. Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "False Pretense".

23. Fraud 🔑68

Deception deliberately practiced for purpose of gaining unfair advantage of another is "fraud". West's Ann.Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

24. False Pretenses ⚷49(1)

In prosecution for grand theft, evidence was sufficient to sustain conviction on theory of fraud committed by false pretenses. West's Ann.Pen.Code, § 484.

◆

Isaac Pacht, Grant B. Cooper, Louis Miller, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Joseph L. Carr and Joseph P. Busch, Deputy Dist. Attys., Los Angeles, for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County, defendants were accused of the crime of Grand Theft, a felony, in violation of Penal Code, Section 487, Subd. 1, allegedly committed on or about July 17, 1953.

Following the entry of a plea of not guilty by both defendants, trial by jury was duly waived and the cause proceeded to trial before the court resulting in the conviction of both defendants of the crime charged against them. Motions for a new trial were denied and defendants were sentenced to serve a term of one year in the county jail. Execution of sentence as to each defendant was suspended, and conditional probation granted. From the judgment of conviction and the order denying motions for a new trial each defendant gave notice of appeal. Subsequently, at the request of counsel for defendant Massey, his appeal was dismissed, and we are here concerned only with the appeal of defendant Reynolds.

Consideration of the appeal of defendant Reynolds (hereinafter referred to as appellant) will be facilitated by here setting forth the names and connection of those mentioned in the narrative of the background surrounding this prosecution, and about to be unfolded.

Appellant Thomas Reynolds is an attorney at law, and a member of the firm of Reynolds, Painter & Cherniss, with offices in Los Angeles. At the time of the trial Reynolds had practiced his profession for thirty-three years, and there was testimony that he enjoyed the reputation of being a capable practitioner. At the time of the transaction here involved, appellant's law firm was from time to time the attorney for the United Savings & Loan Association, defendant Massey and for the Anderson Estate, all to be hereinafter referred to.

Defendant Massey is also an attorney at law and engaged actively in that profession until 1945 when he organized United Savings & Loan Association, (hereinafter referred to as "United") and of which he became President, Manager and Chairman of the Board of Directors, offices which he occupied until September, 1953 when the controlling stock interest was sold by him and other shareholders to La Mirada Rental Co., a partnership composed of Harold L. Shaw, his wife Martha J. Shaw and John Moore Robinson.

Of the 750 authorized and outstanding guaranty shares of United, Massey owned 154 in 1952. In May, 1953, he acquired 3 additional shares from a stockholder, Mary Kondeff, and on July 6th purchased 46 shares from his mother, making a total of 203 shares which he owned prior to July 17th. The remaining shares were distributed among the directors and various stockholders of United.

Affiliated with the business of United, but separate and distinct entities were United Mortgage Corporation and Valley Insurance Agency—activities in which Massey was profitably engaged and which were referred to at the trial as the "fringe benefits."

United Mortgage Corporation was engaged in the business of servicing Veterans Administration loans, making collections, disbursing taxes and conducting escrows. Massey owned slightly less than one-half of its shares.

Valley Insurance Agency was a sole proprietorship owned by Massey and engaged in the business of insurance broker. This organization wrote fire insurance policies for dwellings upon which United had made home loans.

The Anderson Family:

Charles A. Anderson was a resident of Los Angeles for many years. He and his predeceased wife Emma owned as joint tenants 110 shares of United purchased by them in 1945 and 1949. Anderson died intestate on September 18, 1952 and it was from his estate that the theft of 110 shares of stock was charged. At the time of his death and for approximately a year prior thereto, Anderson was the administrator of the estate of his deceased wife and appellant Reynolds was his attorney.

Mrs. Helen Schwartz was Mr. Anderson's sister. She was a resident of Springfield, Ohio, having lived there nearly all of her life. She had never lived in California. She became administratrix of the Anderson Estate.

Harold L. Shaw was a contractor, and as heretofore mentioned, a partner in La Mirada Rental Co., which in September, 1953, purchased controlling stock interest in United.

John Moore Robinson was also a partner in La Mirada Rental Co. and counsel for Mr. Shaw.

Julia Robertson Cook, also known as Julia Robertson, was a successful mortgage loan broker who had known defendant Massey for several years and who had done business with United, securing customers for its real estate loans from 1949 to 1951. Since 1951 Mrs. Cook had acted as a representative for Harold L. Shaw. She knew defendant Massey and had secured several building and construction loans from United in connection with Shaw's business. As the factual background herein is revealed it will appear that she was active in the negotiations between defendant Massey and the Shaw group for the sale of a controlling interest in United.

The trial was a prolonged one and from a careful examination of the lengthy reporter's transcript and aided by the exhaustive briefs filed herein, we regard the following as a fair epitome of the evidence vital to a determination of the issues presented on this appeal.

The record reflects that on June 10, 1952, Donald Metz, accompanied by his attorney Alfred Gitelson, conferred with appellant and defendant Massey concerning the possible purchase of United. The conference took place at appellant's office. Defendant Massey represented that he controlled a large portion of the stock and could persuade the other shareholders to sell. The price suggested by defendant Massey was in excess of $2,000.00 per share, provided defendant Massey would retain certain appurtenances of the business, to-wit, United Mortgage Corporation and Valley Insurance Agency, referred to at the trial as "fringe benefits". Mr. Metz testified, "that immediately upon hearing the price I for myself and the other people whom I represented lost interest in the purchase because the price was so high". This witness further testified that "being in the mortgage business and insurance business myself, I feel—it was my opinion and still is that those two items are one of the most valuable assets of any association like the association in question."

In June or July, 1952, Sidney M. Taper, a land developer and mortgage banker who was not acquainted with but knew of defendant Massey, called on the latter and after discussing financing and market conditions, inquired of defendant Massey if the stock of United was for sale. According to this witness defendant Massey, "didn't say it was, he didn't say it wasn't. He just showed me a balance sheet, a statement of conditions * * * we entered into a discussion of values" of the assets of United. No price was quoted or discussed at this meeting which was adjourned with comment by Mr. Taper, "* * * I will get in touch with you again". Subsequently, a second meeting took place in July or August at which there were present defendant Massey, Mr. Taper, and the latter's attorney William Gilkbarg. At this meeting, according to the testimony of Attorney Gilkbarg, defendant Massey represented that the book value of United's shares was $2,287.50 each. Attorney Gilkbarg suggested, "it seems to me that the very most the thing is worth is a million and a quarter". Defendant Massey inquired of his visitors as to whether they were prepared to make such an offer, although he did not consider the price adequate. On the day following this meeting, defendant Massey stated to Kline Dolan, a Vice President of United, that, "Mr. Taper might consider making a million and a half dollars offer for the stock of the Association (United)".

On September 18, 1952, Charles A. Anderson died intestate, leaving 20 surviving heirs consisting of sisters, brothers and their descendants. One of the surviving sisters was Mrs. Helen Schwartz, and at the time of her brother's death she resided in Springfield, Ohio, where she had lived "nearly all my life". Decedent Anderson's housekeeper informed appellant of the death of Mr. Anderson and suggested that appellant telephone decedent's sister Mrs. Schwartz because "he seemed to depend upon her more than anyone else". Appellant telephoned Mrs. Schwartz, and according to the latter's testimony, "* * * he asked me if I could come out here (to Los Angeles). He wanted us to fly; I asked him if it would be all right for me to bring my niece with me; and he said it would because I just couldn't make the trip by myself." Arriving in Los Angeles on the following morning Mrs. Schwartz and her niece met appellant for the first time. After funeral arrangements had been completed appellant, Mrs. Schwartz, and her niece Mrs. Ell discussed the settlement of Anderson's affairs. According to the testimony of Mrs. Schwartz appellant said, "* * * would I be administrator. Well, I guess I didn't even answer him because I just didn't—I was tired and I just wasn't even thinking, see. And then my niece spoke up and said that her brother lived here, Russell Hale, why couldn't he be appointed administrator." Mrs. Ell testified that when appellant "asked Mrs. Schwartz who she thought would be the one to settle up the estate; and I told him I thought my brother should since he was a resident of California * * * I told him it was Russell Hale and he was in the Probation Department of the Los Angeles County". The witness further testified that appellant then said, "You want to settle it up don't you, Mrs. Schwartz?", whereupon the witness said, "What about her not being a resident of California?", to which appellant replied, "I can fix that up". There is testimony in the record by Mrs. Schwartz that appellant explained to her that to qualify as an administratrix of the estate of her brother she "* * * would have to live out here * * * I would have to take up my residence at 1419 29th Street (decedent Anderson's home)". Appellant prepared a petition for the issuance of letters testamentary to Mrs. Schwartz which she signed, and on October 16th she was appointed administratrix of the Estate of Charles A. Anderson, Deceased. Appellant acted as her attorney. After remaining in California some six weeks, Mrs. Schwartz returned to Ohio. Between September 18th and December 31st, 1952, according to appellant's testimony, on at least two occasions defendant Massey expressed an interest in purchasing the Estate of Anderson stock in United, saying on one occasion, "Is the estate going to sell the stock, and if so I would like to have a chance to buy it."

In November, 1952, the State Inheritance Tax Appraiser for the Anderson Estate called United on the telephone and inquired for the secretary. He was connected with defendant Massey. After identifying himself, the Inheritance Tax Appraiser stated the purpose of his inquiry, and was informed by Massey that the 110 shares of stock in United had been appraised in the estate of decedent's predeceased wife at $200, that this sum was its present value. Based upon this information, the 110 shares of stock in United belonging to the Estate of Anderson were appraised in the same amount, totaling $22,000. Wilbur J. Best, an Assistant State Inheritance Tax Appraiser, testified that after subsequent investigation and the receipt of additional information, the stock was reappraised at $1,050 per share or a total of $115,500. In the year 1952, because he was suffering from bad health, defendant Massey considered selling his stock in United. With this purpose in mind, Massey discussed with Howard Ahmanson the purchase of the stock in United. Mr. Ahmanson offered to purchase all of the stock of United, totaling 750 shares at from $975,000 to $1,300,000 or between $1,300 and $1,730 per share provided the appurtenances, the mortgage company, the collection business and the insurance business were included in the sale. Mr. Ahmanson testified that, "Mr. Massey didn't register any great enthusiasm about accepting the offer * * * I told him that I didn't think it was a very generous offer, myself; which it wasn't", and that about a week or ten days thereafter, defendant Massey called the witness and "said that he was not interested."

Late in February or early March, 1953, Mrs. Julia Robertson Cook visited defendant Massey at the latter's home. During the course of the visit defendant Massey asked if Mr. Shaw would be interested in purchasing United for between a million and two million dollars. She informed him that she would transmit the inquiry to Mr. Shaw.

Subsequently, Mrs. Cook informed defendant Massey that Mr. Shaw was interested in the purchase but would buy only if he could obtain the controlling interest.

In the period between this first discussion in February or March and July 23d, Mrs. Cook, as Mr. Shaw's representative, saw Mr. Massey several times and conversed with him over the telephone concerning the sale of United. Mrs. Cook testified that, "Mr. Massey said he wanted something in writing from Mr. Shaw with referance to his purchase of the United Savings & Loan Association" and that she "would repeat it to Mr. Shaw", but that, "I don't believe this specific subject came up * * * after that."

On March 2, 1953, appellant wrote Mrs. Schwartz to tell her that he had been informed that United had a buyer for the stock at $200 per share. In that letter he stated that "it may be worth more", but "recently, however, things have not been quite so good in that line of business." The letter was prompted by a conversation with defendant Massey in which the latter again expressed an interest in purchasing the stock.

On March 9, 1953, Mrs. Schwartz wrote and expressed her belief that Mr. Massey knew that the estate had to sell the stock, therefore, it would be best for the appellant to try and find another buyer. The appellant, however, never attempted to contact any other buyer.

In June, 1952, Donald Metz, a builder and subdivider who was interested in acquiring a building and loan association, and his attorney had a conference at appellant Reynolds' office with Massey and Reynolds to discuss a possible sale of the stock of United.

Massey mentioned a price in excess of $2,000 per share for all of the shares and specified that the sale did not include the fringe benefits. Metz considered the price exorbitant, made no offer and nothing came of the conference.

During the following months, Sidney Taper and his attorney met with defendant Massey to investigate the financial condition of United as a basis for discussing the purchase of substantially all the shares of the association if available.

A memorandum of the assets and resources of the United which was prepared at the meeting stated that the stock had a book value of $2,287.50 per share.

During the meeting, defendant Massey said that the value of the assets of United was $1,750,000. Taper figured that the assets of United were worth $1,250,000, and in which he included the fringe benefits. This figure was arrived at by him after discounting the assets in accordance with prudent purchasing practices. Defendant Massey, however, was not interested in Taper's figure and negotiations for the sale of the shares came to an end.

There was testimony that following beneficial results of a surgical operation in 1953, defendant Massey returned to active fulltime work in United, and that in May of that year, Glen W. Landes, who was engaged in the hardware business, and who was a former director and stockholder of United, called upon Massey on behalf of certain undisclosed principals to secure an expression concerning a sale of United. Massey told Landes that he would sell anything he had if he could get his price, and that his price was $2,000,000. Landes said that the maximum which he was authorized to offer was $1,600,000. Massey then said that he had previously rejected a higher offer. The conversation ended with Landes stating that he would consult his principals and if they were interested he would contact Massey again. Nothing ever came of this transaction.

Upon regaining his strength and recovering his health in May, Massey abandoned any plans that he had about selling United and devoted his full attention to the business of the Association. During the months of May through August, 1953, he instituted a program of long range planning in which he increasingly called upon appellant Reynolds for legal advice on matters affecting the permanent business policies of United. Reynolds' opinion was asked concerning substantially all the forms in current use by United in connection with its deposits and loans, and Reynolds suggested and recommended revisions required by new orders and regulations of administrative boards affecting the conduct of United's business.

Mrs. Mary Kondeff owned 20 shares of stock of United which she desired to sell. She contacted Mr. Massey who told her the stock was worth $200 per share if sold in part or $250 a share if sold in an entire lot. An advertisement was placed in the Glendale News Press offering the stock for sale, but there was no response. An investment broker who was consulted in regard to the price of this stock telephoned United. Mr. Dolan, Vice President of United, informed him that he would call back in a short time. When he did call, Mr. Dolan asked who the prospective seller was. After being informed that it was Mrs. Kondeff, he stated that the stock was worth $200 per share if sold in part and $250 per share if sold as a block of twenty. Defendant Massey purchased these shares at $250 per share. They were then divided by lot among all of the directors of United.

In April, 1953 defendant Massey informed appellant that he had purchased 20 shares of stock in the association, the Kondeff stock, at $250 per share, and that he wanted an opinion as to the duties owed by a director to a shareholder from whom he purchased stock in the corporation. In that same conversation Mr. Massey asked if the Anderson stock was for sale and when informed that it was expressed his interest in purchasing it.

In June, 1953 appellant contacted defendant Massey and informed him that the Anderson stock was for sale. Mr. Massey offered $300 a share, but was told the price would be $350 per share.

Shortly after making the Kondeff purchase defendant Massey asked appellant to prepare and submit for the former's guidance, a written opinion dealing with the duties of a director when purchasing shares from a stockholder. During the latter part of June, 1953, appellant handed defendant Massey a memorandum of law dealing with this subject which he referred to as the "Special Facts Opinion", and wherein the rule as enunciated in Hobart v. Hobart Estate Co., 26 Cal.2d 412, 432, 159 P.2d 958, was relied upon. Following receipt of the "Special Facts Opinion" defendant Massey asked appellant to prepare an agreement of indemnification which was to be signed by all of the directors who had purchased the Kondeff shares from him. Massey told Reynolds that he had purchased these shares from Mrs. Kondeff and had resold them to the directors and that under the special facts opinion, he felt that the directors should assume their share of any responsibility if a claim were to be subsequently directed against him in connection with the purchase. Reynolds prepared the agreement and it was given to Massey at a meeting in Reynolds' office on August 3rd.

Mrs. Schwartz, administratrix of the Estate of Anderson, returned to California on June 1, 1953. Appellant informed her that defendant Massey would probably be willing to pay $350 per share, therefore, she should hold out for that price. He also calculated for her that the asset value of each share was $2,100, but in his opinion getting that was another matter. Appellant testified that, "I told her that in my opinion, subject to an inquiry that I wanted to make among stockbrokers, that I didn't know of any place where she could get more than $350.00 a share for the stock." He suggested that she "think things over" and then bring Mr. Hale (decedent Anderson's nephew and Los Angeles County Deputy Probation officer) in for a conference on this matter.

On July 13, 1953, Mrs. Schwartz and Mr. Hale visited the appellant's office. Mr. Hale asked what the total issue of stock in United amounted to and was informed by the appellant that there were 750 shares. The appellant asked if Mr. Hale had made any inquiries as to the value of this stock. He replied that he had, and had been informed that it was worth $200 a share. The appellant asked if $350 would be considered a good price. Mr. Hale expressed the belief that it would be. The appellant informed them that defendant Massey was interested in the stock. In considering the question of price he pointed out that although the stock was worth a great deal, it was difficult to find a purchaser. In support of this he represented that he had contacted brokerage houses, but they couldn't put much of a value on it. Advertising in trade papers was suggested, and the appellant agreed that this would be wise. The appellant then mentioned that Mr. Massey happened to be in the building, so he went out and brought him back to the office. Defendant Massey expressed an interest in buying and suggested that a meeting be arranged. The appellant at that time pointed out that he represented both sides. After Mr. Massey departed the appellant stated: "I think I can get $350.00 a share for you. Now, he may try to offer you less, but you hold out for $350 and I am certain we can get it for you." Later the appellant informed Mrs. Schwartz that he had arranged a meeting with Mr. Massey to discuss the sale of the stock.

Mr. Massey requested Mr. Dolan to prepare figures of the net value of United should it be liquidated. These figures were to be used in his interview with Mrs. Schwartz.

On July 15, 1953, appellant sent letters to four brokerage houses inquiring as to the market value of shares in United. When asked, "Well, you knew, did you not, that in order to determine the price of the guarantee stock, that whoever was making the inquiry would eventually have to get to the Association itself and find out from the Association (United) facts and figures upon which they could determine the stock?" appellant answered, "No, I cannot say that I was consciously aware of that. I am not familiar with the way stockbrokers carry on their business." Appellant further testified, "I knew, generally speaking, that small blocks of stock in closed corporations have no market and in order to find a buyer for such stock, you usually had to go on the company."

"Q. And sell it to them? A. That's right.

"Q. And to determine the value you had to go to the company? A. I would put it to determine what you could get for it.

"Q. You realized, did you not, that the only one that gave out that information from the Association (United) was either Mr. Massey or Mr. Dolan? A. If I had thought about it, I would have known that."

Defendant Massey admitted that anyone desiring to ascertain the value of United's stock would be forced to contact the corporation. All the brokers who were asked for opinions had to go to United for an estimate of the value of the stock.

The appellant took no further steps in order to determine the value of the stock. At no time did the appellant attempt to contact any other buyer for this stock.

On July 16, 1953, the petition to sell the 110 shares of United stock belonging to the Estate of Anderson was approved, authorizing the sale of said stock for the minimum price of $22,000.00 and notice of such sale was dispensed with.

On July 17, 1953 a meeting was held in appellant's office which was attended by Mrs. Schwartz, the appellant and Mr. Massey. The appellant represented both parties to this proposed sale. That meeting was recorded by a court reporter.

The appellant commenced the meeting by pointing out the necessity of selling the shares of United in order to make a distribution. He asked Mrs. Schwartz if this were not true. She acquiesced. Mrs. Schwartz, the administratrix, testified that she was unacquainted with financial matters; was ignorant of the meaning of "book value", and relied upon the judgment and advice of appellant. All present at the meeting were informed by appellant that he was attorney for both parties to the sale of the stock and that he desired that Mrs. Schwartz who, as administratrix, had a duty to obtain the highest possible price, be free from any criticism on the part of the other heirs. He also pointed out that defendant Massey was obligated to disclose everything to Mrs. Schwartz.

At the meeting appellant stated that he had written to four stockbrokers and had received three replies which expressed the belief that the shares had a very limited market and would bring between $200–$250. In this regard the record reflects that on July 15, 1953 appellant communicated with four recognized stockbrokers doing business in Los Angeles, asking each one whether there was any present market for the shares; whether an estimate of the price could be obtained; and whether he would be able to sell the shares.

One investment broker valued the shares at $250 and advised an immediate sale at that price if offered. This broker based his estimate of the value of the shares upon the low dividend rate and the fact that the shares were a minority interest. This opinion was given after the broker had secured from Massey a history of the dividends paid, previous sales and Massey's opinion of the value, which he stated was in excess of $250 per share. In making his determination of value, this broker considered the lack of a current market for the shares, the financial condition of United as reflected by its June 30th balance sheet, and the book value of all the shares as being in the neighborhood of $2,000 per share.

Another broker also found that there was no market for the shares. He learned from Kline M. Dolan, Vice President and Secretary of United, the amount of royalties previously paid; that recent transactions in the shares were at the $240 to $250 price level; and he informed Reynolds that the market appeared to be restricted entirely to other holders of the stock.

The third stockbroker told Reynolds that his organization was not interested in the inquiry; and the fourth broker wrote that $230 was the market price per share and that there was no ready market for the stock.

Appellant stressed that a purchaser had to be searched for, at the same time pointing out that Mr. Massey, as the president or director and substantial stockholder of United, was naturally interested in acquiring more stock, and had offered $350 per share.

Defendant Massey then expressed his desire to fully explain all the pertinent facts about United. This disclosure included revealing the total assets of United, an offer to purchase United at $1,400 per share made in April of 1952. No mention was made of any other offers. Even though two were known to the appellant, he made no comment in regard to the second offer. It was represented that the book value of United was about $2,600 per share, but this could only be realized if some one purchased United in its entirety. Defendant Massey denied that at that time any one was negotiating for such a purchase. He did not mention the discussions which were at that time taking place between himself and Mrs. Cook in regard to the purchase of United. Mr. Massey pointed out that a second way to realize the book value of the stock would be to sell the assets of United, which was not contemplated. A third method would be to liquidate United, but this would mean a drastic reduction in the value received for each share. Mrs. Schwartz was further told that United stood to lose between $150,000 and $250,000 on one transaction in which it was involved.

Defendant Massey told of the past sales of stock for $116 in 1947 through the purchase of 20 shares at $250 per share in May of 1953. The appellant was interested in knowing if all of the sales mentioned were at arm's length. He was assured that they had been of such a character.

The dividends paid over the past years were discussed culminating in the statement that United had declared a 6% per annum rate for the first half of 1953 and that in his opinion the dividends for the entire year of 1953 would be the same as in 1952. That no larger dividend was contemplated because of a fear that it would jeopardize the reserve requirements of the corporation.

Defendant Massey then stated that due to the facts stated and the "uncertainty of the future economic conditions of the country and the mortgage business," he could only offer $350 per share.

Appellant then called attention to the fact that the par value of the stock was only $11,000. That, as the dividend of 10% was paid on the basis of par, the administratrix would realize a very small percentage of income on the $38,500 offered for the stock. He pointed out that the 110 shares was a minority block of stock and thus worth less than majority stock. He gave it as his conclusion that the stock would be worth only what was offered for it irrespective of the information supplied by defendant Massey. The record reflects that at the meeting appellant said, "Of course, you could keep the stock, Mrs. Schwartz. You could divide the stock up, but I don't suppose all your heirs in the Midwest would want it, would they? They would rather have the money; isn't that right?" to which Mrs. Schwartz replied, "Yes, I think Mr. Massey would want it that way." Defendant Massey then said, "We would want it that way." Mrs. Schwartz then volunteered, "To stay in the State of California in the place of sending it out to the heirs", and defendant Massey said, "Oh, yes, that is natural." Appellant then said, "Of course, he (Massey) would rather have it that way, but of course, your duty is to your heirs, to do the best you can."

Mrs. Schwartz then informed appellant and defendant Massey that her nephew (Mr. Hale) had made an investigation into the matter, but his only inquiry was made to a man in Glendale, 81 or 82 years old, who formerly was a stockbroker, but at the time of the inquiry was operating a gas station and washing automobiles, and who placed the value of the stock at "Between $200 and $250" per share.

Appellant pointed out that if one retained the stock until the company was sold or liquidated they would probably receive much more for it, "provided we don't run into a depression or something which you never can tell about." When Mrs. Schwartz expressed her belief that there would be no depression, the appellant replied that conditions in the building line had been good for a long time and that he and Mr. Massey had discussed the possibility of business going bad. Mr. Massey then stated that all the periodicals indicated that the market was softening and was being fostered by the federal government.

The record contains evidence that appellant and defendant Massey were aware that United was "making a lot of money", but its profits were never discussed with Mrs. Schwartz. The latter testified that she was furnished with a copy of the June 30th report of United, but that she relied upon the representations made to her at the foregoing conference.

On July 21, 1953, a regular meeting of the Board of Directors of United was held but defendant Massey did not disclose the availability of the 110 shares belonging to the Anderson Estate. A transcript of the meeting of July 17th was furnished to the administratrix, Mrs. Schwartz, and she endorsed two certificates of United, evidencing ownership of a total of 110 shares of stock in United, and also signed the letter granting permission to sell. Although there was other stock in the Estate of Anderson that was to be sold, appellant obtained no special authority for its sale. Appellant testified, "And if my memory serves me right, I called him (defendant Massey) on the telephone immediately and said, 'She will take $350.00 a share'".

On July 23, 1953, Mr. Shaw sponsored a press preview party for newspaper reporters, publicity people and members of various building and loan associations in the Los Angeles area in order to publicize his La Mirada development where he was contemplating the construction of several thousand homes. Prior to this time, during an illness of defendant Massey, Mrs. Cook paid him a visit to inquire as to how he was progressing in the recovery of his health. At this visit there was some informal discussion in which defendant Massey asked Mrs. Cook if Harold Shaw, whom she represented, would like to purchase United. Mrs. Cook replied that she did not know but inquired as to the price, to which Massey replied, "* * * one or two million dollars * * * ". No discussion was had as to terms or details. Sometime later Mrs. Cook mentioned to Mr. Shaw this talk she had had with defendant Massey, and subsequently, Mrs. Cook told Massey that she had talked to Shaw and that she had given him the price, not accurately, "A million or two million dollars"; that it might be a good investment; that it was a lot of money; that Shaw was interested if he could buy the controlling interest in United; and that he had said that she should go ahead and see what could be done.

Massey asked Mrs. Cook to have Shaw put his thoughts in writing; nothing was ever done about this suggestion; nothing was ever said about the preparation of a proposal, nor was any suggestion ever made for a meeting between Shaw and Massey to discuss the subject.

At the aforesaid press preview party defendant Massey asked Mrs. Cook if she had discussed the sale with Mr. Shaw and if he was interested in buying. Both questions were answered in the affirmative. According to the testimony of Mr. Shaw, on one occasion when defendant Massey met him at the party, the following ensued: "He said, 'How about buying my United Savings & Loan Association?'. I said, 'Look, Mr. Massey, we don't talk business on this type of day. This is a day of entertainment'. Well, he said, 'Frankly we can get together if you want to talk about it' ".

On July 28th or 29th, 1953, Mrs. Schwartz, administratrix of the Estate of Anderson, notified appellant that she was returning to her home in Ohio.

On or about July 31, Mrs. Cook came to defendant Massey's office pursuant to a previous appointment and announced to Mr. Dolan, Vice President and Secretary of United, that she had come to purchase the corporation. Mrs. Cook testified that upon the arrival of defendant Massey, "I told him that Mr. Shaw was looking for other Associations to buy, and that he wanted some sort of an expression about the United Savings * * *". Defendant Massey said that for a "personal reason" there would be a delay of about thirty days and that he desired to contact the Board of Directors. Mrs. Cook also again advised Massey that she represented Shaw and that if Shaw purchased United, she was to be Chairman of the Board; that

Mr. Dolan would be Manager; that the other directors would be retained, and that she assumed Massey would retire. Defendant Massey requested Mrs. Cook to refrain from discussing the sale with anyone connected with United and to cancel a personal engagement with Mr. and Mrs. Dolan.

On August 3, 1953, defendant Massey instructed Mr. Dolan to break a dinner engagement with Mrs. Cook at Mr. Shaw's home, as Mr. Massey wanted to handle the negotiations for the sale of United personally.

The appellant was informed by Mr. Massey that he was prepared to proceed with the purchase of the stock. It was then that Mr. Massey was told that the appellant's fee for his work in arranging and handling this sale (of the Estate stock) would be $5,000. Mr. Massey stated, "That seems high but if that's your charge, I won't question it. You will have to come out and sell it to the boys". The legal fee was to be apportioned among the shares on a proportionate basis. The appellant was unable to attend that meeting so he asked Mr. Painter (appellant's law partner) to go for the purpose of explaining the fee. Mr. Painter admittedly did not know the work done in connection with which the fee was charged.

On the evening of August 4, 1953 an informal meeting of all of the directors of United was held. Mr. Painter was also present at this meeting. Mr. Massey read the legal opinion of the appellant which dealt with the aforesaid "Special Facts Doctrine". Next he read in its entirety the transcript of the meeting of July 17. After reading the transcript Mr. Massey announced that he intended to purchase 80 of the 110 shares in the estate at $350 per share and that the remaining 30 shares could be divided among the other directors, each being alloted five shares. In the event the other directors did not choose to purchase the stocks he personally would acquire them.

Defendant Massey also informed the directors that in addition to the price of $350 per share they would be obliged to pay $5,000 in attorney's fees to appellant for his services in connection with this transaction. This fee was to be pro-rated and would amount to approximately $45.45 per share, thereby bringing the total cost per share to $395.45. There was testimony that two of United's directors regarded appellant's charge as a "rather large fee". However, defendant Massey informed the directors that he had been approached by Mrs. Cook who represented a client, Mr. Shaw, who was interested in purchasing United. Mr. Massey stated that he had informed Mrs. Cook that United was not for sale, but if she wanted to talk to him about it, she would have to contact him later.

There was a discussion as to whether or not an offer had in fact been made and as to whether or not it had any merit. Certain directors expressed the view that information of this offer to purchase should be conveyed to Mrs. Schwartz. Mr. Painter was asked to inform Mrs. Schwartz of this offer. He replied that this information would be transmitted to Mr. Reynolds or to Mrs. Schwartz. After the meeting Mr. Massey told Mr. Painter that there was nothing to the Cook offer to purchase United. When Mr. Painter left the meeting he had the names of the purchasers of the stock and their respective amounts thereof. Each of the directors agreed to take their five shares.

At this meeting the indemnity agreement which the appellant had prepared in connection with the previous Kondeff purchase at Mr. Massey's request was signed by the directors.

[1, 2] Subsequent to August 4, defendant Massey assured Mr. Irvin, one of the directors of United, that Mrs. Schwartz, administratrix of the Anderson Estate, had been informed of Mrs. Cook's offer and that the former was satisfied. This conversation between Massey and Irvin was received over the objection of appellant that since he was not present thereat, the conversation as to him was hearsay and there-

fore, incompetent, irrelevant and immaterial. We are satisfied the objection was properly overruled. While it is true that the fact of a conspiracy cannot be proved by evidence of extra-judicial statements of a co-conspirator (People v. Doble, 203 Cal. 510, 517, 265 P. 184), nevertheless, for the purpose of permitting introduction of evidence of the extra-judicial acts and declarations of a conspirator, the conspiracy need be proved only to the extent of producing prima facie evidence of the fact (People v. Sica, 112 Cal.App.2d 574, 583, 247 P.2d 72; People v. Frankfort, 114 Cal.App.2d 680, 699, 251 P.2d 401). It need not be established by a preponderance of the evidence as in a civil action, nor beyond a reasonable doubt as in a criminal action (People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17). In the instant case we are satisfied that under the aforesaid rules, the existence of a conspiracy was sufficiently established to permit a consideration by the trier of facts of the acts or declarations of a conspirator to the end of proving the ultimate guilt of the crime charged (People v. Talbott, 65 Cal.App.2d 654, 151 P.2d 317).

On August 5th attorney Painter, appellant's law partner, informed the latter of what had transpired at the meeting of United's directors on the previous evening. In this regard Attorney Painter testified, in part, as follows: "* * * I said to him that an inquiry had been made by one of the gentlemen present as to whether this was one of the types of matters which should be reported to Mrs. Schwartz, and I told him that I did not know whether it was or not, that I would take it up with him and I think it was after I said that, he said 'Well, I see nothing in that incident that I think should be taken up with her.'" On August 5, 1953, appellant wrote each director confirming the sale and advising them of the formalities to be followed in completing the same. On August 7th, 10th and 11th, 1953, directors Massey, Irvin, Rice, Hawley and Gross, respectively forwarded their checks to cover the purchase price of their stock plus their pro-rata share of appellant's $5,000 fee.

On August 19, 1953, appellant forwarded the endorsed certificate for 110 shares held by the Anderson Estate to United with instructions to "issue new certificates in the names of the seven directors".

On August 20, 1953, pursuant to a previous telephone call to Mrs. Cook, the latter, accompanied by John Moore Robinson called upon defendant Massey at United's office. Mr. Robinson identified himself as Mr. Shaw's representative. Mr. Massey said that, because of a tax problem resulting from the recent acquisition of his mother's stock within the last six months he was unwilling to sell. Mr. Robinson assured him that some arrangement for future purchase of this stock could be arranged. They then discussed the personnel of the organization. The price was discussed, and it was agreed that it would be the adjusted book value. Certain rights which Mr. Massey desired were to be retained by him personally, that is, certain escrow business, insurance business, and the brokerage business.

Later that evening, defendant Massey and United directors Rice and Dolan had dinner together. Concerning this meeting Mr. Dolan testified, "During the course of the dinner he (Massey) told us in his own words of his discussion with Mr. Robinson and Mrs. Cook; that he felt after this talk that they were sincerely interested in the purchase of the stock, providing the majority of the stock could be delivered; and they had discussed the matter to some detail and that a letter would be submitted from Harold Shaw, as I recall, stating that they were definitely interested in the purchase if he could deliver the majority of the outstanding stock."

On August 21, 1953, defendant Massey visited Mr. Robinson at the latter's office and inquired as to the manner in which the stock he had received from "his mother" would be processed. A reverse option arrangement was settled upon. There was then a further discussion of the rights to be retained by Mr. Massey. It was agreed that the appellant should draw the documents involved in the transfer. Mr. Massey was confident he could deliver a majority of the stock, but desired a letter which would outline the offer to present to the other shareholders.

Mr. Massey signed the new stock certificate transferring the Anderson Estate stock in United to himself and the other directors. Mr. Dolan mailed all of the new certificates to the appellant.

On August 24, 1953, Mr. Robinson (Shaw's representative) wrote the letter requested by defendant Massey at the meeting of August 21st and it was delivered to Massey by Mrs. Cook.

About August 31, 1953, defendant Massey contacted Dr. Rice, one of United's directors, asking him if he would contact some of the shareholders who were doctors and friends of his and tell them that "* * * we had a prospective sale. I wasn't sure whether it was definite but to see whether or not they would be interested if it was a very substantial sum. I spoke to Mr. Dolan (Vice President and Secretary) of United and I forgot whether I contacted the other directors or he did."

On August 25th, defendant Massey called the appellant and asked him to begin preparing the necessary papers for the sale of United. It was agreed that the appellant should receive $50 per share transferred, as his fee for handling the transaction.

The appellant and Mr. Massey went to Mrs. Cook's office where they met Mr. Robinson, Mrs. Cook and Mr. Shaw. The parties discussed the arrangements for the sale which had already been threshed out in detail at the other meetings. The appellant was there merely to take notes so that he could draw the final contract.

On August 26, 1953, appellant received a list of those shareholders who were prepared to go ahead with the sale of United to Mr. Shaw, and on August 28, 1953, appellant wrote Mrs. Schwartz, administratrix of the Anderson Estate, informing her that defendant Massey had purchased the Estate stock of 110 shares at $350 per share but did not inform her of defendant Massey's subsequent sale at $2,800 per share.

On September 9, 1953, the stockholders of United approved the sale and the contracts were signed by the interested parties. On September 25, 1953, the escrow was closed and the transaction completed. 574 shares of United were transferred to the Shaw group at $2,800 per share, including the 110 shares formerly owned by the Anderson Estate, and as heretofore noted, purchased from said estate for $350 per share.

On September 28th, and again on October 8th, appellant wrote Mrs. Schwartz, administratrix of the Anderson Estate, but did not disclose to her the sale of United to the Shaw group.

In the month of October, 1953, while appellant was in New York, his law partner, Mr. Painter, contacted him and informed him of the fact that the validity of the sale of the Anderson Estate stock was being questioned. That a report of the purchase at a low price and subsequent sale at a very high price had been made to the probate court and a claim was being made that the stock was procured from the estate by some form of fraud.

The appellant immediately called Mrs. Schwartz. He told her that Mr. Massey had sold the stock for "quite a sum of money", but did not specify the exact amount. In answer to her inquiry as to what could be done, Mrs. Schwartz testified as follows: "I asked him what I could do; and he said 'Nothing', because I told him I didn't want another trip out here."

During the early part of November, 1953, Mr. Peters, a State Inheritance Tax Appraiser, contacted appellant and informed him that in the light of information that the stock had been sold for $2,800 a share, the appraisal of the Association stock in the Anderson Estate should be corrected. The appellant agreed that the stock was worth more than the appraised value but inquired whether the fact that it was a minority interest would not decrease its appraisal. The appellant also requested permission to submit evidence of the true evaluation in the form of letters which he had received from various stockholders and also offered to supply the statement of July 17th.

On November 23, 1953, appellant wrote Mrs. Schwartz, but did not disclose the price at which United was sold.

During the latter part of November, 1953, appellant contacted Mrs. Cupp, a probate court investigator, who told him that from the facts available it appeared as if Mr. Massey had defrauded Mrs. Schwartz. That in the light of these facts Mr. Hale had been advised to contact an attorney to look into the matter. The appellant next called Mr. Hale and was informed that Attorney Warner had been retained as counsel.

On December 3, 1953, appellant met Mr. Warner and Mr. Laybourne who were the attorneys for the heirs of the Anderson Estate. They informed him that they could prove that Mr. Massey had perpetrated a fraud on Mrs. Schwartz by concealing the planned sale to the Shaw interests. Further, the appellant was told that an action against him was being contemplated. When asked concerning when he first learned of the Shaw negotiations, the appellant did not answer, but merely stated that Mr. Massey had lied to him.

Defendant Massey was informed by the appellant that he could no longer represent him in this matter.

On December 2, 1953, appellant telephoned Mrs. Schwartz, administratrix of the Anderson Estate, at her home in Ohio. On December 3, 1953, after Mr. Warner, one of the attorneys for the heirs in the Anderson Estate, contacted him, appellant again telephoned Mrs. Schwartz. On December 9th and 21st, he also telephoned her. In one of these telephone conversations appellant asked Mrs. Schwartz to help him for "They're after me." He then stated that she was the only person who could save him. When asked why they were after him, he replied, "It's over that stock"; that they had made quite a bit of money on it. With regard to the telephone conversations Mrs. Schwartz testified appellant said, " 'If I send you a letter will you answer the letter back' and I told him no, he didn't need me when he made that deal, he didn't need me then". In answer to a question, "* * * was there anything said as to what should be put into this letter that Mr. Reynolds (appellant) asked you for?" Mrs. Schwartz testified, "Well, he said he would write me a letter and then for me to copy it and send it back to him * * * I told him no, because I didn't know nothing about it". In answer to the question "Well, did he say to you in words that he wanted you to write him a letter that you knew about the deal?" the witness answered, "Yes, he did but I couldn't because I didn't know nothing about the deal."

On recross examination with regard to the letter requested from her by appellant, Mrs. Schwartz was asked, "He asked you to write him a letter to confirm the fact that he had mentioned that (the sale of the stock) to you in October, that was all?" the witness replied, "Well, I just don't remember." When defendant Massey was informed of the Anderson Estate's dissatisfaction with the sale of the stock he wanted to refund all of the money that was due the estate.

On December 19, 1953, Mrs. Schwartz resigned as administratrix of the Estate of Anderson, and on January 12, 1954, Russell Hale, a nephew of decedent and a Deputy Los Angeles County Probation Officer, was named administrator.

In February, 1954, Mr. Hale, in his capacity as administrator of the Anderson Estate, filed a petition in the probate court asking authority to sue defendant Massey, appellant Reynolds and the directors of United for recission and damages arising out of the sale of the Anderson shares in United.

The matter of the settlement of the threatened litigation was discussed by the directors of United and appellant's counsel was told that no compromise of the Anderson Estate litigation would be made unless the law firm of which appellant was a member, contributed the sum of $25,000 to defray the legal expenses of the directors in connection with such litigation.

On February 27, 1954, defendant Massey and the directors of United entered into a written compromise agreement with the law firm of Reynolds, Painter & Cherniss, which provided: (1) that defendant Massey and the directors settle the litigation with the administrator of the Anderson Estate by exercising the reverse option clause and directing the proceeds therefrom to be disbursed so that the estate would receive $2,800 per share for its 110 shares; (2) that Reynolds, Painter & Cherniss be released and discharged from all claims and demands in connection with the sale; upon condition (3) that Reynolds, Painter & Cherniss pay to Massey and the directors the sum of $25,000. Prior to the payment of this $25,000 appellant had "heard by rumor" that the matter had been referred to the Office of the District Attorney of Los Angeles County.

Concurrently with the execution of the compromise agreement just referred to, a settlement was effected between defendant Massey and Mr. Hale, as administrator of the Anderson Estate, under which the latter received the difference between the price of $350 per share paid to it for the sale of its 110 shares to defendant Massey and the other directors of United and $2,800 per share which was realized from the sale of said shares, as aforesaid, to the Shaw interests.

[3-7] As his first ground for reversal, appellant urges that the indictment does not state facts sufficient to constitute a public offense.

The indictment charges that the defendants:

> "* * * did wilfully, unlawfully and feloniously take personal property of a value in excess of $200.00 lawful money of the United States, the personal property of the Estate of Charles A. Anderson, deceased * * * and Helen Schwartz, Administratrix of said estate. * * *"

The gist of appellant's challenge to the sufficiency of the indictment is thus stated by him: "The fatal defect in the indictment consists in its failure to describe the property which the defendants are accused of taking. It is our contention that an indictment for theft must describe the property, otherwise it is totally insufficient, and that the mere general allegation in the indictment herein, accusing the defendants of taking personal property of a value in excess of $200.00, the personal property of the estate, and of the administratrix, is no description at all."

When it is remembered that the sufficiency of the indictment is not to be tested by the rigorous rules of the common law, nor by the rules existent in this state prior to the 1927 and 1929 amendments to our statutes governing pleadings in criminal cases, appellant's attack upon the pleading herein cannot be sustained.

The sole purpose of an indictment or information is simply to inform the accused of the charge which he must meet at the trial (Penal Code, Section 952). As was said in People v. Beesly, 119 Cal.App. 82, at page 85, 6 P.2d 114, at page 115, 970: "There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, * * *"

Where this information came solely from the indictment, as at common law, more particularity was required, but under our system, the law now provides, as part of the accusatory procedure, that in every criminal case the accused is entitled to a transcript of the testimony given before the Grand Jury or the committing magistrate, as the case may be (Penal Code, Sections 870, 925). See also People v. Pierce, 14

Cal.2d 639, 645, 96 P.2d 784; People v. Gilbert, 26 Cal.App.2d 1, 7, 8, 78 P.2d 770; People v. Roberts, 40 Cal.2d 483, 486, 254 P.2d 501; People v. Weiss, 123 Cal.App. 2d 487, 491, 266 P.2d 924; People v. Elliott, 115 Cal.App.2d 410, 416, 252 P.2d 661; People v. Schoeller, 96 Cal.App.2d 61, 64, 214 P.2d 565; People v. Longo, 119 Cal. App.2d 416, 418, 259 P.2d 53; People v. Jones, 61 Cal.App.2d 608, 615, 143 P.2d 726; People v. Curtis, 36 Cal.App.2d 306, 317, 98 P.2d 228; People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506.

Penal Code, Section 952, provides in part that an indictment or information is sufficient "* * * if it contains in substance, a statement that the accused has committed some public offense therein specified. * * It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." The quoted words mean what they say, and viewed in the light thereof, we are satisfied the indictment herein is not vulnerable to the stricture imputed to it by appellant. People v. Corenevsky, 124 Cal.App.2d 19, 23, 267 P.2d 1048; People v. Howes, 99 Cal.App.2d 808, 816, 222 P.2d 969; People v. Blankenship, 103 Cal.App.2d 60, 62, 228 P.2d 835; People v. Dunn, 40 Cal.App.2d 6, 12, 104 P.2d 119.

We are not in accord with appellant's contention that the provisions of Penal Code, Sections 952 and 967, are in conflict and that the former cannot constitutionally authorize the indictment herein (Const. of Calif., Art. I, Sec. 8) because of the provisions of the latter code section. We regard both sections as a legislative declaration of permissible modes of pleading and as complimentary to rather than irreconcilable with each other. When these two sections are read together they do no violence, in the instant case to the basic rule that the purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial, while the particular circumstances thereof were furnished him by the transcript of the testimony upon which the indictment was founded.

Our conclusion is fortified by reference to Penal Code, Section 960, which provides: "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

As was said in People v. Howes, supra, 99 Cal.App.2d at page 816, 222 P.2d at page 974: "* * * It is also the law that even a defective information or indictment will not result in a reversal unless a substantial right of the defendant on the merits is adversely affected. [Citing cases.]"

It is elementary that an appellant must not only show error but that such error prejudiced his substantial rights and militated against his receiving a fair trial. In the case at bar, appellant has not suggested how under any possible concept of the record he was in any way prejudiced by the form of the indictment herein. At no time in the trial court did he attack the indictment and his conduct during the trial showed he was at all times cognizant of the offense charged against him and of the particular details thereof—all of which he was apprised of by the Grand Jury transcript furnished him at the time of his arraignment.

Finally, appellant contends that the decision of the court and the judgment are contrary to and without support in the evidence, and are contrary to the law.

[8–10] As we enter upon a discussion of this contention we are confronted with the well established rule as announced in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, that before the court on appeal can set aside the verdict or decision arrived at by the duly constituted arbiter of the facts upon the ground of insufficiency of the evidence, " 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict [or decision] the existence of every fact which the jury [or in the instant case, the trial judge] could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. [Citing cases.]"

[11] It is the trier of fact who must be persuaded beyond a reasonable doubt of the guilt of the accused. Our function is to determine whether there is evidence, contradicted or uncontradicted, which, if believed, is of sufficient substantiality to justify conviction (People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P.2d 90; People v. Bass, 110 Cal.App.2d 281, 283, 242 P.2d 685; People v. Falk, 113 Cal.App.2d 857, 860, 249 P.2d 60).

Appellant relies heavily on the case of People v. Nichols, 52 Cal.App.2d 31, 125 P.2d 513, decided by this court and wherein a judgment was reversed on the ground "of the insufficiency of the evidence". In the case just cited however, the court set forth the limited power of an appellate tribunal under the rules above enunciated, and then said, 52 Cal.App.2d at page 35, 125 P.2d at page 515, "But it is axiomatic as well that an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince this court that its rendition was the result of passion or prejudice upon the part of the trier of facts. *When a case presents any of these features this court deals with it as a matter of law.*" (Emphasis added.) It was then pointed out that "In the case now before us the prosecution introduced no positive, direct or affirmative evidence on any material issue". Under the facts of the case at bar, we do not consider the Nichols case as militating against any of the established rules herein set forth and under which we must approach the rendition of a decision herein as to appellant's claim of insufficiency of the evidence to justify his conviction.

[12] While the indictment did not specifically charge appellant and defendant Massey with the crime of conspiracy, the theory of the prosecution throughout the trial was that appellant and his co-defendant had conspired to commit grand theft. In this state it is now settled law that a conspiracy need not be pleaded in an indictment or information if the evidence actually shows the existence of one (People v. Tanner, 3 Cal.2d 279, 299, 44 P.2d 324; People v. Whelpton, 99 Cal.App.2d 828, 832, 222 P.2d 935; People v. Anderson, 35 Cal.App.2d 23, 29, 94 P.2d 627).

[13, 14] A conspiracy is established when it is shown that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement (Penal Code, Secs. 182, 184; People v. Buffum, 40 Cal.2d 709, 715, 256 P.2d 317). A conspiracy cannot be established by suspicion or mere association of the parties. There must be evidence of some participation or interest in the commission of the offense, as well as guilty knowledge of the formation and existence of a common unlawful design (People v. Long, 7 Cal.App. 27, 33, 93 P. 387; People v. Linde, 131 Cal.App. 12, 20, 20 P.2d 704; People v. Rodriguez, 37 Cal.App.2d 290, 295, 99 P.2d 363; Underhill, Criminal Evidence, 4th Ed., Sec. 773, p. 1401).

[15] Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. This rule is sanctioned for the obvious reason that experience has demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence. "'* * * it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than

by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy (citing authority).' People v. Sampsell, 104 Cal.App. 431, 438–439, 286 P. 434, 437." People v. Steccone, supra, 36 Cal.2d at page 238, 223 P.2d at page 19. From the very nature of the stealth generally involved in the crime of conspiracy, it is not necessary to prove that the parties came together and reached a formal agreement (People v. Campbell, 132 Cal.App.2d 262, 267, 281 P.2d 912). In cases such as the one now engaging our attention, involving as it does, the claim of a conspiracy to defraud, it can hardly be expected that direct evidence of such a conspiracy can be obtained because such evidence could ordinarily be secured only in the event one of the conspirators admitted guilt. The judge herein was therefore, entitled to infer the existence of a conspiracy from all the circumstances proven, and if the inference is a reasonable one it will not be disturbed on appeal. In Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943, 946, our Supreme Court, quoting from a Georgia case, Woodruff v. Hughes, 2 Ga.App. 361, 58 S.E. 551, said: "'The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. * * * *The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.*'" (Emphasis added.) And in People v. Fratianno, 132 Cal.App.2d 610, 624, 282 P.2d 1002, 1009, we find the following language: "* * * the purpose of the evidence in conspiracy cases is to establish a mental state—an illicit concord of minds of several persons. The jury is entitled to consider every fact which has a bearing on the ultimate fact in issue. There is no valid objection to evidence which tends to show, step by step, the gradual formation of a criminal concord in the minds of those accused, merely because the evidence begins at a time long anterior to the wrongful meeting of minds. 'It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy. * * * "From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are almost always proven by circumstantial and 'piecemeal' evidence" * * *.' People v. Stevens, 78 Cal.App. 395, 407, 248 P. 696, 700. See Allen v. United States, 7 Cir., 4 F.2d 688."

[16] While, as heretofore stated, mere association with the perpetrator of a crime is not sufficient to prove a criminal conspiracy and that there must be evidence of some participation or interest in the commission of the offense (Dong Haw v. Superior Court, 81 Cal.App.2d 153, 158, 183 P.2d 724), nevertheless, when it is shown that a conspiracy is already in existence, a different situation may arise and evidence of a close association and constant contact is not totally irrelevant, if it tends to show that by reason of such association acts, apparently disconnected, are shown to have some relation to and are being committed in relation to and in furtherance of the conspiracy (People v. Griffin, 98 Cal.App.2d 1, 39, 219 P.2d 519).

[17] It is equally well settled that after a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy in furtherance of their original plan is in contemplation of law the act of all of them (15 C.J.S. Conspiracy § 74, p. 1105; People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Stoddard, 48 Cal.App.2d 86, 89, 119 P.2d 160; People v. McManis, 122 Cal.App.2d 891, 900, 266 P.2d 134).

In the instant case the record reflects that appellant and his co-defendant were intimately associated. The former was not only counsel for United, but for defendant

Massey personally, and at the time of the negotiations for and consummation of the sale of the stock of the Anderson Estate, appellant was attorney for the administratrix of said estate. He was fully aware that defendant Massey was constantly interested in purchasing stock in United, indeed, the appellant knew that Mr. Masey had talked to the late Mr. Anderson concerning the purchase of the Anderson stock. He also admits knowledge of at least two recent offers to purchase United at a price far in excess of that paid for the estate shares, but cannot recall whether or not he was informed of any other offers to purchase United. Upon the death of Mr. Anderson in September of 1952, he was aware that Mrs. Schwartz, who was appointed administratrix, was not a resident of this state, but that a nephew of decedent was such a resident and employed in the Probation Office of Los Angeles County, yet appellant prepared the documents necessary to procure the appointment of Mrs. Schwartz, advising her she could claim the Anderson home in Los Angeles as her residence address and that mail in connection with the estate could be forwarded to her home in Ohio. It is not unreasonable to say that the trial judge was justified in drawing the inference that appellant's interest in having a non-resident administratrix appointed who was without knowledge of financial matters and removed from the local scene was that she would be more easily influenced to follow appellant's recommendations as to sale of the stock than one who resided in the locale in which the estate was administered. After Mrs. Schwartz was appointed administratrix and returned to her home in Ohio, appellant forwarded to her the documents in the estate which required her signature and upon their return, notarized those signatures.

Sometime between Mr. Anderson's death and the end of 1952 Mr. Massey admittedly communicated to appellant his interest in purchasing the Anderson stock, but it was not until the beginning of March that Mrs. Schwartz was informed of this. Mrs. Schwartz was told that United had a buyer for the stock at $200 per share. "It may be worth more" he stated, "but recently however, things have not been quite so good in the line of business". The court was warranted in inferring that the purpose of this letter was to impress upon Mrs. Schwartz the wisdom of accepting such an offer as an inducement to influence her subsequent decision to accept $350 which offer appellant knew he could obtain from his co-defendant Massey. Mrs. Schwartz however, was reluctant to accept the proffered offer of $200 per share until an effort was made to find another buyer at a better price. Appellant made no effort to locate another buyer though he knew at least two persons, Mr. Ahmanson and Mr. Metz, who had been interested in purchasing stock of United. It seems only reasonable to infer that they might have ben interested in obtaining a block of 110 shares of the 750 of United. With reference to the $350 offer for the estate stock, appellant was asked, "But in so far as you were concerned, when you in your mind came to this figure of $350.00, essentially you knew that there had been a batch at some time in the past that sold for $300.00, and you reached up in thin air and grasped the figure of $350.00; is that it?" His answer was, "I would say that is approximately it." He further testified that the figure of $350 was based upon prior sales and "what I thought those directors would pay" since defendant Massey had purchased stock at $250 per share after attempts had been made to sell it elsewhere, "that $300.00 was the highest price that it had ever brought, and I thought that going up another $50.00 was about as much as they would stand." It is significant, to say the least, that the price offered by defendant Massey was $350, the exact price appellant advised Mrs. Schwartz to hold out for. In discussing the price with Mrs. Schwartz, the administratrix, appellant advised her that the asset value of the stock was $2,100 per share, but to obtain that sum was another question. Appellant's opinion was that $350 was the top price which could be obtained. While appellant stated that he made inquiries of various brokers, he conceded that these brokers, in order to determine the value of the stock, would have to go to United. On July 16th, the day before the conference between appellant, defendant Massey and Mrs. Schwartz, defendant procured authorization to sell the stock. The meeting on the following day evidenced the concert of action between appellant and his co-defendant. At the outset of this meeting appellant urged upon the administratrix the necessity of selling the stock in order to make distribution in the estate. He then advised her that the aforesaid inquiry of brokers resulted in information that the stock was worth between $200 and $250 per share, but that there was no market for the stock. Defendant Massey then entered the discussion. He informed Mrs. Schwartz that United had total assets of $37,119,165.53 and described them. Roughly he said, the book value of each share was $2,600. But, he told her, "book value" could only be realized if (1) United were sold, (2) the assets of United were sold, or (3) that United was liquidated. He further stated that many deductions would have to be made in order to arrive at a true value, in the event one of these three alternatives developed, which was much less than indicated.

Defendant Massey represented that there were no negotiations pending for the sale of United when in fact at this time he was in contact with the Shaw interests whom he knew were interested in purchasing United.

Defendant Massey informed Mrs. Schwartz of an offer in April of 1952 to purchase United. He failed to reveal the Taper offer, the Metz negotiations, or the Landes offer which was made in May of 1953. *The appellant knew of at least two offers (Ahmanson and Metz). He also knew of defendant Massey's continual search for a purchaser for United.*

Defendant Massey disclosed the dividends paid in the past since 1948 and indicated that until such time as certain litigation was settled and the reserves firmly established the dividend would remain at 10% per year on the basis of $100 par, but he failed to disclose that business was actually so prosperous that in the "foreseeable future" the Association would be able to increase the dividends to 40%.

As a further inducement for the sale of the estate stock, appellant, at the meeting, pointed out to the administratrix that the estate would receive only $1,100 a year in dividends on this stock, whereas if the money received from the sale of this stock were just deposited in a bank the income would be greater. Appellant then analyzed the situation in light of the fact that the estate owned only a minority of the stock which, he stated, "is worth less than majority stock * * * and in the last analysis, valuation for purposes of sale has to be governed by what you can get for it, irrespective of all these figures as I see it." Appellant then pointed out that the stock could be retained, but "I don't suppose all your heirs in the Midwest would want it, would they? They would rather have the money; isn't that right?" To us there appears no reasonable doubt that appellant and defendant Massey were working in cooperation with each other. As soon as the administratrix accepted the $350 offer, appellant informed his co-defendant who immediately proceeded to consummate the purchase of the estate's stock.

We also deem it noteworthy that appellant and defendant Massey agreed upon a fee of $5,000 to the former for his handling of this transaction while he was attorney for the administratrix. The trial judge was entitled to consider this fact in connection with the association of appellant and his co-defendant.

When defendant Massey offered some of the recently acquired stock of United to the other directors and some question was raised as to appellant's fee, defendant Massey announced that he had been approached by a prospective purchaser of United.

Appellant's law partner was requested to inform the administratrix of the Anderson Estate of the offer to purchase United, which request was transmitted to appellant, but the latter saw no reason for compliance therewith.

It is also significant that in the latter part of February, 1953, defendant Massey solicited prospective purchasers for the sale of United but such solicitations were not vigorously pursued until he had been informed on July 21st that the administratrix had agreed to the sale of the estate stock. Two days thereafter defendant Massey personally contacted Mr. Shaw with regard to the purchase of United, but purchase of the estate stock was not then complete, and on July 31st he suggested "for personal reasons", a delay of 30 days in the pending negotiations.

On August 19th the estate stock certificates were forwarded to United by appellant and defendant Massey thereupon contacted Mrs. Cook (the broker) and made an appointment for the following day. The estate stock was transferred on August 21st and the final agreement for the sale of United to the Shaw interests was consummated some two weeks thereafter, on September 9th.

That appellant was aware of the negotiations for the purchase of a majority interest in United is indicated by his presence at the meeting on August 25th at which he acted as a scrivener and at which meeting the details of the sale were agreed upon. However, he made no inquiry as to when this sale was first contemplated—whether before or after he had advised the administratrix to accept $350 per share for the stock owned by the estate, nor did he communicate with her until the circumstances surrounding the sale were under scrutiny.

As to when appellant first learned of the negotiations to sell United to the Shaw interests, the court was entitled to consider that in December, 1953, when he was informed that the Anderson heirs contemplated legal action against him, he refused to state when he had first learned of such negotiations. In that regard, Attorney James O. Warner, who represented 60% of the heirs of Charles A. Anderson, deceased, testified that on December 1st or 2nd he had a conversation with appellant and others in appellant's office, wherein Mr. Warner advised appellant "at the present state of my investigation I felt I would institute an action against him and the other persons * * * I asked Mr. Reynolds (appellant) when in substance the stock had actually been delivered, and he said that it had been delivered approximately August 13, 1953. I asked him in the course of the conversation when he first learned about the negotiations that culminated in the sale of this stock, *and he did not answer that question. He stated that Mr. Massey had lied to him—*". (Emphasis added.)

Another incriminatory aspect of appellant's conduct is his telephone call to the administratrix of the Anderson Estate in December after appellant had been informed that the stock transaction in which he participated was being questioned, and in which conversation he asked for a letter in which the administratrix would say that she knew of the proposed sale of United.

[18] With reference to the compromise agreement hereinbefore set forth and as a result of which appellant refunded the sum of $25,000, it must be conceded as claimed by appellant, that courts favor the settlement of disputes involving liability, nevertheless, in criminal cases we are satisfied that the facts and circumstances under which a compromise of civil liability is made may be considered by the trier of facts in connection with whether such conduct was occasioned by consciousness of guilt.

[19] We are impressed that the evidence was amply sufficient to show that appellant and his co-defendant associated themselves together to accomplish by concerted action the sale of the estate stock in order that defendant Massey and the other directors of United might obtain control of the majority of the stock in said corporation with a view to disposing of such controlling interest at a price far in excess of the price paid for the estate stock. True, there was evidence in conflict with the foregoing—evidence, which if believed by the trial judge would

have sustained inferences contrary to those drawn by him, but, on an appeal from a judgment of conviction in a criminal case we are required to view the evidence in a light most favorable to the prosecution (People v. Newland, supra; People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547), and on appeal, in the case of conflicts in the evidence, our function is limited to a determination of whether there is substantial evidence, contradicted or uncontradicted, to sustain the conclusion reached by the duly authorized arbiter of the facts.

[20, 21] We come now to a consideration of the question of whether the evidence was sufficient to establish that the foregoing acts and conduct of appellant and his co-defendant Massey were in furtherance of a common desire to accomplish an *unlawful* object. It is now well established that the offense of grand theft as defined in Section 484 of the Penal Code includes the crimes of larceny, embezzlement, and obtaining money by false pretenses, and a judgment of conviction of grand theft, based on a general verdict of guilty can be sustained only if the evidence discloses the elements of one of the consolidated offenses (People v. Ashley, 42 Cal.2d 246, 258, 267 P.2d 271; People v. Jones, 36 Cal.2d 373, 376, 224 P.2d 353). We are satisfied that the evidence offered in the instant case in proof of appellant's commission of the crime of grand theft must be considered on the theory of fraud committed by false pretenses. The elements of the crime of grand theft on this theory of obtaining money or property by false pretenses are: (1) an intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with the money or other property. People v. Jones, supra, 36 Cal.2d at page 377, 224 P.2d at page 355; People v. Baird, 135 Cal.App.2d 109, 114, 286 P.2d 832.

[22, 23] It would unduly prolong this already lengthy opinion to here restate the evidentiary features of this case. What constitutes fraud and false pretense may not be the subject of a definite or invariable rule, but we feel that it may justly be said that included therein are the elements of trick, cunning, dissembling and unfair ways by which another is deceived. Deception deliberately practiced for the purpose of gaining an unfair advantage of another is fraud.

[24] Appellant herein was an attorney at law. He was counsel for the administratrix of the Estate of Anderson and as such it was his duty, by reason of the confidence reposed in him by such administratrix, to make full disclosure of all material facts within his knowledge relating to the transactions here in question. Appellant was also counsel for United, as well as for his co-defendant Massey personally, and was well informed as to the affairs of United. Appellant also accepted a fee of $5,000 from his co-defendant and the other directors for his services in securing for them at $350 per share the stock owned by the estate for which he was legal counsel, and which, within some two weeks after transfer of said stock, was sold for $2,800 per share. To us, the foregoing narrative of testimony received at the trial depicting a course of conduct in which appellant knowingly participated, teeming with fraud and replete with intrigue, deception and duplicity, warranted the trial judge in finding appellant guilty of grand theft involving an intent to defraud the Estate of Anderson by the use of false pretenses to perpetrate the fraud and accompanied by a reliance upon the fraudulent representations by appellant's client, the administratrix of the Estate of Anderson in parting with the 110 shares of stock in United.

We have painstakingly read the voluminous reporter's transcript containing as it does more than 3,000 pages; we have carefully read appellant's briefs in connection therewith consisting of 302 pages—from all of which we conclude that appellant had a fair and impartial trial. In fact, the learned trial judge displayed to defense counsel unusual consideration and patience. His decision, in our opinion, was based on clear and convincing proof.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

151 Cal.App.2d 517

Mike TYMKOWICZ and Emma Ann Tymkowicz, Plaintiffs and Respondents,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, Defendant and Appellant.

Civ. 17244.

District Court of Appeal, First District, Division 2, California.

June 6, 1957.

Action against a school district for the death of plaintiffs' minor son as result of fall on school yard pavement when released from another boy's grip while playing game of "blackout". From a judgment of the Superior Court, Santa Clara County, John D. Foley, J., on a jury's verdict for plaintiffs, defendant appealed. The District Court of Appeal, Draper, J., held that adequacy of supervision of school playground, school officials' use of same care as persons of ordinary prudence would have used under same circumstances, whether inadequate supervision was proximate cause of injury, and decedent's contributory negligence or assumption of risk, were questions for jury.

Judgment affirmed.

1. Schools and School Districts ⇨89.11

Lack of or improper supervision of pupils may constitute negligence of school district.

2. Appeal and Error ⇨989

In action for death of school boy as result of fall on school-yard pavement while playing a game, defendant school district's argument that entire testimony of boy participating in game with decedent showed that witness meant to refer only to immediate area of game, not whole school yard, in testifying that he did not see any teacher in yard while he was playing game, was proper argument to jury, but could not be addressed to District Court of Appeal on appeal from judgment on jury's verdict for plaintiffs.

3. Evidence ⇨586(3)

Testimony of one in position to see persons claimed to be present when accident occurred that he did not see them is sufficient to support jury finding that such persons were not present.

4. Schools and School Districts ⇨121

In action against school district for death of school boy as result of fall on school-yard pavement while playing a game, testimony of boy participating with decedent in game that he did not see any teacher in yard during game was sufficient to support jury's finding that no teacher was in yard at time of accident.

5. Schools and School Districts ⇨121

In action against school district for death of plaintiffs' minor son as result of fall on school-yard pavement while playing game of "blackout" with another pupil, jury could consider plaintiff father's testimony that school principal admitted he knew such game was going on for quite a few years as evidence of fact assertedly admitted.

6. Schools and School Districts ⇨122

In action against school district for death of school boy as result of fall on school-yard pavement while playing game of "blackout" with another boy, evidence was sufficient to take to jury issue as to adequacy of supervision of school playground.

7. Appeal and Error ⇨1002

Schools and School Districts ⇨122

In action against school district for death of school boy as result of fall on school-yard pavement while playing a game with another boy, whether school officials used same care as persons of ordinary prudence would have used under same circumstances in supervising pupils on playground was fact question for jury, whose determination, supported by substantial evidence, adverse to defendant on such issue, will not be disturbed on appeal from judgment on verdict for plaintiffs, though there was contrary evidence warranting different conclusion, if accepted by jury.

8. Schools and School Districts ⚷121, 122

In action against school district for death of school boy as result of fall on school-yard pavement while playing game of "blackout" with another boy, evidence was sufficient to take to jury question whether inadequate supervision of pupils on playground was proximate cause of death and to support jury's verdict for plaintiffs on such question.

9. Negligence ⚷105

Knowledge that danger exists is not knowledge of amount of danger necessary to charge a person with negligence in assuming risk caused by such danger.

10. Schools and School Districts ⚷121

In action for death of school boy as result of fall on school-yard pavement, evidence warranted jury's finding against school district's defense of decedent's contributory negligence and assumption of risk.

11. Trial ⚷295(6)

In action against school district for death of school boy as result of fall on school-yard pavement while playing game of "blackout" with another boy, instruction quoting statutory provision that every teacher in public schools shall hold pupils to strict account for their conduct on playgrounds or during recess was not prejudicial to defendant, even if erroneous, where instructions as whole fully advised jury of factual basis required to impose liability on district and made it clear that a fellow pupil's act would not alone establish such liability.

12. Trial ⚷253(4)

In action for death of school boy as result of fall on school-yard pavement while playing game of "blackout" with another boy, trial court's omission of statutory words, "on the way to and from school," from instruction quoting remainder of statutory provision that every teacher in public schools shall hold pupils to strict account for their conduct on playgrounds or during recess, was not error, as fatal injury was not incurred in going to or from school.

13. Appeal and Error ⚷1064(1)
Schools and School Districts ⚷122

In action against school district for death of school boy as result of fall on school-yard pavement while playing game of "blackout" with another boy, instruction that when failure to perform a duty, such as duty to be present to supervise pupils' conduct during recreation periods, may reasonably be expected to result in rough, rowdy and dangerous practices, wrongful absence of supervisor may constitute negligence, was not irrelevant or prejudicial to defendant as placing before jury a fact not in evidence, in view of substantial evidence that no teacher was in yard at time of or for appreciable period before accident.

14. Appeal and Error ⚷1064(4)
Schools and School Districts ⚷122

In action against school district for death of school boy as result of fall on school-yard pavement while playing a game with another boy, use of word "wrongful" in instruction to jury that wrongful absence of supervisor may constitute negligence when failure to perform duty to be present to supervise pupils' conduct during recreation periods may reasonably be expected to result in rough, rowdy and dangerous practices, was not error or prejudicial to defendant, as such word was used to protect defendant.

◆

Weinstock, Anderson, Maloney & Chase, San Francisco, for appellant.

William G. Clark, San Jose, for respondents.

DRAPER, Justice.

This is an action for wrongful death of Michael Tymkowicz, 10, a pupil at College Park Grammar School. Shortly before school, decedent was engaged in a game of "blackout," played on the school grounds. In this "game," one boy takes a deep breath and holds it, while another boy squeezes him tightly around the chest. The object is to render the first boy unconscious. On this occasion, the object apparently was partially attained. When released from his companion's grip, Michael fell and struck his head upon the school yard pavement, sustaining injuries which resulted in his death later the same day. Jury verdict was in favor of plaintiffs, the parents of the deceased boy. Defendant school district appeals. Its principal contention is that the evidence is insufficient to support the judgment.

[1-4] Lack of supervision of pupils (Forgnone v. Salvador U. E. School Dist., 41 Cal.App.2d 423, 106 P.2d 932), or improper supervision (Buzzard v. East Lake School Dist., 34 Cal.App.2d 316, 93 P.2d 233) may constitute negligence on the part of the school district. Appellant concedes that failure to provide supervision "may result in actionable negligence," but argues that the evidence shows actual supervision by teachers. Richard Rastellini, the other participant in the "game," was called by appellant. He was asked "while you were playing this, did you see any teacher at all in the yard?" and answered "No, sir." Appellant argues that his testimony as a whole shows that he meant to refer only to the immediate area of the "game," and not to the school yard as a whole. This was a proper argument to the jury, which had the function of weighing the evidence. It cannot be addressed to this court which, looking to the evidence only to see whether there is substantial support therein for the jury's implied finding, finds it in the testimony quoted. There was like testimony by another witness. When one in a position to see testifies that he did not see persons claimed to be present, this negative evidence is sufficient to support a jury finding that such persons were not present (Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 86 P.2d 829. Such negative evidence is more commonly found in cases where the issue is whether a warning whistle or bell was sounded by a train. In these analogous cases, the rule is clear that a finding that no warning was sounded is supported by testimony of one in a position to hear that he heard no warning (Scott v. City and County of San Francisco, 91 Cal.App.2d 887, 889, 206 P.2d 45), even in the face of positive testimony that the warning was given (Carey v. Pacific Gas & Electric Co., 75 Cal. App. 129, 242 P. 97; Hamilton v. Pacific Elec. Ry. Co., supra). Thus the testimony above quoted is, in our case, sufficient to support a determination by the jury that no teacher was in the yard.

[5, 6] There also was evidence from which the jury could conclude that the game was played for at least ten minutes before the injury to Michael. Additionally, plaintiff father testified to an admission by the school principal that he "knew that game was going on for quite a few years." The jury could consider this testimony as evidence of the fact assertedly admitted (Satariano v. Sleight, 54 Cal.App.2d 278, 129 P.2d 35). There was no evidence of efforts by school authorities to stop the game. The evidence summarized in this paragraph was sufficient to place before the jury an issue as to the adequacy of the supervision of the school playground (see Lilienthal v. San Leandro etc. Sch. Dist., 139 Cal.App.2d 453, 293 P.2d 889; Satariano v. Sleight, supra).

[7] The basic issue is whether defendant district exercised ordinary care. "The question is whether the school officials used the same care as persons of ordinary prudence * * * would use under the same circumstances" (Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 582, 81 P.2d 894, 897). This is a question of fact, and is essentially for the jury. Their determination of this issue is supported by substantial evidence. It will not be disturbed here,

even though there is contrary evidence which, if accepted by the jury, would lead to a different conclusion.

[8] Appellant also attacks the sufficiency of the evidence to show that inadequate supervision was a proximate cause of the injury. But this question, too, is one of fact for the jury, and we cannot say that, as a matter of law, the evidence is insufficient to support the verdict in this respect (Charonnat v. San Francisco Unified Sch. Dist., 56 Cal.App.2d 840, 133 P.2d 643; Ogando v. Carquinez Grammar School District, 24 Cal.App.2d 567, 75 P.2d 641; Lindsey v. De Vaux, 50 Cal.App.2d 445, 123 P.2d 144).

[9, 10] Appellant argues that the deceased child was, as a matter of law, guilty of contributory negligence or assumed the risk of the injury. But "knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger" (Ridge v. Boulder Creek, etc., School Dist., 60 Cal. App.2d 453, 460, 140 P.2d 990, 993). Even as to adults, determination that contributory negligence exists as a matter of law is rare, and a much more lenient rule is applied to minors (Ross v. San Francisco Unified School Dist., 120 Cal.App.2d 185, 191, 260 P.2d 663, and cases there cited). In the case of this 10 year old boy, it was well within the province of the jury, on the evidence before it, to find against the defense of contributory negligence and assumption of risk.

[11, 12] Appellant asserts error in the giving of an instruction, quoting from Education Code Section 13229, the language: "Every teacher in the public schools shall hold pupils to a strict account for their conduct * * * on the playgrounds, or during recess." Hanson v. Reedley, etc., School Dist., 43 Cal.App.2d 643, 111 P.2d 415, is cited. But that case involved negligence of school authorities in the choice of an automobile and driver for the transportation of students. Supervision of the student driver was not an issue. Even there, it was held that the instruction was not prejudicial. In the case at bar, the sole issue was the adequacy of the supervision of students at play. The quoted code section is a principal basis for requiring adequate supervision (Charonnat v. San Francisco Unified Sch. Dist., supra, 56 Cal. App.2d 840, 844, 133 P.2d 643). Thus it is difficult to find error in the reading of the code section to the jury. In any event, the instructions as a whole fully advised the jury of the factual basis which must be found if liability was to be imposed, and made clear that the act of a fellow student would not, alone, establish liability of defendant district. Thus the questioned instruction, even if erroneous, was not prejudicial. Appellant also complains that the court omitted from its quotation of the section the language requiring strict account of pupils "on the way to and from school." But here the injury was not incurred in going to or from school, and the omitted language was irrelevant. Its omission was not error.

[13, 14] Appellant assigns as error the giving of an instruction that "Mere lack of supervision or inadequate supervision may not necessarily create liability on the part of a School District to compensate for injuries sustained by a pupil; but when the failure, if any, to perform a duty such as the duty to be present to supervise the pupils' conduct during the recreation periods may reasonably be expected to result in rough, rowdy and dangerous practices * * * the wrongful absence of a supervisor may constitute negligence." It is asserted that there was no evidence of the absence of supervisors from the yard, and that this instruction therefore is irrelevant and is prejudicial in placing before the jury a fact not in evidence. We have already pointed out that there was substantial evidence from which the jury could find that there was no teacher in the yard at the time of the accident or for an appreciable period before it. Appellant also asserts error in the use of the word "wrongful" in the phrase "the wrongful absence of a supervisor may constitute negligence." But

the adjective obviously was used to protect appellant. Rather than informing that mere absence of supervision is a basis of liability, the court limited liability to a case of wrongful absence. There is no prejudice to appellant.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

151 Cal.App.2d 523

HOUSE OF REST OF the PRESBYTERIAN CHURCH IN the UNITED STATES OF AMERICA, Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES, a body corporate and politic, and City of Pasadena, a municipal corporation, Defendants and Appellants.

Civ. 22085.

District Court of Appeal, Second District, Division 3, California.

June 6, 1957.

Action to recover taxes paid under protest. The Superior Court of Los Angeles County, Parks Stillwell, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that nonprofit organization, having for its specific and primary purpose the providing of a house of rest for furloughed missionaries and other Christian workers to stay in while in United States, was a corporation organized for religious and charitable purposes whose property had been irrevocably dedicated to such purposes and exclusively used therefor, and held that its property was entitled to the welfare statute exemption.

Affirmed.

1. Taxation 🔑241(1), 251

Welfare tax exemption law must be given a strict, but reasonable, construction, and party claiming exemption has burden of showing that it clearly comes within terms thereof; any doubt being resolved against right of exemption. West's Ann. Rev. & Tax.Code, § 214.

2. Taxation 🔑241(1), 244

The purposes for which a corporation is organized, the extent of its powers, and whether its property is irrevocably dedicated to religious or charitable purposes, within welfare tax exemption law, are to be determined from its articles of incorporation.

3. Corporations 🔑370(1)

Statement of purposes in articles of incorporation results in defining scope of authorized corporate activity and limits powers of corporate officers and agents, and is controlling not only over those powers stated in articles but also those given by statute. West's Ann.Corp.Code, § 803.

4. Taxation 🔑241(1), 244

Welfare tax exemption law requirement that property be irrevocably dedicated to religious or charitable purposes is concerned with purposes rather than uses. West's Ann.Rev. & Tax.Code, § 214.

5. Taxation 🔑241(1), 244

Test for determining whether property is used exclusively for religious or charitable purposes is not whether such property is "essential, indispensable, and necessary" for accomplishment of such purposes but whether use is "incidental to and reasonably necessary" for accomplishment of such purposes, and integrated activities as a whole must be examined in determining tax status of property for welfare exemption. West's Ann.Rev. & Tax.Code, § 214.

6. Taxation 🔑241(2), 244

Nonprofit organization, having for its specific and primary purpose the providing of a house of rest for furloughed missionaries and other Christian workers to stay in while in United States, was a corporation organized for religious and charitable purposes whose property had been irrevocably dedicated to such purposes and exclusively used therefor, and its property was entitled to the welfare statute exemption from taxation. West's Ann.Cal.Const. art. 13, § 1c.

◆

Harold W. Kennedy, County Counsel, and Gordon Boller, Asst. County Counsel, Los Angeles, for appellants.

Hammack & Pugh, Dan S. Hammack, Jr., and Richard H. Vawter, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action against the County of Los Angeles and the city of Pasadena to recover taxes paid under protest, claiming its property was exempt from taxation under the welfare tax exemption law. Cal.Const., art. XIII, § 1c; Rev. & Tax.Code, § 214. Plaintiff filed its claims for the exemption with defendants, the claims were denied, and the taxes assessed for the tax year 1954–55 paid under protest. Plaintiff had judgment. Defendants appeal.

Plaintiff was organized February 25, 1954. It is a nonprofit California corporation. It has no capital stock. It is organized to provide facilities for missionaries, clergymen, other religious workers and their families who work in establishing and furthering Christian purposes throughout the world and in the general diffusion of Christianity. Its specific and primary purpose is to provide a house of rest where missionaries and other Christian workers may stay in the United States. The members of the corporation are elected by the Board of Foreign Missions of the Presbyterian Church in the United States.

Plaintiff owns and operates the House of Rest in Pasadena for housing missionaries of the foreign and national boards of the Presbyterian Church in the United States and for workers of the Young Men's and Young Women's Christian Associations who are on furlough. The House of Rest is a two-story building with seven apartments completely furnished. Missionaries on furlough pay a token rent of $32 a month, which includes utilities and a cleaning charge. The amount received from rent is substantially less than the expense of operating and maintaining the House of Rest. The difference is met by donations made to the Board of Foreign Missions of the Presbyterian Church in the United States, referred to as the Board of Foreign Missions, which allocates the funds to plaintiff for operating expenses.

Revenue and Taxation Code, section 214, as it read at the time in question, in relevant part provided:

> "Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:
>
> "(1) The owner is not organized or operated for profit; * * *
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> "(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;
>
> "(3) The property is used for the actual operation of the exempt activity;
>
> "(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;
>
> "(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary re-

ligious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes * * *."

Stats.1953, c. 730, p. 1994.[1] It appears to be conceded and the court found that plaintiff and the subject property met the requirements of subdivisions (1), (2), (4), and (5) of section 214 and that on liquidation, dissolution or abandonment of the owner the property will not inure to any prohibited private person. The dispute is as to whether plaintiff is a corporation organized for religious or charitable purposes; as to whether the property is irrevocably dedicated to either of such purposes; and as to whether the property is used exclusively for either of such purposes.

[1] Section 214 is to be given a strict but reasonable construction, and plaintiff has the burden of showing that it clearly comes within the terms of the exemption. Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 785, 221 P.2d 62; Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 734–735, 221 P.2d 31, 15 A.L.R.2d 1045. Any doubt must be resolved against the right of exemption. Sutter Hospital v. City of Sacramento, 39 Cal.2d 33, 39, 244 P.2d 390.

[2] Defendants assert plaintiff is not organized for religious or charitable purposes and that its property is not irrevocably dedicated to either of such purposes. The purposes for which a corporation is organized; the extent of its powers; and whether its property is irrevocably dedicated to religious or charitable purposes are to be determined from its articles of incorporation. Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 221 P.2d 62; Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 849, 264 P.2d 539.

According to its articles of incorporation plaintiff is organized for these purposes:

"*Two:* The purposes of this corporation are as follows: To provide facilities for missionaries, clergymen, other religious workers and their families who work in establishing and furthering Christian purposes throughout the world and in the general diffusion of Christianity. The specific and primary purpose for which this corporation is formed is to provide a house of rest where missionaries and other Christian workers may stay in the United States. In connection with its purposes, this corporation may provide any and all kinds of facilities and services necessary or desirable to further the purposes of the corporation, and it may transact any and all business, engage in any and all activities and do any and all things which are lawful for a nonprofit corporation under the laws of the State of California.

"*Three:* This corporation is organized pursuant to the General Nonprofit Corporation Law [Corp.Code, § 9000 et seq.] * * *."

We are of the opinion it is manifest from plaintiff's articles that the purposes for which it is organized are to provide facilities for its missionaries and a house of rest in which they and other Christian workers may stay while they are in the United States. Its articles, taken as a whole, are not fairly or reasonably subject to the construction that it may engage in any other activity. Its purposes are exclusively religious and charitable.

[3] The statement of the purposes in the articles results in defining the scope of authorized corporate activity and limits the powers of the corporate officers and agents and is controlling over the powers, both those stated in the articles and those given by statute.

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[1] Section 214 was amended in 1955. Stats.1955, c. 1067, p. 2034.

The powers of a religious or charitable corporation are construed with reference to the purposes of its corporate existence. The statement in the articles of the objects, purposes, and powers of the corporation constitutes a limitation on the actual authority of the representatives of the corporation as between it and the state. Corp. Code, § 803. Powers are to be deemed ancillary to the purposes and are limited thereby. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 469–470, 105 P. 411; Ballentine, California Corporation Laws, 171, §§ 184, 187; 46 Harvard Law Rev. 1337.

The enumerated powers in plaintiff's articles include only those activities which are incidental to and reasonably necessary to the accomplishment of the religious and charitable purposes for which it is organized and exists: "To provide facilities for missionaries, clergymen, other religious workers and their families who work in establishing and furthering Christian purposes throughout the world and in the general diffusion of Christianity," and specifically "to provide a house of rest where missionaries and other Christian workers may stay in the United States." Plaintiff is empowered *"in connection with its purposes"* to provide any and all kinds of facilities and services necessary or desirable *"to further the purposes of the corporation."* (Emphasis supplied.) The power to "transact any and all business, engage in any and all activities and do any and all things which are lawful for a nonprofit corporation under the laws of the State of California" is not a general grant of power. It is specifically restricted to furtherance of the purposes of the corporation.

All that plaintiff is empowered to do is to provide the facilities specified in its articles, and in so doing to exercise the powers given it by its articles and by statute, all of which are incidental to and are reasonably necessary to the accomplishment of those purposes.

Said the Supreme Court in Pacific Home v. County of Los Angeles, 41 Cal.2d 844, at page 850, 264 P.2d 539, at page 542:

> "The further enumerated powers of plaintiff to buy and sell property, to make contracts, to receive devises and bequests, to borrow money, to contract debts and to do 'all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation' are all powers which a nonprofit corporation has by statute Corporation Code, § 9501, and which plaintiff would possess without their recital in its articles. Davis v. Pacific Studios Corp., 84 Cal.App. 611, 615, 258 P. 440. The statement in the articles that the 'enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation' does not purport to be a general grant of power. Rather it appears to be a precautionary clause to signify that the incidental powers reasonably necessary to effectuate plaintiff's main purposes shall not be limited by their specific enumeration. See 7 Fletcher Cyclopedia Corporations, Perm. ed., ch. 42, § 3648, p. 780. It does not give plaintiff any powers except such as are specifically conferred by the articles and those given by statute. Such powers are not unlimited powers, but are subordinate to plaintiff's main objects and purposes, which are wholly charitable."

[4] Plaintiff's articles expressly provide, "The property of this corporation is irrevocably dedicated to religious and charitable purposes." This provision is entirely consistent with its expressed purposes and powers. The requirement that property be irrevocably dedicated to religious or charitable purposes is concerned with purposes rather than uses. Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 785, 221 P.2d 62. Plaintiff is not authorized to use any of its property for any purpose other than religious or charitable purposes. The fact that the deed of the

property to plaintiff was a regular corporation grant deed without dedication or limitation as to the use of the property does not broaden the use which plaintiff may make of the property, as defendants appear to urge. Under its articles plaintiff may use the property for exempt purposes only. If plaintiff should devote its property to any nonexempt use the Attorney General could successfully seek to enjoin such use as *ultra vires* and as inconsistent with its purposes and powers. In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 861, 257 P.2d 1; Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 854, 264 P.2d 539.

Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 221 P.2d 62, 66, which held that certain property of the plaintiff had not been irrevocably dedicated to exempt purposes, does not help defendants. In that case the plaintiff's articles empowered it "to permanently divert all of its property to *any* lawful nonprofit purpose * * * though the welfare exemption does not extend to *all* lawful nonprofit purposes and, in fact, expressly excludes certain ones such as fraternal, lodge, or social purposes unless 'clearly incidental' in nature Rev. & Tax.Code, § 214(5), its directors were empowered to convey all or part of its property in trust for *any* lawful purposes which they might deem advisable * * *; in carrying out its broad purposes, plaintiff's powers were likened to those of corporations organized for *social* as well as other purposes * * *; and finally, plaintiff was vested with authority 'to carry on any other lawful business, enterprise or activity whatsoever' which would 'enhance the value of its properties.'" No such powers are to be found in the articles of plaintiff in the present case. Moody Institute of Science v. County of Los Angeles, 105 Cal.App.2d 107, 233 P.2d 51, 52, is not apposite. In Moody the plaintiff's articles empowered it to receive and expend money and property "for other religious, scientific, and *educational* purposes." (Emphasis added.) Since the articles permitted the holding and use of property for educational purposes, on the authority of the Pasadena Hospital case it was held the plaintiff was not accorded an exemption under the statute.[2] Goodwill Industries v. County of Los Angeles, 117 Cal.App.2d 19, 254 P.2d 877, is also not helpful. Among Goodwill's general and primary purposes as stated in its articles were educational and industrial nonexempt purposes. Distinguishing these cases in Pacific Home v. County of Los Angeles, 41 Cal.2d 844, at page 853, 264 P.2d 539, at page 543, the court stated:

> "The above-cited Pasadena Hospital, Moody Institute, and Goodwill Industries cases are clearly distinguishable. In each of those instances the recipient corporation was organized and operated for both exempt and nonexempt purposes, and the property in question was acquired without any dedication to any one of its several purposes, exempt or nonexempt. Consequently, though the property in fact may have been used for exempt purposes at the time that the welfare exemption was sought, it could not be said that it had been irrevocably dedicated to exempt purposes when the corporate powers and purposes of the claimant corporation permitted it to divert the property or its proceeds to nonexempt purposes. The various broadly stated purposes, exempt and nonexempt, of the respective recipient corporations at the time of acquisition of the property prevented the imposition of a trust on the property for hospital (Pasadena Hospital Assn.), religious (Moody Institute), or charitable (Goodwill Industries) purposes. But here when plaintiff acquired the properties in question, its

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[2] At that time property used for educational purposes was not exempt from taxation under the welfare tax exemption law. Section 214 was amended by the Legislature in 1951 to exempt property used by certain educational institutions. (Stat.1951, c. 242, p. 502.) By referendum the amendment became effective in 1952 when it was ratified by the people at General Election, November 4, 1952.

> purposes as declared in its articles of incorporation were limited solely to exempt charitable purposes."

The stated powers of plaintiff in the case at hand are limited solely to the accomplishment of its exempt religious and charitable purposes. Plaintiff's powers are only exempt powers; it does not have any nonexempt power. Its activities within its corporate powers may be only exempt activities. It is organized solely for religious and charitable purposes and its property is irrevocably dedicated to such purposes.

The welfare tax exemption law provides that to be exempt from taxation, property shall be used exclusively for religious or charitable purposes. Rev. & Tax.Code, § 214. It is asserted plaintiff's property, the House of Rest, is not used exclusively for religious or charitable purposes.

The contention that the House of Rest is not used exclusively for religious or charitable purposes is predicated on the erroneous assumption that the furlough is a vacation, a residence away from the mission, a planned and rather extended absence from work—residence use, not mission or welfare use.

The Board of Foreign Missions of the Presbyterian Church in the United States, organized in 1837, is the agency of the Presbyterian Church which sends missionaries to foreign countries. Since World War II there have been between 1,000 and 1,250 missionaries continuously in the foreign field. For more than 100 years it has been the established policy of the Board of Foreign Missions to grant furloughs to all missionaries to return to the United States at regular intervals. On furloughs the missionaries and their families return to the United States. While in the United States, some of the missionaries and their families stay at the House of Rest.[3]

The Manual of the Board of Foreign Missions states:

> "Purpose of Furloughs
>
> "Furloughs have become a part of the routine procedure of foreign missions service. The individual furlough is not a vacation but a change of activity. It enables the missionary (1) to obtain needed rest, medical care, mental and spiritual renewal; (2) to reestablish family and church relationships. From the standpoint of the service, it enables the missionary (3) to report to the home Church; (4) to share with the Board in creating greater missionary interest; (5) to prepare for better work upon returning to the field through advanced study and by observation of improved methods in institutions and churches."[4]

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[3] The court found: "The Board of Foreign Missions of the Presbyterian Church in the United States of America (herein called Board of Foreign Missions), sends missionaries to various countries throughout the world to spread the word of Jesus Christ. It follows a fixed policy of granting furloughs to each missionary after a definite term of service in the field. When furloughed, the missionary and his family are returned to the United States. The length and number of furloughs granted a missionary will vary according to his missionary field and the period of each preceding term of service. Furloughs have for years been a part of the routine procedure of the Board of Foreign Missions service. The furlough is not a vacation but a change of activity. It enables the missionary to obtain needed rest, medical care, mental and spiritual renewal, to re-establish family and church relationships; to prepare for better work upon returning to the field through advanced study and by observation of improved methods in institutions and churches, and to again become familiar with the American way of life so it can be reinterpreted upon his return to the field."

[4] Other provisions of the Manual with respect to furloughs are:

"Study Furlough

"The furlough after the first term of service is regarded as a special opportunity for the missionary to complete his preparation for life service in the light of his field experience and of the field judgment as to the nature of his future work. For this reason, except in certain fields where special conditions have led to the fixing of a shorter period for the

[5] The test for determining whether the property is used exclusively for religious or charitable purposes is not whether such property is "essential, indispensable and necessary" for the accomplishment of such purposes, as argued by defendants, but whether the use is "incidental to and reasonably necessary" for the accomplishment of such purposes. "To this point it would appear that the exemption of property 'used exclusively for religious * * or charitable purposes' should be held to include any property of the religious or charitable entity which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of religious or charitable purposes. The integrated activities as a whole must be examined in determining the tax status of property for the welfare exemption." Serra Retreat v. County of Los Angeles, 35 Cal.2d 755, 758, 221 P.2d 59, 60.

In Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045, the major part of the property claimed to be exempt under the welfare tax exemption law was devoted to the housing of essential hospital personnel—residence use—and to the conduct of a nurses' training school operated in connection with the hospital. Holding that the use of property by the plaintiff hospital for a nurses' training school and to provide housing for hospital interns, resident doctors, student nurses, and other essential employees required to be readily available in its effective operation, and maintaining a tennis court as a

regular term, the term of service is shortened and a full year's study furlough is granted, the major part of which shall be devoted to advanced study as advised by the Mission or responsible field organization, and under direction of the Board. The missionary shall plan to spend one full academic year in study at an approved institution of higher learning or comparable study under the direction of the Board."

"Pre-Furlough Information Regarding Housing Needs

"The missionary should write to the Board through the Foreign Secretary regarding housing during his furlough period. The Board maintains certain missionary apartments and has the responsibility for aiding in the placement of missionaries in other apartments and residences throughout the United States. Ordinarily the Board expects a missionary to reside in one of these apartments or homes if it is available. The study plans of the missionary often determine his place of residence and the Board gives special consideration to such cases. In any event, the Board should know through correspondence in advance what the individual and family needs are in regard to housing."

"Country of Furlough Residence

"(1) It is considered desirable that furloughs be spent in the United States for the sake of the missionary's influence in the home Church. * * *"

"Rest and Recuperation

"Based on the medical examination and with the advice of the Medical Department, the missionary shall plan to spend a sufficient portion of his furlough in rest and recuperation to make certain of his return to the field in the best physical condition."

"Continued Preparation for Service

"(1) *First Term Missionary.* Under the immediate supervision of his Foreign Secretary, the first term missionary shall devote the major portion of his first furlough to advanced study, ordinarily in an institution of higher learning. The place of study shall be determined by the missionary and Foreign Secretary in consultation with the Secretary for Student Work. For economy in travel, the institution should preferably be near the missionary's home, yet highest efficiency is not to be unduly sacrifi[c]ed for such saving."

"General Promotional Work

"All missionaries on furlough should place themselves at the disposal of the Home Base Department for longer or shorter periods of promotional work. After plans for rest and medical care have been made in consultation with the Medical Department, and plans for study have been arranged, the missionary should inform the Home Base Department as to the periods of time he will be free for such promotional work."

"Visit to Supporters

"Those missionaries supported by individual churches or church groups should arrange, after consultation with the Home Base Department, to visit these supporting groups during furlough, remaining in each community long enough to become acquainted with the membership."

limited recreation for the hospital personnel, constituted uses exclusively for hospital purposes, and that the property was within the scope of the welfare tax exemption law, the court declared (35 Cal.2d at pages 736, 738, 739, 744, 745, 221 P.2d at pages 35, 37, 40, 41):

> "It thus appears that under the rule of strict but reasonable construction, the phrase 'property used exclusively for * * * hospital * * * purposes' should be held to include any property which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of hospital purposes; or, in other words, for any facility which is reasonably necessary for the fulfillment of a generally recognized function of a complete modern hospital. * * *
>
> Maintained as an integral part of the hospital operations, a nurses' training school has generally been regarded as a facility which is incidental to and reasonably necessary for the accomplishment of hospital purposes, and therefore entitled to exemption. [Citations.] Though necessarily serving the private educational interest of the student nurses in attendance, property so used for a nurses' training school does not thereby lose its character as property 'used exclusively for * * * hospital * * * purposes' within the scope of the welfare exemption law. [Citations.] Rather, it is to be regarded simply as 'an educational feature' of the hospital—'an incident to [the latter's] main purpose and usefulness'. * * *
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> "Typical of such living quarters were those furnished by plaintiff Cedars of Lebanon Hospital in 'a building known as Lebanon Hall * * * attached to the main building of the hospital' and for which 'each of the nurses' so accommodated 'makes a payment of $10.00 per month' to the hospital. * *
>
> "The tennis court is located on the hospital grounds and is used as an outdoor recreational facility for the hospital personnel as above mentioned. * * *
>
> "In other words, the tennis court was reasonably necessary for the fulfillment of a generally recognized function of a complete, modern hospital. Perhaps it may not be said that such recreational facility, in its use by either patients or essential personnel, is indispensable to the accomplishment of hospital purposes; but absolute indispensability does not commend itself as an appropriate test, and it finds no support in the authorities."

Y.M.C.A. v. County of Los Angeles, 35 Cal.2d 760, 221 P.2d 47, held that dormitory rooms in the plaintiff's buildings which were rented and returned income—residence use—were used exclusively for charitable purposes. The court stated (35 Cal.2d at pages 767, 769, 221 P.2d at page 51):

> "Rather the construction of the law, though strict, must also be reasonable. To this end it would appear that the exemption of property 'used exclusively for * * * charitable purposes,' like the exemption of property 'used exclusively for religious [or] hospital * * * purposes,' should be held to include property used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of such purposes. * * *
>
> "The dormitory accommodations furnished at plaintiff's respective branches appear to be a reasonably necessary facility in carrying out plaintiff's general program and to constitute a base of operations from which radiate its commonly recognized influences and teachings directed to the elevation and betterment of young men and boys. * * *
>
> "It is manifest from the record here that plaintiff's conduct of dormitory facilities at its respective branches

> correlates wholly with its purpose of providing for the welfare of young men and boys of moderate earning capacity and income, through the maintenance of lodging quarters at a minimum cost so that they may have a place of study, recreation and abode, under wholesome and decent influences and with proper protection and guidance designed to foster good citizenship and inculcate Christian ideals and character. * * * As so analyzed, the fact that plaintiff's dormitories, as a secondary consideration also serve the residential purposes of the occupants does not destroy the effect of their dominant purpose as property 'used exclusively for religious * * * or charitable purposes' within the contemplation of the welfare tax exemption law.
>
> "Similar considerations prevailed in opinions this day filed with regard to the tax exempt status of a nurses' home operated as a necessary adjunct of a hospital Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31, and the lodgings of priests in effectuating the operation of a religious retreat house Serra Retreat v. County of Los Angeles, 35 Cal.2d 755, 221 P.2d 59."

Also see Fredericka Home v. County of San Diego, 35 Cal.2d 789, 792, 221 P.2d 68; Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 264 P.2d 539.

The Board of Foreign Missions of the Presbyterian Church has found that missionaries, because of their isolation in foreign countries, lose touch with what has happened in the church and in the United States. Because of that fact and because world-wide views are changing so rapidly, the Board feels it is essential that missionaries come home from time to time on furlough to obtain needed rest, medical care and recuperation, mental and spiritual renewal; to reestablish family and church relationships; to report to the home church; to study; to exert influence in the home church; to reorientate themselves with what is happening in the church at home and throughout the world; to engage in promotional work; to create greater missionary interest; to prepare for better work on returning to the field. Certain missionaries are called home specifically to attend conferences on the Christian approach to communism. Furloughs are not vacations. Vacations are granted missionaries at regular intervals while they are in the field.

[6] The only use made of plaintiff's property is providing temporary low-cost housing facilities in the House of Rest for such missionaries and their families while the missionaries are on furlough, and for other religious workers and their families who work in establishing Christian purposes throughout the world. The only permanent resident of the House of Rest is a hostess who is available to the missionaries at all hours. The House of Rest is maintained as an integral part of the religious and charitable operations of the Presbyterian Church. It aids and augments the Board of Foreign Missions' program of spreading Christianity throughout the world. It is used solely in carrying out that program. Y. M. C. A. v. County of Los Angeles, 35 Cal.2d 760, 767, 221 P.2d 47. It seems evident that plaintiff's property is a facility which is incidental to and reasonably necessary for the accomplishment of plaintiff's religious and charitable purposes and that it is used exclusively for those purposes. Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 736, 221 P.2d 31.

The trial court properly concluded and adjudged that plaintiff's property was exempt from taxation for the tax year in question.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

151 Cal.App.2d 775

CAL–FARM INSURANCE COMPANY, a corporation, Plaintiff and Appellant,

v.

Carolyn BOISSERANC and James Boisseranc, a minor, Defendants,

James Boisseranc, Respondent.

Civ. 17223.

District Court of Appeal, First District, Division 1, California.

June 19, 1957.

Rehearing Denied July 19, 1957.

Hearing Denied Aug. 13, 1957.

Action by an insurer for determination that it was not liable under a comprehensive liability policy issued by it to named insured for any damages which might be awarded in an action arising out of an injury inflicted by insured's child upon another child. The Superior Court, Santa Clara County, Edwin J. Owens, J., entered judgment adverse to insurer and it appealed. The District Court of Appeal, Peters, P. J., held that evidence, including testimony that insured's child spent over half of his time with his father under a joint custody provision of an interlocutory divorce decree, and that the child was involved in accident in question only a few days after he had left insured's home to live a short while with his mother, sustained finding of trial court that child was an insured within meaning of policy protecting insured, his wife, and relatives, if residents of named insured's household.

Judgment affirmed.

1. Declaratory Judgment 🔑368

Where extrinsic evidence had to be admitted before court could interpret language of a comprehensive liability policy, question was one of fact, rather than one of law.

2. Appeal and Error 🔑991

Where construction of language in a comprehensive liability policy was one of fact, any reasonable construction by lower court would be upheld under general rules applicable to conflicting evidence.

3. Insurance 🔑146(3)

In determining whether a trial court's construction of language in a comprehensive liability policy was reasonable, any ambiguities in the policy were required to be interpreted against the insurer, including determination of the question as to who was covered by policy.

4. Insurance 🔑435.34

The terms "residence" and "household" of an insured as used in a comprehensive policy protecting insured and his wife and relatives if residents of his household, had no absolute meaning, but their meaning might vary according to the circumstances.

See publication Words and Phrases, for other judicial constructions and definitions of "Residence" and "Household".

5. Divorce 🔑302

The terms of an interlocutory divorce decree, awarding custody of child jointly to father and mother, while a factor in determining whether child was protected under a comprehensive liability policy issued to father and covering his wife and relatives if residents of his household, was not conclusive as to such issue.

6. Declaratory Judgment 🔑347

In action by an insurer for determination that it was not liable under a comprehensive liability policy issued by it to named insured, for any damages which might be awarded in an action arising out of an injury inflicted by insured's child upon another child, evidence, including testimony that insured's child spent over half of his time with his father under a joint custody provision of an interlocutory divorce decree, and that the child was involved in an accident in question only a few days after he had left insured's home to live a short while with his mother, sustained finding of trial court that child was an insured within meaning of policy protecting insured, his wife, and relatives, if residents of named insured's household.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, of counsel, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, Edward J. Niland, San Jose, of counsel, for respondent.

PETERS, Presiding Justice.

Jame Boisseranc, the child of Carolyn and August Boisseranc, aged 6, injured another child. Civil actions were filed against the Boisserancs and James. The insurance carrier brought this action for declaratory relief, seeking a determination that the insurance company was not liable under a policy issued by it to August Boisseranc. This policy was a comprehensive liability policy which protected August and his wife and relatives "if residents of his household" against liability imposed by law because of bodily injuries sustained by others. The trial court found that the insurance carrier was not obligated to defend or to respond in damages in any action against Carolyn, but decreed that James was an insured within the meaning of the policy. Cal-Farm appeals from this portion of the judgment.

The insurance policy contains the following pertinent coverage provisions:

> bility.
>
> "Coverage A—Bodily Injury Lia-
>
> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law * * * for damages, because of bodily injury * * * sustained by any person or persons."

It is also provided that: "The unqualified word 'insured' includes the named insured and also includes, if residents of his household, his spouse and relatives * * *."

Under the terms of the policy the insurer is admittedly obligated to defend any suit asserting a liability against any of the insured covered by the policy. The question presented is whether James, the son of August Boisseranc, is an insured within the meaning of the policy. This depends upon whether James, as a matter of fact, qualified as a "resident" of the "household" of August on the date of the accident.

When the policy was executed in 1949 the Boisseranc family was intact, that is, August and Carolyn and their children, including James, lived as a family unit on the insured premises. In 1952 August and Carolyn separated, and two of the children, including James, went to live with their mother. In February of 1953 Carolyn secured an interlocutory decree of divorce. Following the separation, James spent part of his time with each parent, the major portion being spent with his father. On September 1, 1953, shortly after leaving his father's home and while staying with his mother, James injured the child who has brought the actions from which the insurance carrier seeks to be relieved.

The main argument of the insurance carrier is that under the terms of the interlocutory decree of divorce between August and Carolyn, their son James, as a matter of law, resided with Carolyn and not with August. The interlocutory, in reference to the custody of James, provided as follows:

> "That said parties are awarded the joint custody of James Boisseranc, the minor son of these parties, provided that the physical residence of the said James Boisseranc shall be divided between the parties so that said son shall reside alternate periods of fifteen (15) consecutive days with each of the parties, the first of said fifteen (15) day periods to begin with the 6th day of February, 1953, and plaintiff to have the first opportunity to select the beginning period in which said child will reside with her.
>
> "That each of said parties shall have freedom of visitation with the child or children in the custody of the other at reasonable times and places."

Several months after this decree was entered, and before September 1, 1953, the terms of the interlocutory were modified by stipulation to read as follows:

> "That said parties be awarded the joint custody of Diane Boisseranc, their minor daughter, as well as the joint custody of James Boisseranc as provided for in said agreement and decree;
>
> "That the physical residence of Diane Boisseranc shall continue to be with plaintiff and that the physical residence of James Boisseranc shall be with plaintiff, rather than divided, as provided in said decree; provided, however, that defendant shall have the right of visitation with said two minor children at all reasonable times and places, including the visitations by them in his home."

The evidence most favorable to respondent shows that after the interlocutory was entered James spent substantially three-fourths of his time, day and night, with his father. After the decree was modified and up to June, 1953, James was with his father more than half the time. The school year ended in June. After the termination of the school year, James spent a few days with his mother and then returned to his father's home, where he remained until about a week before the accident when he returned to his mother's house. He was physically staying at his mother's home when the accident occurred. The evidence shows that between the date of the modification of the interlocutory and the date of the accident James was with his father three-fourths of the time. After the accident and up to December of 1953 James spent substantially more time with his father than he did with his mother. James had a bed in his father's house and kept a substantial amount of his clothing and many of his playthings there. At all times August Boisseranc paid for his son's support, clothing and medical bills.

August testified that it was his belief that he and his wife were equally entitled to the custody of James. Carolyn testified that she did not interpret the modified interlocutory as meaning that James' "residence" was to be exclusively with her. She also testified that even after the interlocutory and following the accident she had not definitely decided never to return to August. Later, however, she did secure a final decree and marry another person.

On this evidence the trial court, after finding that Carolyn was not covered by the policy, found that "on September 1, 1953, defendant James Boisseranc, a minor, was the son and a resident of the household of August Boisseranc within the meaning and terms of the policy of insurance, the subject of this action, and that on said date a relationship of insurer and insured did exist between the plaintiff herein and the said James Boisseranc."

Appellant, as already stated, places its main reliance on the custody terms of the interlocutory decree and its modification in support of its contention that, as a matter of law, James was not a "resident" of August's "household" at the time of the accident. It cites cases dealing with the technical definitions of "residence" and "domicile," particularly in the fields of family law and conflict of laws.

There can be no doubt that in some situations, particularly in the field of jurisdiction, courts have held that the terms of a divorce decree are decisive as to the residence of a minor child.[1] There are also a line of cases holding that the parent to whom custody has been given by a decree has the power to change the legal residence of the child. Section 213, Civ.Code; § 1526, Welf. & Inst.Code; Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739; In re Gi, 134 Cal.App.2d 479, 286 P.2d 364; Guardianship of Brazeal, 117 Cal.App.2d 59, 254 P.2d 886; Heinz v. Heinz, 68 Cal.App.2d 713, 157 P.2d 660; In re Chandler, 36 Cal.App.2d 583, 97 P.2d 1048; Guardianship of Casella, 133 Cal.App. 80, 23 P.2d 782; Annotation 53 A.L.R. 1160.

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[1] (See, for example, Toledo Traction Co. v. Cameron, 6 Cir., 137 F. 48, holding that the terms of a custody decree established the residence of a child to determine federal diversity jurisdiction; Board of Com'rs of Summit County v. Board of Com'rs, etc., 116 Ohio St. 663, 158 N.E. 172, holding such a decree established residence in determining whether the child was eligible for county relief.)

Appellant also emphasizes that James was living with his mother when the accident occurred, and contends that this negatives any thought that James was then a "resident" of his father's "household."

[1] The contention that residence, so far as coverage under the policy is concerned, is a question of law is not sound. Obviously, extrinsic evidence had to be admitted before the court could interpret the policy. This is one test as to whether the question is one of "fact" or "of law." Quader-Kino A. G. v. Nebenzal, 35 Cal.2d 287, 217 P.2d 650; Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748; Transportation Guar. Co. v. Jellins, 29 Cal.2d 242, 174 P.2d 625; In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319. At the trial both sides introduced extrinsic evidence on the subject. Thus, appellant introduced the terms of the interlocutory and its modification. Both sides, without objection, presented evidence as to the periods James spent with each parent. The parties were undoubtedly correct in assuming that extrinsic evidence was admissible on the question of interpretation. Obviously "relatives" of the named insured "if residents of his household" require some explanation *dehors* the contract. Chastain v. Belmont, 43 Cal.2d 45, 271 P.2d 498; Herrmann v. Fireman's Fund Ins. Co., 127 Cal.App.2d 560, 274 P.2d 501; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 214 P.2d 392.

[2, 3] Since the question is one of fact then, of course, any reasonable construction by the lower court must be upheld under the general rules applicable to conflicting evidence. Another rule of construction is also applicable, that is, that in determining whether the trial court's construction is reasonable any ambiguities in the policy must be interpreted against the insurer. This rule of construction extends to a determination of the question as to who is covered by a policy. In Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 437, 296 P.2d 801, 809, it was stated: "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. [Citations.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; *if the doubt relates to extent or fact of coverage, whether as to peril insured against* [Citations], *the amount of liability* [Citations] *or the person or persons protected* [Citations], the language will be understood in its most inclusive sense, for the benefit of the insured." (Emphasis added.) See also Arenson v. National Auto. & Cas. Ins. Co., 48 Cal.2d 528, 310 P.2d 961; Ensign v. Pacific Mut. Life Ins. Co., 47 Cal.2d 884, 306 P.2d 448; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 214 P.2d 392.

Appellant claims that the rule of construction against the insurer applies only after those insured have been determined and does not apply in determining whether a particular person is or is not in the insured class, citing some out-of-state authorities commented on in 44 C.J.S. Insurance § 308, p. 1226. Whatever the law may be in other states, the rule in California is to the contrary as is made clear in the underlined portion of the above quotation.

Thus, we start the problem of interpretation with the rule that the policy must be construed so as to give James the benefit of any reasonable interpretation that may bring him within its coverage. The precise question is whether, under any reasonable interpretation of the policy, was James, at the time of the accident, a "resident" of the "household" of August?

[4, 5] These quoted terms have no absolute meaning. Their meaning may vary according to the circumstances. Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 184 P.2d 153, 173 A.L.R. 896; Moore S. Corp. v. Industrial Acc. Comm., 185 Cal. 200, 196 P. 257, 13 A.L.R. 676. An important factor is to ascertain the purpose of

the terms of inclusion and exclusion. Arenson v. National Automobile & Cas. Ins. Co., 45 Cal.2d 81, 286 P.2d 816; Smith v. Smith, 45 Cal.2d 235, 288 P.2d 497. It is certainly obvious that the terms of the custody decree are not controlling as a matter of law. Certainly, even if such decree had given full custody and control of James to Carolyn, without even a right of visitation in August, and had James spent all of his time on his father's farm, James would be an "insured" within the meaning of the policy. One purpose of the extension of coverage clause is to broaden the coverage of the named insured. *August,* when he took out the policy, was potentially liable for the torts of his minor children under proper circumstances. Thus, the extension of coverage to "relatives" protects August, the named insured, as well as protecting the relatives. Another purpose of the extended coverage provision was to assist the insured, August, in complying with his moral and legal obligation to maintain and support his family. It is of some significance that the policy does not contain any itemization of the persons covered, specifying only the named insured, August and his partner, and the insured premises. The premium payments were not based upon the number of relatives living on the premises.

The parties refer to many cases which discuss the terms here involved. These cases are collected and discussed in 50 A.L.R.2d 120; 1 A.L.R.2d 561; 19 Words and Phrases, Household, 698; 27 Words and Phrases, Member of Household, 23; 37 Words and Phrases, Residing Together as Member of Family, 453. While the cases do not all appear consistent, it can generaly be stated that, insofar as the cases involve insurance policies, they can be roughly divided into cases involving policies excluding from coverage of the policies members of the insured's household, and those extending coverage to such persons. Both attempt to apply the rules of construction above discussed. As a result, in the extension cases the questioned terms are broadly interpreted, while in the exclusion cases the same terms are given a much more restricted interpretation. This is necessary because in both situations the courts favor an interpretation in favor of coverage. This was illustrated by the case of Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 184 P.2d 153, 156, 173 A.L.R. 896. The court in that case was interpreting an automobile policy *excluding* from coverage any car operated by the named insured and furnished to him by a "member of his household." It was held that a son of the named insured, who admittedly was a "member of his household" prior to entry into the military service, was not such a member at the time of the accident. In this way the policy was interpreted most strongly against the insurance company so as to impose liability upon it. Inconsistent, insofar as the definition of the terms are concerned, but reconcilable in result, is Central Manufacturers' Mut. Ins. Co. of Van Wert, Ohio v. Friedman, 213 Ark. 9, 209 S.W.2d 102, 104, 1 A.L.R.2d 557, where a minor son serving in the armed forces was held to be a "member of the insured's family of the same household" within the meaning of a personal property policy *extending* coverage to such persons. The common denominator in the two cases is that in both, the court upheld the rule that the language should be interpreted most strongly against the insurance company so as to hold that the policy covered the persons involved.

There are several California cases interpreting similar language. Thus, in Harlan v. Industrial Acc. Comm., 194 Cal. 352, 228 P. 654, 657, it was held that a sister of the mother of an illegitimate child was a dependent and "good faith * * * member of the family or household" of the child within the meaning of a provision of the Workmen's Compensation Act extending coverage to such persons, where the child had been reared in the home of the sister but was killed while in the employ of and residing with a third person. Under the same provision of the act, in Moore S. Corp. v. Industrial Acc. Comm., 185 Cal. 200, 196 P. 257, 13 A.L.R. 676, a minor was held entitled to death benefits where she lived with her mother and the decedent and was supported by decedent, although the relationship between her mother and decedent was knowingly meretricious. In Leroux v. Industrial Acc. Comm., 140 Cal.App. 569, 35 P.2d 624, the court was dealing with a compensation policy excluding from coverage relatives of the insured "when * * * living on the premises occupied by the [insured] and/or in the household of the [insured]." It was held that a brother of the insured was covered while living temporarily in the insured's house during a seasonable employment with the insured. See also Clark v. Industrial Acc. Comm., 129 Cal.App. 536, 19 P.2d 44.

An interesting case is Olson v. Standard Marine Ins. Co., 109 Cal.App.2d 130, 240 P.2d 379, 383. The policy involved protected certain itemized personal property of the named insured, a San Francisco resident, and the property of "members of his or her family of the same domicile." Certain of the itemized property, including some articles owned by the named insured's daughter, were stolen from the Los Angeles apartment of the daughter. It was held that the daughter was covered. The trial court had found that the daughter was domiciled in San Francisco, although living in Los Angeles. The finding was held supported by testimony of the daughter that she did not have the intention to make Los Angeles her home. But see Kohner v. National Surety Co., 105 Cal.App. 430, 287 P. 510.

There are many cases holding that in interpreting such clauses the physical place the claimed insured was living is not necessarily controlling. See, for example, Olson v. Standard Marine Ins. Co., 109 Cal. App.2d 130, 240 P.2d 379; Hoff v. Hoff, 132 Pa.Super. 431, 1 A.2d 506; Umbarger v. State Farm Mut. Automobile Ins. Co., 218 Iowa 203, 254 N.W. 87. In Barker v. Iowa Mutual Insurance Co., 241 N.C. 397, 85 S. E.2d 305, fire coverage was extended to an apartment maintained by the named insured's wife and son while these two were away from the family home during the time the son was attending college. See also Mississippi Ben. Ass'n v. Majure, 201 Miss. 183, 29 So.2d 110; Wright v. Bank of Southwestern Georgia, 13 Ga.App. 347, 79 S.E. 184.

These cases illustrate that the interpretation of the terms involved is not fixed but varies according to the circumstances of the case. They also demonstrate that most courts will interpret the terms so as to extend the coverage if this can be done under any reasonable interpretation of the facts.

[6] In the instant case, we start with the premise that the terms of the interlocutory, while a factor, are not conclusive. We know that after the decree the child spent three-fourths of his time with his father under circumstances where the child was certainly a "resident" of his father's "household," at least while actually living with his father. The accident happened a few days after the child had left the father's home to live a short while with his mother. Under the cases discussed above we know that actual residence at the time of the accident is not conclusive and that coverage may exist while temporarily away from the named insured's premises. Certainly, under the facts, the child had a continuing relationship with his father, so far as residence is concerned. In view of the purpose of such policies already discussed, and the rules of construction applicable to such policies, it must be held that the finding of the trial court on the issue is supported.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; McCOMB, J., dissenting.

152 Cal.App.2d 4

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald B. KEELING, Defendant and Appellant.

Cr. 3304.

District Court of Appeal, First District, Division 1, California.

June 20, 1957.

Defendant was convicted of murder in the first degree and from a judgment in the Superior Court, County of Alameda, Donald K. Quayle, J., the defendant appeals. The District Court of Appeal, Bray, J., held that the evidence sustained the conviction; that there was no error in giving and refusing instructions; no misconduct of the District Attorney; and no prejudicial error in the admission of evidence.

Judgment and order affirmed.

1. Homicide ⚿22(2)

"Deliberation" as respects first degree murder is something which is unhurried and arrived at as a result of thought and weighing of considerations, both for and against doing an act, while "premeditate" means to revolve in the mind beforehand, to contrive and design previously. West's Ann.Pen.Code, § 189.

See publication Words and Phrases, for other judicial constructions and definitions of "Deliberation" and "Premeditate".

2. Homicide ⚿147

Deliberation and premeditation, as respects first degree murder, may be inferred from proof of circumstances which will furnish a reasonable foundation for such an inference. West's Ann.Pen.Code, § 189.

3. Homicide ⚿22(1)

Requisite malice required for murder in the first degree is demonstrated when the evidence shows a deliberate intention to take the life of another human being. West's Ann.Pen.Code, § 189.

4. Homicide ⚿253(3)

Evidence sustained conviction for first degree murder as against claim that the evidence failed to show premeditation because of the amount of alcohol found in the system of defendant, so that he was allegedly unable to form the requisite intent, where circumstances showed that defendant did premeditate, and know what he was doing. West's Ann.Pen.Code, § 189.

5. Homicide ⚿294(2)

In murder prosecution, instructions on voluntary intoxication and unconsciousness were not improper on the ground that they did not cover the defendant's situation, in that they did not distinguish between the effects of accused's voluntary intoxication and effect of long term over indulgence.

6. Criminal Law ⚿825(3)

In murder prosecution, where court gives the usual proper instructions on voluntary intoxication and unconsciousness, if defendant desires further instructions upon the subject he must offer them.

7. Criminal Law ⚿824(4)

In murder prosecution, failure of court to instruct of its own motion with respect to acute intoxication of defendant, a pre-existent mental defect plus trauma both triggered by alcohol and a mental condition due to chronic alcoholism was not error under the evidence.

8. Criminal Law ⚿824(5)

In murder prosecution, where defendant after the homicide made statements to an officer who wrote them down in his notebook and which the defendant signed, and officer testified to the contents so that the contents were in evidence although the notebook itself was not, failure of the court without request to instruct that no writing was in evidence was not error.

9. Criminal Law ⚿824(5)

In murder prosecution, alleged fact that court did not instruct jury on effect of admissions made, if the defendant was not possessed of his faculties, was not ground for complaint where defendant did not request such an instruction.

10. Criminal Law ⚷814(16)

In murder prosecution, failure to instruct the jury on effect of admissions made, if defendant was not possessed of his faculties, was not error, where defendant's own evidence refuted his claim that he did not remember the events preceding and leading up to the homicide.

11. Homicide ⚷307(1)

In murder prosecution, instruction on difference between murder and manslaughter which omitted reference to killing perpetrated by poison, lying in wait, torture or in the perpetration of crimes mentioned in the homicide statute was not error where none of such elements was involved.

12. Criminal Law ⚷720(2)

In murder prosecution, comment of district attorney that defendant's statement was in evidence was not misconduct under the circumstances.

13. Criminal Law ⚷1030(1)

Defendant to take an advantage of an alleged error on appeal must have objected in the trial court.

14. Criminal Law ⚷1169(1)

In murder prosecution, admitting evidence showing that the victim's wife was in a hospital on the night of the homicide for "childbirth" though not relevant was not prejudicial.

15. Criminal Law ⚷438

In murder prosecution, admitting photographs of deceased taken after the killing was not error where the pictures were not gruesome, but had some evidentiary value in showing exact point of the wound and whether the intoxication of defendant entered into the crime.

◆

Howard W. Wayne (appointed), Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., of Alameda County, Frank Vukota, Deputy Dist. Atty., Oakland, for respondent.

BRAY, Justice.

Defendant appeals from a judgment of conviction, after jury trial, of murder in the first degree with life imprisonment, and from the order denying new trial.

Questions Presented.

1. Insufficiency of evidence to show premeditation.
2. Error in giving and refusing instructions.
3. Alleged misconduct of the district attorney.
4. Admission of immaterial evidence.

1. Evidence.

The victim of the homicide, Leon Ward, was in "Uncle Tom's Cabin" bar drinking at a time when defendant came in. Apparently there was no conversation between them at the time. Ward left for a few minutes, returning just after midnight with a Mrs. Davidson. Shortly thereafter an altercation took place between Ward and defendant. Only one blow was struck between them, Ward hitting defendant in the area of the mouth. The blow staggered defendant, loosened two front teeth and caused his mouth to bleed. Defendant went into the washroom to clean his face. William Bates, a customer, brought a towel to him. Defendant told him he would get even with Ward even if he had to go to jail for it. After several minutes defendant left the premises. He went to his hotel a short distance away, obtained his room key from the clerk and went up in the elevator with the clerk to his room floor. After getting his knife in his room, he rang for the elevator. He came down with the clerk, giving him the room key. Defendant then returned to the bar, having been gone only 10 or 15 minutes. Seeing Ward seated at a table with Mrs. Davidson, he walked over to him and stabbed him with a knife. His first thrust was the fatal one, over the shoulder of the sitting victim into the chest and through the heart. Defendant then stabbed Ward twice in the back. Ward fell and died almost instantly. As defendant watched Ward, defendant said, "Die, you son-of-a-bitch, die like a dog. This is the price you will have to pay for knocking two of my teeth out." Defendant remained quietly in the bar until the arrival of the police. To them he stated, "I did it, and I hope the son-of-a-bitch dies," and in answer to a question, "It was probably premeditated because I went back and got the knife." He explained that he had been in an argument with Ward who hit him in the mouth; he became angry and obtained from his room his knife with which he stabbed Ward.

At the trial defendant remembered his actions on the fatal day up to the time he first entered the bar, but denied any recollection of anything that happened, other than having a few drinks there, until he found himself getting into a patrol wagon outside the tavern. He remembered being questioned at the Hall of Justice but did not remember being questioned at the scene nor seeing there the officer who questioned him. He remembered some of the statements given by him at the Hall of Justice, but did not remember others of them, but admitted he could have made them. Two officers testified that he described certain events immediately preceding and subsequent to the scuffle and stabbing, which on the stand he claimed he could not recall. He admitted owning a knife similar to the murder weapon.

He testified to his drinking habits, usually two "boilermakers" (a bottle of beer and a shot of whiskey) before work and three or four more after work. He was a customer of Uncle Tom's Cabin almost nightly. The fatal day he had a "few drinks" on his way to work. While working for the Southern Pacific Company as a mail and baggage handler from 1:15 p. m. to 9:15 p. m. that day he consumed a good part of a half pint of whiskey between 1 and 5 p. m. and the same of a pint of whiskey between 5 and 9 p. m. He was not drunk but was "feeling pretty good," "feeling pretty high." Two of his coworkers whom he stated had drunk with him a portion of the two bottles of whiskey denied doing so. They had not smelled alcohol on his breath while at work. Bates, a van driver who was in the bar at the time of the killing, a police officer and a police inspector, the bartender, the hotel elevator man who took defendant up to his room when he secured his knife, testified that defendant did not appear to be drunk, although under the influence of liquor.

Dr. Lewis McKeever, a psychiatrist called by defendant, answered certain hypothetical questions. He stated that a blow of sufficient force to loosen teeth could impair the ability to reason and premeditate, which impairment could last 15 minutes or longer. The possibility of such impairment would be greater if a person was under the influence of alcohol with the factor of anger being an additional impairing element. The ability to reason would depend upon the degree of each factor. A person of the drinking habits described would suffer deterioration of the brain which would cause such person to be more susceptible to loss of reasoning power. The hypothetical person concerning whom the witness was examined could be in a state of "partial consciousness or clouded consciousness" where he might be acting as if he had most of his conscious functions but actually be acting without his normal conscious functions and without ability to premeditate and control his acts. However, the witness admitted that he was talking in possibilities and that the hypothetical person possibly could also premeditate and reason.

It was stipulated that three hours after the homicide defendant had a blood alcohol content of .229 per cent. Death by alcoholic consumption is expected where the percentage reaches .5 per cent. Dr. Ortega testified that blood alcohol content in excess of .15 per cent is considered sufficient to render a person under the influence of alcohol. With a .229 per cent a person could not do anything requiring a high degree of coordination. He could still reason except the process would be somewhat affected. Three witnesses testified to defendant's good reputation for peace and quiet.

Defendant's contention that the evidence does not support the conviction in that it fails to show premeditation boils down practically to his claim that because of the amount of alcohol found in his system it must be determined as a matter of law that he was unable to form the intent required for first degree murder. However, it cannot be so determined, particularly under the circumstances of this case. Even defendant's own expert admitted the possibility of a person in defendant's condition being able to premeditate and reason, while Dr. Ortega's testimony was to the effect that he could still reason although the process would be somewhat affected. Defendant's acts show almost conclusively that in spite of the alcohol in his system he reasoned and premeditated. Defendant after being struck and retiring to the rest room expressed a disposition towards revenge; he walked several blocks to get his knife. After stabbing his victim he expressed satisfaction with his action and wished his victim dead. After the stabbing he admitted to police he did the act and stated he "went back and got the knife." The fact that he deliberately went for a knife, walked a few blocks to get it, apparently acted normally in going to and from his room in the elevator, and the method of attack, are significant. Defendant did not slash wildly or without aim. It took considerable deliberateness to strike the victim in the heart by leaning over his shoulder. Defendant's coordination at that time, and all the circumstances, demonstrate a choice and a plan of conduct which was carried out to obtain revenge, and were inconsistent with a conclusion that defendant did not premeditate or know what he was doing.

[1-4] We are only concerned with first degree murder as defined in Penal Code, section 189 as "any other kind of wilful, deliberate, and premeditated killing * * *." "Deliberation" has been defined as something which is unhurried and arrived at as a result of thought and weighing of considerations, both for and against doing an act. "Premeditate" means to revolve in the mind before hand, to contrive and design previously. People v. Bender, 1945, 27 Cal.2d 164, 183, 163 P.2d 8; People v. Nichols, 1948, 88 Cal.App.2d 221, 228, 198 P.2d 538. Deliberation and premeditation may be inferred from proof of circumstances which will furnish a reasonable foundation for such an inference. People v. Guldbrandsen, 1950, 35 Cal.2d 514, 519, 218 P.2d 977; People v. Cole, 1956, 47 Cal.2d 99, 301 P.2d 854. And the requisite malice required for murder is demonstrated when the evidence shows a deliberate intention to take the life of another human being. People v. Greig, 1939, 14 Cal.2d 548, 561, 95 P.2d 936. "It is 'the exclusive province of the jury to determine from the evidence whether the killing was the "wilful, deliberate and premeditated" act of defendant.' [Citation.] However, 'as is true as to all factual issues resolved by a jury, the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict.' [Citation.] This court may not, in reviewing the evidence, substitute its judgment for that of the jury, and, where there is substantial evidence in support of the jury's verdict, its determination must be upheld. [Citations.]" People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1, 6; see also People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911; People v. Holt, 25 Cal.2d 59, 153 P.2d 21. The evidence amply meets all the above tests and was more than legally sufficient to support the verdict.

There is no resemblance between the facts of this case and those of People v. Griggs, 17 Cal.2d 621, 110 P.2d 1031, and therefore the case is not applicable here. There, there were no eyewitnesses to the killing, and the physicians appointed by the court reported the defendant to be a chronic alcoholic and even insane. Nor is the situation one like in People v. Holt, supra, 25 Cal.2d 59, 153 P.2d 21, where the circumstances of the killing were inconsistent with a deliberate intent to kill. In the Holt case, as pointed out by the court, 25 Cal.2d at page 92, 153 P.2d at page 38, the moment the deceased stopped advancing towards the defendant, the latter who had shot twice, stopped shooting even though there were eight loaded cartridges still in his rifle, and permitted the victim to proceed without further molestation. Contrast that situation with defendant's actions.

2. Instructions.

(a) *Voluntary intoxication and unconsciousness.*

[5] Defendant does not question the correctness of the instructions given on the subjects of voluntary intoxication and unconsciousness, as far as they went, but contends that they did not cover his situation in that they did not distinguish between the effects of acute voluntary intoxication and the effect of long term over indulgence which leaves the brain damaged and predisposed to black out upon a blow to the head. The court cited somnambulists and persons suffering from delirium of fever as among those protected by the defense, but did not add those rendered unconscious by a blow on the head or the other factors which defendant claimed the evidence showed.

We deem it unnecessary to determine whether as contended a person may be excused from the commission of a crime, if committed while unconscious from a condition brought about by long continued voluntary use of alcohol[1] for the reason that no instructions were requested by defendant on this subject.[2] The court after stating the presumption of consciousness which follows from a person's acting as if conscious, instructed: "This presumption, however, is disputable, and may be overcome or questioned by evidence to the contrary, and, if you should find that the defendant committed an act which if he was conscious would have constituted the crime charged against him or have been an element of that crime, and if you should not be convinced beyond a reasonable doubt that he then was conscious, you shall find that he was unconscious."

[6, 7] Defendant contends that the evidence would have supported a finding that defendant at the time of the killing was acting unconsciously, his unconsciousness being caused by any one of four conditions: (1) by acute intoxication; (2) by the blow and anger not caused but possibly "triggered" by the alcohol; (3) a preexisting mental defect plus the trauma, both "triggered" by the alcohol; and (4) a mental condition due to chronic alcoholism. Therefore, contends defendant, the court should have instructed of its own motion and without any request or suggestion from defendant, on all of these possible conditions. It is very doubtful that there was substantial evidence to support unconsciousness on any of these theories. While the psychiatrist discussed a hypothetical person who might have been influenced by some of these conditions (as the witness testified, he was only giving testimony "concerning possibilities") defendant's basic defense was intoxication to the point of inability to premeditate and then a general claim that the victim was at fault. The record fails to show that "unconsciousness" was in any way urged as a basic defense. To expect a trial court under the circumstances of this case to prepare instructions upon the complex matters which defendant now urges, would be putting an unusual and unrequired burden on the court. Generally, where the court gives the usual proper instructions upon voluntary intoxication and unconsciousness, if defendant desires further instructions upon

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[1] It should be noted that People v. Anderson, 87 Cal.App.2d 857, 860, 197 P.2d 839, holds that unconsciousness due to a heart condition aggravated by the defendant's voluntary intoxication could not be an excuse for the commission of a crime.

[2] See People v. Guthrie, 113 Cal.App.2d 720, 722, 248 P.2d 947, for an instruction on this subject. But see also People v. McNichol, 100 Cal.App.2d 554, 555, 224 P.2d 21, which may be inconsistent with the rule there set forth.

the subject it is his duty to offer them.[3] See People v. Reinschreiber, 141 Cal.App.2d 688, 699, 297 P.2d 658.

(b) *Admissions and Confessions.*

[8] Defendant admits that the instructions on this subject were correct but contends that when the court told the jury to view with caution testimony as to oral or written admissions or confessions by defendant, it should have told the jury there were no written admissions or confessions in evidence, and also that the jury should have been told to disregard admissions if made while defendant was not possessed of his faculties by reason of intoxication "or for other reason." Officer Barbeau, who arrived at the bar almost immediately after the stabbing, testified to questioning defendant and stated that defendant told him "It was probably premeditated because I went back and got the knife." On cross-examination defendant brought out that the officer then and there had written in his notebook the statements made to him by defendant, that he read the statements to defendant then gave the notebook to him to read and asked him to sign it. Defendant looked at it and signed it. Thus, the contents of the statement were in evidence although the writing itself was not. In his argument, defense counsel referred to the statement containing the word "premeditation" and said that the written statement was not in evidence. Replying thereto the deputy district attorney in his closing argument stated that defendant "was handed a statement. He read the statement and signed it and made no changes, and when counsel tells you that statement is not in evidence he isn't telling you the truth. It is down in here in black and white and it is part of the People's case and you can have it read to you if you so desire." Literally, the district attorney's statement is correct. Defendant's statement to the officer was in evidence although the signed writing thereof was not. Defendant contends that because the writing itself was not in evidence the court should have told the jury when discussing admissions that there were no written admissions in evidence. Neither at the time the district attorney made the above mentioned statement nor at any time did defendant request the court to inform the jury that the notebook statement was not in evidence. The fact that the testimony showed that defendant made a written admission or confession and its contents made the court's instruction correct. In any event, the failure of the court without a request to instruct that no writing was in evidence could not be error. See People v. Holbrook, 45 Cal.2d 228, 233, 288 P.2d 1.

[9, 10] The same is true of the fact that the court did not instruct the jury on the effect of admissions made if defendant was not possessed of his faculties. Defendant did not request such an instruction. Assuming, but not deciding, that if such an instruction had been requested, it would have been the duty of the court to give it, there could be no error in not giving such an instruction when it was not requested. It should be pointed out that in addition to the statements made by defendant at the scene of the crime, later in the morning after he admits he recovered consciousness he made similar statements to the police at the Hall of Justice, and then in the afternoon to the district attorney (this statement

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[3] It is very doubtful that even if defendant had offered an instruction on unconsciousness the court would have been required to give it. Defendant's actions before, during and after the killing completely refute his own statement that he "blacked out." See People v. Clifton, 186 Cal. 143, 150, 198 P. 1065, and People v. Coston, 82 Cal.App.2d 23, 40, 185 P.2d 632. People v. Griggs, supra, 17 Cal.2d 621, 110 P.2d 1031, is not in point here. There the court was discussing a situation where the defendant was not only a chronic alcoholic but was suffering from mental deterioration or aberration. The court said: "* * * when insanity is the result of long continued intoxication, it affects responsibility in the same way as insanity which has been produced by any other cause." 17 Cal.2d at page 625, 110 P.2d at page 1034. In our case there was no evidence of chronic alcoholism, mental deterioration, aberration or of insanity.

was taken down by a secretary), all of which refuted his claim that he did not remember the events in the bar after Ward struck him.

See People v. Clifton, supra, 186 Cal. 143, 150, 198 P. 1065, 1068, where the court held that where, as here, "Every witness who testified regarding the matter testified that, although the defendant was somewhat under the influence of liquor, he apparently sufficiently understood and intelligently answered the questions", it was not error to refuse an instruction *offered by the defendant* upon the same subject which defendant here contends the court should have given of its own motion.

(c) *Refusal of instructions on first degree murder.*

[11] The only practical difference between the offered instruction on the difference between the degrees of murder and manslaughter and the one given by the court is that the court's instruction omitted reference to a killing perpetrated by means of poison, lying in wait, torture or in the perpetration of the crimes mentioned in the homicide statute. As none of these elements were involved in this case, we see no error in not mentioning them to the jury. We find nothing in People v. Holt, supra, 25 Cal.2d 59, 89–90, 153 P.2d 21, cited by defendant, or in any other case requiring the court to point out in a case where none of these situations are involved, the situations in the commission of which a killing would automatically become first degree murder.

3. Alleged Misconduct.

[12, 13] We see no misconduct in the comment of the district attorney to the effect that defendant's statement was in evidence. He was referring to defendant's oral statement which the officer reduced to writing. The confusion between defense counsel's reference to the writing and the district attorney's reference to its contents could easily have been cleared up had defendant at any time called the matter to the attention of the court. This situation well illustrates the rule that to take advantage of alleged error on appeal defendant must object in the trial court. Had he done so the court would have informed the jury of the correct situation.

4. Immaterial Evidence.

[14] Mrs. Ward, the victim's wife, was asked by plaintiff if she saw Ward on the night of the homicide. She stated she saw him at the hospital. She was asked whether she or he was the patient there. She stated that she was. She was then asked for what purpose she was a patient there. Defendant's objection was overruled and she replied "childbirth," and then testified that it was a girl and that she had no other children. (No objection was made to the question eliciting this information.) Obviously the matter was not relevant or material to the guilt or innocence of the defendant. The objection should have been sustained. However, the error could not possibly have been prejudicial.

[15] Defendant contends that the admission of two photographs of the deceased taken after the killing should not have been admitted as their only purpose could have been to prejudice the jury. People v. Burns, 109 Cal.App.2d 524, 541–542, 241 P.2d 308, 242 P.2d 9, and People v. Cavanaugh, 44 Cal.2d 252, 266–268, 282 P.2d 53, discuss at some length the matter of admitting photographs in homicide cases of the dead body of the victim. As there pointed out, if photographs can be of some help to the jury they are admissible, and "there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors." Burns case, 109 Cal.App.2d at page 542, 241 P.2d at page 319. We do not believe that that line was crossed in our case. The pictures were not gruesome. Defendant's attorney had shown one of the photographs to defendant asking him if he had ever known the person depicted. We agree with the statement of the trial judge, the Hon. Donald K. Quayle, concerning them: "I don't think it is inflammatory in the sense that it would upset the Jury or create any bias or prejudice in their

minds, and I do think it has some evidentiary value in showing the exact point of the wounds here, whether or not intoxication enters into it; the degree of the crime enters into it and the ability to locate on an alleged first blow a vital spot, I think has some probative value."

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

151 Cal.App.2d 821

Marvon J. HENSLEY, a Minor, by his Guardian ad litem, Roy Hensley, Plaintiff and Appellant,

v.

John Russell HARRIS et al., Defendants.

Leslie H. Smith and Ernest G. Thorp, Individually and as co-partners, doing business as Smith & Thorp, Limited, a co-partnership, and John Russell Harris, Defendants and Respondents.

Civ. 22081.

District Court of Appeal, Second District, Division 3, California.

June 19, 1957.

Rehearing Denied July 10, 1957.

Hearing Denied Aug. 13, 1957.

Action by automobile guest against truck driver, who claimed he suffered loss of memory from just prior to collision, and his employers for injuries sustained in intersectional collision between automobile and truck, wherein defendants did not plead contributory negligence. From adverse judgment of the Superior Court, Los Angeles County, George Francis, J., the guest appealed. The District Court of Appeal, Shinn, P. J., held that whether truck driver suffered loss of memory from time his truck was about 50 feet from intersection, was a question of fact for jury, and defendant's instruction, that at outset of trial each party was entitled to presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law, improperly took question from jury, and failure of plaintiff to request a proper instruction did not preclude him from raising error since instruction related only to defendant's theory of case.

Judgment reversed.

Vallée, J., dissented.

1. Automobiles 🔑245(14)
Trial 🔑194(16)

In action by automobile guest against truck driver and his employers, who made no claim of contributory negligence, for injuries sustained in intersectional collision between truck and automobile, wherein truck driver testified that he could not recall anything from time that his truck was about 50 feet from intersection, whether truck driver had suffered loss of memory was question of fact for jury, and defendants' instruction that at outset of trial each party was entitled to presumptions of law that every person takes ordinary care of his own concerns and that he obeys law improperly took that question from jury. West's Ann.Code Civ.Proc., §§ 607a, 647.

2. Trial 🔑255(2)

Each party has duty to propose instructions in law applicable to his own theory of case but he has no duty to propose instructions which relate only to opposing theories of his adversary, and having no duty respecting them he has no responsibility for latter's mistakes. West's Ann.Code Civ.Proc., § 607a.

3. Trial 🔑261

Rule that all issues raised by pleadings are waived unless instructions relative thereto are requested has not been applied so as to absolve a party of responsibility for instruction given at his request which takes from jury and decides as matter of law vital issue in case. West's Ann.Code Civ.Proc., § 607a.

4. Trial ⚷255(2), 256(2)

Party is under no duty to offer instructions upon principles that are irrelevant to his own theory of case or to offer corrections of instructions of his adversary pertinent only to latter's theory of case.

5. Appeal and Error 274(5)

Statutory exception given to a party to instructions is equivalent of specific objection to all of his adversaries' instructions and while exception will be of no avail where instruction states law correctly but is deficient merely by reason of its generality, in other cases party will not be foreclosed from claiming error and prejudice. West's Ann.Code Civ.Proc., § 647.

6. Automobiles ⚷246(60)

In action by automobile guest against truck driver and his employer for injuries sustained in collision between automobile and truck at uncontrolled, blind intersection, instruction that mere fact that accident happened, considered alone, does not support an inference that some person, or any party to action, was negligent, was not improper, even if doctrine of res ipsa loquitur was applicable.

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Julius W. Feldman and Eric A. Rose, Long Beach, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents.

SHINN, Presiding Justice.

Appeal by plaintiff from a judgment for defendants entered on a verdict in an action for damages for personal injuries arising out of a collision between an automobile and a truck.

The accident occurred about 4:45 p. m. on September 7, 1954, in an uncontrolled, blind intersection at Golden Avenue and 6th Street in Long Beach. Plaintiff was riding as a guest in an automobile driven by Donald Cory in a northerly direction on Golden Avenue. Defendant Harris, an employee of the other defendants, in the course of his employment was driving a truck west on 6th Street. The vehicles collided in the intersection. Plaintiff sued Harris and his employers but did not sue Cory. Defendants answered denying negligence but did not plead contributory negligence upon the part of plaintiff. They pleaded that the accident was unavoidable.

[1] The only claim of error is the giving of two instructions. At the request of defendants the court gave this instruction: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary." Defendant Harris testified: "My recollection stops back from the intersection a bit"; I do not remember whether I ever looked south on Golden; my "recollection stops some place back east of the entrance of the intersection"; I cannot recall anything further from the time my truck was about 50 feet east of the east entrance of the intersection; my "recollection went blank"; I did not see the Cory car before the accident. Harris further testified:

> "Q. [By Mr. Feldman, attorney for plaintiff] Then right at the time of the accident, after the accident, you didn't know whether you were involved in an accident with a car or a truck or jeep or what kind of a vehicle you were involved in in an accident? A. I had no idea.
>
> "Q. When did you find out you were involved in this accident with the Mercury? A. I don't know. I don't remember.
>
> "Q. Did you ever become conscious of any danger before the collision? A. No, I don't think so.
>
> "Q. You can't recall becoming conscious of the fact that you were in danger, did you? A. No.
>
> "Q. What is the next thing you did remember from the point you say your truck was at approximately 50

feet back from the east entrance of the intersection? A. I had the sensation of somersaulting with no support.

"Q. So from the time you were 50 feet back east of the intersection at the time you felt yourself somersaulting, you don't remember a thing? A. That is correct.

"Q. You didn't even know you had been in an accident, did you.

"Mr. Bradish: When?

"The Witness: When I was in the air.

"Q. By Mr. Feldman: That is right. A. No, I don't think so.

"Q. You don't recall hearing any crash or anything like that? A. No, I don't believe I heard any noise either.

"Q. You don't recall—did you lose consciousness at any time? A. I don't think I was ever unconscious, no.

"Q. Now from the scene of the accident or at the scene of the accident, do you recall seeing the car that was involved in the accident after you felt this sensation of somersaulting through the air? A. No, because I have got another blank in there where I don't remember anything that was going on.

"Q. From when to when? A. Between the time I was somersaulting and the time some woman was talking to me. I don't remember anything in between there.

"Q. Now, so, you never saw the car? A. No."

A police officer called by plaintiff testified he had a conversation with Harris in a hospital on September 7, 1954, in which Harris said he did not notice the danger from the collision; he was going 25 miles an hour at the time and that Harris stated: "I was coming west on 6th Street from Daisy, traveling approximately 25 miles per hour, when a station wagon or jeep made a U-turn in front of me. I then slowed down for him, and then he pulled over on the right side of the street and started going west on 6th. I took this movement from him as a signal for me to pass him. As I just cleared him, I was struck by a blue car."

Plaintiff asserts that on this evidence it was error to give the instruction on presumption of due care. He argues the instruction should not be given "where there was nothing in the record of the case to indicate any physical basis for a loss of memory in the presence of an admission that the defendant did not lose consciousness at any time, and that he gave a detailed report of the accident to the police officer immediately following the accident." We do not agree with this contention. If the jury had believed the testimony of Harris it would not have been unreasonable to conclude therefrom that he had in fact suffered a loss of memory as to what took place while he was traveling the last 50 feet before the collision, and defendants would have been entitled to the benefit of the presumption. Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313.

However, we agree with the further contention of plaintiff that it was a question of fact for the jury whether Harris had suffered a loss of memory. Defendants do not contend otherwise. They frankly and very properly say "From the foregoing discussion it is clear that whether a party has sustained a genuine, rather than a pretended, loss of memory is a question of fact for the jury. If the jury believes that the loss of memory is genuine and that it resulted from the accident, then the presumption does apply." They cite Napoli v. Hunt, 141 Cal.App.2d 782, 789, 297 P.2d 653 and other cases which clearly establish the correctness of this statement. Defendants do not contend that the presumption would have been applicable if the jury had determined that Harris had not suffered a loss of memory. Inasmuch as the question of Harris' claimed loss of memory was a vital factual question it was not only error but grave error to take that question from the jury. Zollers v. Barber, 140 Cal.App.2d 502, 507, 295 P.2d 561.

The only answer of defendants to the contention that it was error to take the question from the jury is that if plaintiff had desired an instruction that the presumption was applicable to Harris only in case it was found he had suffered a loss of memory, he should have requested such an instruction or a qualification of the instruction that was given.

Defendants rely upon the rule found in 24 California Jurisprudence, pages 796–798: "Although it is not true as a general proposition that all issues raised by the pleadings are waived unless instructions relative thereto are requested, it is unquestionably the law that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain upon appeal only in case he requests that the charge be made more specific, or asks for other qualifying instructions, and his request is denied."

[2] This is a development of the requirement of section 607a of the Code of Civil Procedure that the parties propose instructions covering the law as disclosed by the pleadings. Each party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter's mistakes.

[3] The rule relied upon by defendants has rarely been applied except in the case of inadequate definitions of words and legal terms which each of the parties would desire to have correctly defined, and in nearly all instances the inadequacy has been in the definitions of negligence. See 24 Cal.Jur. 796. The instruction in question is not within the rule. It is not "correct as far as it goes" nor is it "deficient merely by reason of its generality." It is erroneous, just as any other instruction is erroneous which improperly takes from the jury a material factual issue that upon the evidence can be decided either way. The rule has not been applied so as to absolve a party of responsibility for an instruction given at his request which took from the jury and decided as a matter of law a vital issue in the case. There are many such cases, but we know of none in which the party who was prejudiced by his opponent's instructions in this manner was denied the right to complain of the error. See cases listed in 24 Cal.Jur. 841.

[4] There are innumerable cases which state the heart of the rule upon which the defendants rely as it was stated in State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 340, 240 P.2d 282, 287, "had plaintiff desired more specific instructions on the law of the case, it should have requested them." In none of the cases cited by defendants, nor in any that has come to our attention has it been held that a party is under any duty to offer instructions upon principles that are irrelevant to his own theory of the case or to offer corrections of the instructions of his adversary pertinent only to the latter's theory of the case.

[5] As previously stated, the answer did not plead the defense of contributory negligence of plaintiff. He did not desire that any instruction be given as to the presumption of the exercise of care. The instruction could have been of benefit only to the defendants and, obviously, was so intended. To hold that it is the duty of a party to correct the errors of his adversary's instructions, or to submit better instructions upon his adversary's theory of the case, would be in contravention of section 647, Code of Civil Procedure, which gives a party an exception to instructions that are given. That is the equivalent of a specific objection to all his adversaries' instructions. While the exception will be of no avail where an instruction states the law correctly but is "deficient merely by reason of its generality", in other cases he will not be foreclosed from claiming error and prejudice. Perhaps it would be the better practice to require specific objections to the instructions proposed by one's adversary, but that is not our law nor is it a matter for judicial legislation.

The law on the subject is well established to the contrary of the contention urged by defendants that plaintiff may not claim error in the instruction. It was declared by this court in Colgrove v. Lompoc Model "T." Club, 51 Cal.App.2d 18, 124 P.2d 128, 131, as follows: "If the law applicable to the facts of a case is stated correctly in a general charge to the jury, a party may not, in the absence of a request for a more specific or elaborate instruction, complain that a more specific or elaborate instruction should have been given. Townsend v. Butterfield, 1914, 168 Cal. 564, at page 569, 143 P. 760; Ohran v. County of Yolo, 1940, 40 Cal.App.2d 298, at page 307, 104 P.2d 700, 24 Cal.Jur. 796. In this case, however, the instructions as to the duty owing to a licensee injured by active negligence were erroneous, and plaintiff is not precluded from asserting that error was committed in instructions which were given, even though he did not request a proper instruction." This statement was quoted and declared to be the correct rule by the Supreme Court in Tabata v. Murane, 24 Cal.2d 221, at page 228, 148 P.2d 605. It was quoted and approved in Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, at page 587, 160 P.2d 21. In Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531, 534, the court said: "Ordinarily, before an appellant may complain of the lack of an instruction, he must have made a request that the charge be made more specific, or ask for qualifying instructions. This general rule is apparently qualified by the rule that an appellant may complain, in the absence of such request, where the instruction given erroneously states the applicable law and prejudice is suffered thereby. Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 587, 160 P.2d 21; Tabata v. Murane, 24 Cal.2d 221, 148 P.2d 605; Colgrove v. Lompoc Model "T." Club, 51 Cal.App.2d 18, 124 P.2d 128." In Sexton v. Brooks, 39 Cal.2d 153, at page 158, 245 P.2d 496, at page 499, the court stated: "The instruction which was given was erroneous and misleading, and defendant did not waive the error by failure to request an instruction which correctly defined her duty to plaintiff. See Tabata v. Murane, 24 Cal.2d 221, 227–228, 148 P.2d 605." In Kading v. Willis, 135 Cal.App.2d 82, 286 P.2d 861, 869, the appellant complained of error in an instruction on the duty of care and the opinion states: "Respondent argues that appellant cannot complain because he requested no specific instruction embodying the application of the correct rule. It is true that one who would complain of an absence of instruction on a material matter or of need of clarification or elaboration in an instruction which is correct as far as it goes must tender an appropriate request or be precluded from claiming error, but that rule does not apply to an erroneous instruction which is given at the instance of the opposing party. Colgrove v. Lompoc Model "T." Club, Inc., 51 Cal.App.2d 18, 24, 124 P.2d 128; Tabata v. Murane, 24 Cal.2d 221, 228, 148 P.2d 605; Sexton v. Brooks, 39 Cal.2d 153, 158, 245 P.2d 496."

In the recent case of Clark v. Pamplin, 147 Cal.App.2d 676, 305 P.2d 950, 952, the appellant complained of an instruction that omitted subdivision (c) of section 511 of the Vehicle Code, which related to speed of 55 miles per hour and would have complemented the one that was given; the court replied: "True, he did not request the giving of subdivision (c) to the jury and therefore cannot complain of failure to include it in the instruction which was given. But he is not thereby precluded from complaining of his being limited to an inapplicable 25 mile maximum. Tabata v. Murane, 24 Cal.2d 221, 227–228, 148 P.2d 605."

In our case proper instructions respecting the presumption of the exercise of care would have stated that only the defendants were seeking the benefit of the presumption and that they would be entitled to it only in case it was determined by the jury that Harris, because of loss of memory due to the accident, as he testified, was unable to recollect and relate what his actions were up to the moment of the collision. Since such an instruction would have been contrary to plaintiff's contention that there was insufficient evidence to prove that Harris had suffered a loss of memory, it would not be reasonable to say that he had a duty to propose such an instruction nor would it be just to deprive him of a fair trial when he was not at fault.

[6] Robert Drake, an eyewitness, testified for plaintiff that just before the accident defendants' truck passed him at a speed of 40 miles per hour, that it did not decrease its speed and its rear lights did not go on before it entered the intersection. Mr. Cory testified that he was traveling 15 or 20 miles per hour at the time of the accident; he looked both ways before entering the intersection and saw no approaching vehicle before he observed the truck entering the intersection from the east. Defendants adopted the testimony of these witnesses. Harris was traveling west on 6th Street which was 50 feet wide and Cory was traveling north on Golden which was 40 feet wide. The view of each was obstructed. There was undisputed evidence that the point of the accident was 21 feet south of the north curb line of 6th Street and 16 feet west of the east curb line of Golden. The truck came to rest 112 feet north of the north line of 6th Street and about 4 feet west of the west curb line of Golden. The implied finding of the jury was that Harris was not negligent. In our opinion the accident would not have happened without negligence upon the part of one or both drivers and we think it unlikely that the jury would have determined that Cory, alone, was negligent if it had been properly instructed.

At the request of defendants the court gave this instruction: "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action, was negligent." Plaintiff argues that on his theory of the case he was entitled to application of the doctrine of *res ipsa loquitur* and that when the doctrine is applicable it is error to give the instruction. No instruction on the doctrine was requested. Assuming, without deciding, that the doctrine was applicable, the giving of the instruction was not error. The Supreme Court in the recent case of Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724, so held. No purpose would be served in repeating what is said in that opinion.

The judgment is reversed.

PARKER WOOD, J., concurs.

VALLÉE, J., dissents.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

KEY NUMBER SYSTEM

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151 Cal.App.2d 505

COUNTY OF ALAMEDA, a body corporate and politic, and a legal subdivision of the State of California, Petitioner,

v.

Leland W. SWEENEY, as Chairman of the Board of Supervisors of the County of Alameda; Jack G. Blue, as County Clerk of the County of Alameda and ex officio Clerk of the Board of Supervisors of Alameda County, Respondents.

No. 17742.

District Court of Appeal, First District, Division 1, California.

June 5, 1957.

Mandamus proceeding brought to compel filing and recording of transcript of resolution approving certain amendments to Alameda County charter. The District Court of Appeal, Bray, J., held that in Constitution section providing that proposals to amend county charter may be submitted at "general election" by resolution (rather than by ordinance, as required for submission at a special election), quoted reference does not necessarily mean "*the* general election" and a primary election is a "general" election within meaning of that section.

Order accordingly.

1. Counties 🔑3

Ratification of county charter amendment by Legislature has all of essence of plain legislative enactment, and legislative resolution is conclusive as to facts recited in resolution, and if no irregularity appears on face of such legislative enactment, courts may not go behind enactment to determine if facts there recited are true, but if irregularity in proceedings by local authorities appears on face of legislative resolution, approval by legislature is not conclusive. St.1957, c. 60; West's Ann.Const. art. 11, § 7½.

2. Statutes ⚷212.2

Where existence of fact is necessary to support validity of legislative enactment, it will be conclusively presumed in support of such enactment that evidence was heard and facts ascertained which authorized legislature to proceed; and questions of law only, unmixed with questions of fact, will be considered in determining validity of legislative enactment.

3. Counties ⚷3

In Constitution section providing that proposals to amend county charter may be submitted at "general election" by resolution (rather than by an ordinance, as required for submission at a special election), quoted reference does not necessarily mean "*the* general election" and a primary election is a "general" election within meaning of that section. West's Ann.Elections Code, § 23; West's Ann.Const. art. 11, § 7½.

See publication Words and Phrases, for other judicial constructions and definitions of "General Election".

J. F. Coakley, Dist. Atty., R. Robert Hunter, Chief Asst. Dist. Atty., Richard J. Moore, John A. Lewis, Deputy Dist. Attys., Oakland, for petitioner.

Hubert W. Bryant, Oakland, for respondents.

BRAY, Justice.

Petition for writ of mandate to compel the County Clerk and ex officio Clerk of the Board of Supervisors of Alameda County and the chairman of the board to file and record a transcript of Assembly Concurrent Resolution No. 54 (chapter 60, Stats. 1957) approving certain amendments to the Alameda County charter, duly authenticated and certified by the Secretary of State as required by section 7½, article XI, Constitution.[1]

Questions Presented.

1. Does the legislative approval of the charter amendments appear valid on its face (a) as to the special election called, (b) as to the alleged general election? This question, in turn, depends upon whether a primary election is a "general" election within the meaning of section 7½, article XI, Constitution.

Record.

Alameda County adopted a county charter in 1927 and ever since has been acting thereunder. On April 17, 1956, the Board of Supervisors adopted Resolution No. 79501 ordering submitted to the qualified electors of the county at an election to be held June 5, ten proposed amendments to the county charter. The resolution ordered that the proposed ten amendments as therein set forth be published ten times in the Oakland Tribune. This set forth the proposals in full. The notice was so published. May 8, Ordinance No. 189 N.S. was adopted stating that "the public interest requires the holding of a special county election" to submit to the electors certain proposals to amend the charter and calling "a special county election" for June 5. This was the date of the statewide direct primary and presidential primary election. The ordinance ordered that the special election be consolidated with the consolidated primary election and that officers of the special election be the persons named as such for the consolidated primary election, and provided that the ordinance be published in the Berkeley Gazette for five days. At the election three of the amendments, propositions "A", "B", and "C" were ratified by the voters. Thereafter the Board of Supervisors certified and authenticated to the Legislature a copy of said ratified proposals together with certain recitals. The Legislature, by Assembly Concurrent Resolution No. 54, approved the three charter amendments. February 5, 1957, by Resolution No. 82594, the Board of Supervisors directed respondents to authenticate, certify, record and file copies of the amendments as provided in section 7½. Respondents in writing refused so to do on the ground that they had honest doubts as to whether publication of notice of the election had been fully and strictly complied with as required by section 7½.

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[1] Section 7½ provides that after approval of amendments to a charter by the Legislature, a copy of the amendments certified and authenticated by the Chairman and Clerk of the Board of Supervisors shall be made in duplicate and filed, one in the office of the Secretary of State and the other, after being recorded in the office of the County Recorder, shall be filed in the office of the County Clerk.

1. Invalidity of Special Election Appearing on Face of Resolution.

[1] The parties agree that the ratification of charter amendments by the Legislature has all the essence of a plain legislative enactment (see Taylor v. Cole, 201 Cal. 327, 334, 257 P. 40); that the legislative resolution is conclusive as to the facts recited in the resolution (see People v. City of San Buenaventura, 213 Cal. 637, 640, 3 P.2d 3); that if no irregularity appears on the face of the legislative enactment the courts may not go behind the enactment to determine if the facts there recited are true. See Taylor v. Cole, supra, 201 Cal. 327, 257 P. 40; People by Howser ex rel. Levin v. County of Santa Clara, 37 Cal.2d 335, 339, 231 P.2d 826. The rule is, too, that "if the irregularity in the proceedings by the local authorities appears *on the face* of the legislative resolution, the approval by the legislature is not conclusive, as it would be, if it was not revealed by the resolution." People by Howser ex rel. Levin v. County of Santa Clara, supra, 37 Cal.2d at page 339, 231 P.2d at page 828.[2]

Thus, we must look to the recitals in the legislative resolution and determine whether any irregularity appears on its face. Section 7½ requires that an ordinance calling a special election to amend a county charter shall be published five times. The Preamble of Concurrent Resolution No. 54 recites the enactment by the Board of Supervisors of Alameda County of Ordinance No. 189 N.S. calling for a special election to consider the proposed charter amendments, and among other matters, ordering the publication of said ordinance five times in a certain newspaper. It then states "and said ordinance was duly published in full and at length * * * in the Berkeley Daily Gazette on May 21, 1956." The only reasonable conclusion from this recital is that the ordinance was published only on May 21—only once and not five times as required by section 7½ and the ordinance itself and that therefore the resolution shows irregularity on its face—the failure to publish the ordinance as required by law.[3]

See People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3. Thus, if the election or the resolution depends for validity on the holding of a special election, proper notice was not given and the election and resolution are void.

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[2] Petitioner argues that even though an irregularity appears on the face of the recitals in the resolution, nevertheless the courts may not interfere, because, says petitioner, if jurisdictional defects existed, it was the duty of the Legislature to reject the documents tendered as a whole and reject ratification. Having accepted the certificate of the clerk and chairman of the Board of Supervisors it will be presumed the Legislature took other evidence which overcame any defect and the courts are bound by the Legislature's approval of the charter amendments. This was the effect of the dissenting opinion in People v. City of San Buenaventura, supra, 213 Cal. 637, 643, 3 P.2d 3. Such a rule, however, has not been adopted. See majority opinin the San Buenaventura case and People by Howser ex rel. Levin v. County of Santa Clara, supra, 37 Cal.2d 335, 339, 231 P.2d 826.

[3] It is conceded that the ordinance actually was published only the once.

2. Is a Primary Election a General Election?

Petitioner contends that the election may be sustained as a general election. Section 7½ provides, in effect, that proposals to amend a county charter may be submitted at a general election by a resolution (rather than by an ordinance as required for submission at a special election). It requires that the amendment proposals be published 10 times (rather than as in the case of a special election, that the ordinance be published five times). The Preamble in Resolution No. 54 recites: "Whereas, the Board of Supervisors of said County, pursuant to the provisions of Section 7½ of Article XI of the Constitution of said State, ordered said proposals submitted to the qualified electors thereof at a general election held not less than thirty (30) days nor more than sixty (60) days after the publication of such proposals for ten (10) times, to-wit; at the regular state-wide Consolidated Primary Election to be held on June 5, 1956, which is a general election for the purpose of amending County Charters within the purview of Section 7½ of Article XI and Section 2¾ of Article II of the Constitution of said State, and out of due caution, and not as a determination to proceed by way of special election, and solely to avoid long delay in carrying out the mandate of the voters who approved such amendments by overwhelming majorities or subjecting them to very substantial costs of a county-wide special election, in the event a court might hold the Consolidated Primary Election not to be a general election within the purview of the Constitutional provision, the Board of Supervisors on the 8th day of May, 1956 duly enacted Ordinance No. 189 N.S. calling and ordering the holding of a special county election * * *." It also recites that the proposed amendments were duly published for ten times, giving the dates of publication.

[2] Respondents contend that the resolution referred to in the Preamble did not order the amendment proposals to be submitted at a general election. However, this recital in the Preamble is a finding by the Legislature that the resolution did. We are bound by that finding. "* * * where the existence of a fact is necessary to support the validity of a legislative enactment, it will be conclusively presumed in support of such enactment that evidence was heard and facts ascertained which authorized the Legislature to proceed. In other words, questions of law only, unmixed with questions of fact, will be considered in determining the validity of a legislative enactment." Taylor v. Cole, supra, 201 Cal. at pages 336–337, 257 P. 40, 44. If as a matter of law the primary election is not a general election under the Constitution the resolution designating it a general election could not make it so. Therefore we are required to determine whether the direct primary election is a general election within the meaning of section 7½. If it was, the election was held in accordance with the requirements of the section. That section merely uses the words "a general election." It does not define them.

The only case flatly considering whether the direct primary election could be a general election, held that it could not. In Bigelow v. Board of Supervisors, 1912, 18 Cal.App. 715, 124 P. 554, the Board of Supervisors of Sonoma County submitted to the electors at a presidential primary election a proposal to license the sale of alcoholic liquors. The local option law under which the election was held, required that such a proposal be submitted at a "general election." The court held the election to be void, stating that a presidential primary was not a general election within the meaning of the local option law. It pointed out that at the presidential primary election, as the law then stood, only those might vote who at the time of their registration, designated the party with which they intended to affiliate; all persons who refused to give a party affiliation or who registered as independents or who designated affiliation with a party which had not polled at the preceding election at least

3 per cent of the entire state vote of the last general election were precluded from voting. Thus, the election being only open to a "select coterie of voters" (18 Cal.App. at page 719, 124 P. at page 556) could not be a general election. It pointed out further that there was more than one ballot and that each voter was ticketed and confined to the ballot of one party, and therefore it could not be a general election. It gave as tests of a general election, among others, whether or not all of the voters can vote for anyone whom they desire for any office and whether all of the candidates on all of the tickets would be under one ballot. Since the Bigelow case the direct primary law has been changed. Most of the offices voted for at the direct primary election are now nonpartisan offices,[4] and the election constitutes the final election as to nonpartisan candidates who receive a majority of the votes. No elector is denied the right to vote for nonpartisan candidates because of lack of party designation or other reason. The test of the Bigelow case of one ballot and the right to vote for all candidates is not met at the direct primary, for each party has a separate ballot and the elector who has designated a party can vote for a candidate of the other party only if such candidate has qualified on the elector's ballot. Nevertheless, the primary election for many purposes is a general election. McClintock v. Abel, 21 Cal.App.2d 11, 68 P.2d 273, stated that the effect of the adoption of section 2¾, article II, of the Constitution was "to transmute a primary election held for the purpose of nominating candidates, into a general election of those nonpartisan officers receiving in the primary a majority of all votes cast for their respective offices." 21 Cal.App.2d at page 16, 68 P.2d at page 276. This case held that the contest provision of the direct primary law applied only to the persons *nominated* at the primary and did not apply to those elected there. See Doran v. Biscailuz, 128 Cal.App.2d 55, 60, 274 P.2d 691, holding that the general election contest provisions of the Election Code applied to contests of the primary election, because the primary election is a general election as to nonpartisan officers receiving a majority of the votes cast.

In Donnellan v. Hite, 139 Cal.App.2d 43, 293 P.2d 158, in construing section 71180, Government Code, dealing with election of appointees to the municipal court, the court stated that "the primary election has been, in legal effect, insofar as non-partisan offices are concerned, a general as distinguished from a nominating election." 139 Cal.App. 2d at page 46, 293 P.2d at page 160. The court further referred to "a primary election which is in legal effect a general election." 139 Cal.App.2d at page 47, 293 P.2d at page 160. The court held that the requirement of election "at the general state election" meant the primary election.

In People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L.R.A. 838, the court held that the annual election provided by law for the election of municipal officers was a "general election" at which a proposal for reorganization of the town as a city of the fifth class could be submitted under a constitutional provision providing for the submission of such a proposal "at a general election," (Art. XI, § 6, Const.) and a statute providing for submission "at the next general election." St.1883, p. 95, § 4. The court said (102 Cal. at page 306, 36 P. at page 593): "It is true that the words 'general election' are ordinarily used to designate one at which state and county officers are elected, but we know of no provisions in the constitution or statutes limiting them to such an election."

"A regular or general election is one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other than the efflux of time. * * * In application of the foregoing rules, it is held that the term 'general election' embraces a primary election occurring at regular intervals * * *" (18 Am.Jur. p. 181, § 5.)

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[4] This, of course, it not true of the presidential primary which is consolidated with the direct primary. However, the consolidation of the presidential primary would not affect the question here, if the direct primary is a general election.

Section 7½ obviously did not contemplate that "*a* general election" there mentioned only "*the* general election" provided by section 23, Election Code. If so, the municipal election which in People v. Town of Berkeley, supra, 102 Cal. 298, 36 P. 591, 23 L.R.A. 838, was held to be a general election could not have been such. Schutz v. Merrill, 96 Cal.App. 58, 63, 273 P. 863, in holding that the words "general election" in the then section 1094, Political Code, had a broader meaning than the use made of the words in section 1041, Political Code (now section 950, Election Code, providing for *the* general election in November) quoted with approval the Town of Berkeley case.

All of the attributes of a general election so far as they pertain to the requirements of section 7½ are now present at the direct primary election. It occurs at stated intervals as fixed by law without any superinducing cause other than the efflux of time. All electors in addition to the notice of the proposals to be presented required by section 7½, receive as full notice of the election and of the measures to be voted on as at *the* general election. No elector is denied a ballot; he may vote on all measures submitted at the election and for all candidates except only certain partisan candidates for party nomination. The fact that he is denied the privilege of nominating a candidate of a party not of his choice does not take away the general election aspects of the election in view of all the other aspects of the election.

City Council of City of San Jose v. Goodwin, 196 Cal. 274, 237 P. 548, dealt with a proposal to increase the tax rate. The city charter provided that such a proposal must be submitted "at a general or special election." It was submitted at a primary election provided for in the charter. It was held that such an election was neither "a general or special election" because the charter "by unmistakable terminology" (196 Cal. at page 277, 237 P. at page 549) clearly distinguished the primary election from the other two. That the case is not authority upon the question we are dealing with is shown by the court's statement (196 Cal. at page 277, 237 P. at page 549) that "It may be assumed that the essential elements of a general election, as defined" in Bigelow v. Board of Supervisors, supra, 18 Cal.App. 715, 124 P. 554, may be attached to the primary election provided for by the charter.

[3] "The provisions of the Constitution must receive a liberal, practical commonsense construction * * *." McMillan v. Siemon, 36 Cal.App.2d 721, 726, 98 P.2d 790, 793. They should be construed where possible to meet changed conditions and the growing needs of the people. Veterans' Welfare Board v. Jordan, 189 Cal. 124, 143, 208 P. 284, 22 A.L.R. 1515. We are mindful of the statement in Bigelow v. Board of Supervisors, supra, 18 Cal.App. at page 722, 124 P. at page 557: "If we were to hold that the primary election law may respond to the numerous statutes where the terms 'general election' or 'next general election' are used, it would introduce great confusion in our laws, for it will be found that in many statutes the 'general election' is mentioned as determining when some act is to be done or some event is to transpire. By the Political Code one definite time has been fixed as answering to these terms, and we think we are unwarranted in holding that the Legislature has established a new rule as to what constitutes a general election when referred to in those terms." That references to "*a* general election" does not necessarily mean "*the* general election" in spite of the outmoded language in the Bigelow case, has been hereinbefore demonstrated. If the quoted paragraph is to be interpreted as giving a narrow definition in every event that the only general election is *the* general election, it is no longer the law. To hold, however, that every reference in the Constitution or the statutes to "a general election" includes the primary election, would be giving too broad an interpretation, and might bring about the said confusion. We are limiting our interpretation to the words expressed in section 7½. There may well be instances in other por-

tions of the Constitution and in the statutes where such an interpretation would be contrary to their intent.

The demurrer to the petition for writ of mandate is overruled. Let a peremptory writ of mandate issue directing that respondents Leland W. Sweeney as Chairman of the Board of Supervisors of the County of Alameda and Jack G. Blue as County Clerk of the County of Alameda and ex officio Clerk of the Board of Supervisors of Alameda County, respectively, record and file a duly authenticated and certified copy of said charter amendments as provided in article XI, section 7½ of the Constitution of the State of California, and otherwise perform any and all acts required of them relative to the provisions of article XI, section 7½.

PETERS, P. J., and FRED B. WOOD, J., concur.

151 Cal.App.2d 698

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Hugh Curtis WILDER, Defendant and Appellant.

Cr. 5690.

District Court of Appeal, Second District, Division 1, California.

June 13, 1957.

Hearing Denied Aug. 6, 1957.

Prosecution for violation of Section 288 of the Penal Code. The Superior Court of Los Angeles County, Kenneth Newell, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that evidence sustained conviction.

Affirmed.

1. Criminal Law 🔑260(11)

Before an appellate tribunal may reject statements made by witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

2. Infants 🔑20

In prosecution for violation of Penal Code Section 288, evidence sustained conviction. West's Ann.Pen.Code, § 288.

3. Criminal Law 🔑1159(2, 4)

Reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. West's Ann.Code Civ.Proc., §§ 1847, 2061.

4. Criminal Law 🔑553, 554

In prosecution for violation of Section 288 of the Penal Code, where testimony of defendant and his wife and testimony of 11½ year old complaining witness were in sharp conflict, jury was authorized after a full and fair consideration of the testimony, to reject any testimony which might have been contradictory to that of the complaining witness and therefore, to disbelieve testimony of defendant and his wife. West's Ann.Code Civ.Proc., §§ 1847, 2061.

5. Infants 🔑20

Fact that complaining witness in prosecution for violation of Section 288 of the Penal Code, delayed a week in making complaint, went only to the weight of her testimony. West's Ann.Pen.Code, § 288.

6. Infants 🔑20

In prosecution for violation of Section 288 of the Penal Code, corroboration is not required. West's Ann.Pen.Code, § 288.

7. Witnesses 🔑78

In prosecution for violation of Section 288 of the Penal Code, record disclosed that 11½ year old prosecutrix possessed sufficient capacity to testify. West's Ann.

Pen.Code, § 288; West's Ann.Code Civ. Proc., §§ 1879, 1880, 1881.

8. Witnesses ⚷40(2)

The law fixes no prescribed standard whereby to measure mental competency to qualify one as a witness, and the determination is almost wholly within the discretion of the trial judge. West's Ann.Pen.Code, § 288; West's Ann.Code Civ.Proc., §§ 1879, 1880, 1881.

9. Criminal Law ⚷1036(2)

Where there was no showing of an abuse of the court's discretion in allowing 11½ year old prosecutrix to testify, coupled with fact that no objection was made to the witness on ground of her incompetency, contention could not be made on appeal that prosecutrix' alleged incompetency to testify was the basis for reversal of conviction. West's Ann.Pen.Code, § 288; West's Ann.Code Civ.Proc., §§ 1879, 1880, 1881.

10. Infants ⚷20

In prosecution for performing lewd and lascivious acts upon a minor under 14 years of age, it is the circumstances connected with the offense by which the necessary statutory intent of arousing the passions or sexual desires of such person or of such child, is manifested. West's Ann. Pen.Code, §§ 21, 288.

11. Infants ⚷20

In prosecution for performing a lewd and lascivious act upon a minor under 14 years of age, evidence was sufficient to support jury finding that the intent of arousing the passions or sexual desires of person or of child was shown. West's Ann.Pen.Code, §§ 21, 288.

12. Criminal Law ⚷1036(2)

Accused may not ordinarily remain silent and permit leading questions to be propounded and then for the first time complain of the evidence on appeal. West's Ann.Code Civ.Proc., § 2046.

13. Witnesses ⚷243

In prosecution for violation of Section 288 of the Penal Code, there was no abuse of discretion by trial court in determining extent of leading questions to be asked of 11½ year old prosecutrix. West's Ann. Code Civ.Proc., § 2046.

14. Indictment and Information ⚷191

Offense of contributing to delinquency of a minor is necessarily included in the offense denounced by Section 288 of the Penal Code. West's Ann.Welfare & Inst. Code, § 702; West's Ann.Pen.Code, § 288.

15. Criminal Law ⚷824(3)

Where defendant was prosecuted for violation of Section 288 of the Penal Code, where defendant made no request for an instruction on the included offenses of contributing to the delinquency of a minor, he could not complain on appeal that no such instruction was given. West's Ann. Welfare & Inst.Code, § 702; West's Ann. Pen.Code, § 288.

16. Indictment and Information ⚷189(1)

Statute providing that a jury may find defendant guilty of any offense, commission of which is necessarily included in that with which he is charged, contemplates the conviction of an accused of a lesser offense when the evidence is insufficient to justify a conviction for the greater offense charged. West's Ann.Pen.Code, § 1159.

17. Criminal Law ⚷768(1)

In prosecution for violation of Section 288 of the Penal Code, court's charge to jury that accusation made against defendant was easily made but difficult to disprove, complied with Supreme Court decision holding that defendant was entitled to have jury informed of the difficulty of disproving such charges. West's Ann.Pen. Code, § 288.

Hugh Curtis Wilder, in pro. per.

Edmund G. Brown, Atty. Gen., Herschel Elkins, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in two counts with violations of Section 288 of the Penal Code. A prior conviction of a felony, Issuing Checks

Without Sufficient Funds, and for which defendant served a term of imprisonment in the State Prison, was also alleged, and subsequently admitted.

Defendant pleaded not guilty, was tried before a jury and found guilty on both counts. The court found that defendant was not a sexual psychopath. His motion for a new trial was denied, as was his application for probation, and he was sentenced to State Prison. From the judgment of conviction and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reflects that for about a month prior to August 3, 1955, a young girl named Brita, age 11 years, and her brother Johnnie, age 10 years, had been visiting the home of defendant and the latter's wife often for the purpose of viewing television. The children had no television set at their home.

On August 3, 1955, between the hours of 2 and 3 p. m. Johnnie and Brita came to defendant's house and were admitted. Both defendant and his wife were at home. Johnnie, Brita, defendant, and his wife watched television until sometime later in the afternoon when defendant's wife went into her room. Between the hours of 5 and 6 p. m., defendant asked Brita and Johnnie to go with him into the kitchen. Once there, he gave each a candy bar and asked Johnnie to leave the room and go back and watch television. Defendant then told Brita she had "a big stomach", a statement he had made earlier that afternoon, and asked her to sit on his lap. At the time, she was wearing a bathing suit covered by a shirt. Defendant put his hand on her stomach, then under her bathing suit between her legs, on her private parts, moving his hand around. He told her not to tell anyone what had happened. After she had so promised, defendant and Brita returned to the living room.

In the living room defendant gave money to Johnnie, told him to go and buy some ice cream, and sat on the couch beside Brita. While Johnnie was gone, defendant once more put his hand under Brita's bathing suit, on her private parts. During this time, defendant's wife was still in her room. At some time after 6 p. m., defendant and his wife took Johnnie and Brita home.

Brita told Johnnie what had happened and also told her 13 year-old sister, Eva.

Brita's oldest sister Mona, age 17, was at the beach during the first week of August and did not return home until about August 11, 1955. After returning from the beach, Mona met defendant, who drove her home, and asked her why Brita had not been over to see him "for a long time". Mona said she would ask Brita. That evening, in front of the whole family, Mona asked Brita why she had not been going to appellant's house. "She acted as if she were scared, and she said she would tell me later but she couldn't tell me right now." Later that evening, Brita told Mona what had happened on August 3. On August 12, Brita made a complaint to a deputy sheriff of Los Angeles County.

Testifying as a witness in his own behalf, defendant denied that at any time on August 3, 1955 he was alone with Brita in the kitchen of his home; that at no time did he ask Brita to sit on his lap, and that she did not do so. Defendant also denied that he touched the private parts of Brita or that he ever made the comment that she "had a large stomach". Defendant testified that he was the father of two children by a former marriage, one of whom was an adult and the other 10 years of age.

With reference to the visits made by Brita and Johnnie to his home, defendant testified that the children had become acquainted with his wife and asked if they "could come and watch television because they had none of their own." Defendant further testified that the children commenced coming to his house "along maybe in June" 1955, some two months before the date charged in the information. That Brita came "a few times a week; Johnnie came almost every day."

Mrs. Frances L. Wilder, wife of the defendant, testified she was employed at a residence across the street from where Brita and Johnnie lived. That by direction of the people by whom she was employed, the witness told Brita and Johnnie "not to come" to the home where the witness was employed. That "Brita got very angry and walked down the driveway and was quite angry, and she said, 'I hate her'. That was about me."

As to the date here in question, Mrs. Wilder testified she was at home when Brita and Johnnie came to her house. That during the afternoon she did retire to her bedroom "for a little rest". That at all times the door between the living room, where the children and her husband were, was open, that she and her husband took the children home and went into the house with them where Mrs. Wilder played the piano and defendant entertained with songs. That the mother of the children was there; that no complaint was made, and "everything was pleasant".

As his first ground for reversal of the judgment and order, appellant urges that the evidence is insufficient to sustain his conviction in that the complaining witness "told an incredible and uncorroborated story"; that she did not possess the mental capacity to understand or to answer simple and ordinary questions, and that the intent required under Section 288 of the Penal Code was not established.

[1] Giving consideration first to appellant's contention that the testimony of the prosecutrix was inherently improbable, it has often been reiterated by the courts of this state that before an appellate tribunal may reject statements made by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Involved in the contention that testimony is inherently improbable and unworthy of belief is the claim that something has been done that would ordinarily have been impossible to have been done under the circumstances described, or that the testimony involves conduct that no one in his right mind would be guilty of. People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836; People v. Loehr, 35 Cal.App.2d 1, 5, 94 P.2d 390; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Gardner, 147 Cal.App.2d 530, 305 P.2d 614; People v. Stangler, 18 Cal.2d 688, 691, 692, 117 P.2d 321; People v. Carr, 113 Cal.App.2d 783, 786, 248 P.2d 977.

The rule is cogently set forth as follows in People v. Collier, 111 Cal.App. 215, 226, 295 P. 898, 902: "We understand that an appellate court can reject the positive testimony of a witness only when that testimony is 'inherently improbable.' It is not sufficient that the testimony may disclose circumstances which are unusual. Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice. We are not advised of any precedent which would sanction our taking judicial knowledge of the extent of the acquaintance which must be had with the modern bootlegger before he could be asked to pay for protection. All the appellants devote much time and space in their attacks upon the credibility of the witness Smith, and lest they feel that their arguments have gone unnoticed, let it be said here that the appellate court does not sit as a jury to determine the issues of fact upon the credibility of the testimony of the witnesses but, when the attack is made on these grounds, it is necessary for the appellant to go further and show that the testimony which we are asked to reject is inherently improbable or that it was incompetent, or for some other reason, not legal evidence upon which the jury could rely."

[2] We shall not here repeat the testimony given by the complaining witness, and which we have hereinbefore narrated in detail. Suffice it to say that keeping in

mind the foregoing rules, we cannot find in the testimony of Brita a narrative of facts and circumstances that would justify a declaration by this court that the verdict of the jury is barren of a sufficient foundation to uphold it.

Appellant directs our attention to certain inconsistencies in the testimony given by Brita at the preliminary examination and that given at the trial. He also points out the following which occurred during the cross-examination of the complaining witness in the court below:

"Q. Has anyone talked with you about the incident since you were in Court the last time, Brita? A. Talking about this thing?

"Q. Yes. A. Yes.

"Q. Who was it that talked to you about it? A. My mother.

"Q. Your mother? A. Yes.

"Q. Did talking with your mother help to make you more positive that this happened in the living room? A. Yes.

"Q. When you were talking with your mother about it, did she ask you questions or did you just discuss it? A. We just discussed it.

"Q. Did she tell you anything that you should say when you come to Court? A. She just said to tell the truth.

"Q. Have you discussed this with anyone else other than your mother and the policewoman? A. I don't understand.

"Q. Well, you talked about coming to Court and testifying with the policewoman, did you? A. It was a long time ago I talked to the policewoman. It was last year, a couple weeks after.

"Q. And you have also talked with your mother about it, is that right? A. Yes.

"Q. Have you talked with anybody else other than your mother and the policewoman? A. Well, our family.

"Q. Did you talk to any other police officers? A. Yes.

"Q. How many police officers have you talked to? A. Counting that woman?

"Q. Counting the woman, yes. A. I believe it was three, I think, or else it was two.

"Q. Two besides the first policewoman you talked to? A. It was either two besides or one besides her.

"Q. And you talked to them about coming to Court and testifying, did you? A. Yes.

"Q. And they told you to come in and tell the truth, is that right? A. Yes.

"Q. The same thing your mother told you? A. Pardon?

"Q. The same thing your mother told you? A. Yes."

While the alleged variances or inconsistencies in Brita's testimony and the showing that she had talked with her mother and certain police officers, undoubtedly afforded an opportunity for a persuasive argument to the jury against the reliability of her testimony, we see in them nothing from which a reviewing court could justly conclude that her entire testimony is *per se* unbelievable, and that it was therefore, the jury's duty not only to wholly disregard it, but to accept appellant's denial of improper conduct, or at least find that the latter's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778).

[3, 4] As has often been repeated, reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. The legislature has ordained that the jury are the *exclusive* judges of the *credibility* of witnesses (Code Civ. Proc., Sec. 1847), and are the judges of the *effect* or *value* of evidence addressed to them, except in those cases where it is declared by law that it shall be conclusive proof of the fact to which it relates (Code Civ.Proc., Sec. 2061). And, as a necessary corollary to the above noted rules, the jury, in the instant case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof to reject any testimony which

might have been contradictory to that of the witness Brita, and therefore, to disbelieve the testimony of appellant and accept that of Brita as to the immediate circumstances of the charges herein made, however weak in places the latter's testimony may have been made to appear, or however sharply her testimony on other important points might have conflicted with the testimony of appellant and his wife.

[5] Appellant's contention that Brita's testimony is unbelievable because of a week's delay on her part in making a complaint goes only to the weight of her testimony and that was within the province of the duly constituted arbiter of the facts (People v. Healey, 52 Cal.App. 563, 564, 199 P. 551; People v. Dutton, 62 Cal.App. 2d 862, 865, 145 P.2d 676). However, the record reflects that she told her brother Johnnie almost immediately after the occurrence in question, and she advised her 13-year-old sister Eva on the night of such occurrence, or on the next day.

[6] It is true, as urged by appellant, that portions of Brita's testimony were not corroborated, but in prosecutions of the kind before us corroboration is not required (People v. Cox, 104 Cal.App.2d 218, 219, 231 P.2d 91; People v. Raich, 26 Cal.App. 286, 287, 146 P. 907; People v. Karpinski, 43 Cal.App.2d 545, 548, 111 P.2d 393; People v. Westek, 31 Cal.2d 469, 473, 190 P.2d 9).

[7] Appellant next complains that the prosecutrix did not possess sufficient capacity to testify in that she was unable to comprehend or answer simple and ordinary questions. A reading of the reporter's transcript does not sustain appellant in this claim. At times, when she failed to understand questions propounded to her, Brita requested clarification thereof and her answers when finally given indicated an ultimate understanding of the questions propounded to her. And, Section 1879 of the Code of Civil Procedure makes competent as witnesses "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, * * *." The next section, numbered 1880, refers to actions against estates; testimony of children under ten years of age (Brita, the complaining witness, was eleven years of age); and testimony of a person of unsound mind. Section 1881 refers to testimony involving confidential communications. There has been no showing that the complaining witness is or was at the time of trial of unsound mind, and the other provisions of Sections 1880 and 1881 do not apply to this case.

[8, 9] The law fixes no prescribed standard whereby to measure the mental competency to qualify one as a witness, and therefore, the determination is almost wholly within the discretion of the trial judge (People v. Horowitz, 70 Cal.App.2d 675, 696, 161 P.2d 833; In re Mazuran, 88 Cal.App. 272, 277, 263 P. 339). The trial judge in the case at bar conducted an examination of the child witness and therefrom, we think, justly concluded she possessed sufficient mental understanding to testify. In the absence of a showing of an abuse of the court's discretion, coupled with the fact that no objection was made to the witness on the ground of her incompetency, the contention cannot now be made the basis of a reversal (People v. Rulia Singh, 182 Cal. 457, 484, 188 P. 987).

Insofar as the age of the witness is concerned (11½ years), cases reveal that girls aged 5, 6 and 8 were permitted to testify (People v. Allen, 131 Cal.App.2d 72, 279 P.2d 996; People v. Reeves, 128 Cal.App.2d 410, 275 P.2d 158; People v. Carpenter, 3 Cal.App.2d 746, 40 P.2d 524; People v. O'Connor, 44 Cal.App.2d 301, 112 P.2d 279; People v. Norred, 110 Cal.App. 2d 492, 243 P.2d 126).

Appellant next contends that there was no showing that the intent required by Section 288 of the Penal Code, that of "* * arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child", were present in the instant case.

[10, 11] It is the circumstances connected with the offense by which the intent

is manifested (Penal Code, Sec. 21; People v. Owen, 68 Cal.App.2d 617, 619, 157 P.2d 432). In the case now engaging our attention however, appellant denies he committed the acts charged, and we are impressed that it cannot be reasonably said that the acts, which the jury found were committed, are of such a nature as to suggest that they could have been committed innocently.

[12, 13] Appellant next complains that the testimony of the witness Brita was elicited by means of leading questions which suggested the desired answers. Appellant particularly directs our attention to two questions as being leading, suggestive and self-serving. However, reference to the reporter's transcript reveals that both of these questions were propounded by appellant's counsel during the cross-examination of the complaining witness. It is true that some of the questions asked by the prosecution were somewhat leading and had objections been made thereto by appellant's counsel, the court might well have sustained them. An accused may not ordinarily remain silent and permit leading questions to be propounded and then for the first time complain of the evidence on appeal (People v. Houston, 88 Cal.App.2d 11, 17, 198 P.2d 53; People v. Simmons, 28 Cal.2d 699, 723, 172 P.2d 18). Section 2046 of the Code of Civil Procedure states the rule applicable in the case at bar as follows: "On a direct examination, leading questions are not allowed, *except in the sound discretion of the Court,* under special circumstances, making it appear that the interests of justice require it." (Emphasis added.) An examination of the record herein impresses us that in the absence of objection, the court did not abuse the discretion vested in it in determining the extent of such leading questions (People v. Goff, 100 Cal.App.2d 166, 169, 170, 223 P.2d 27).

[14–16] Appellant earnestly contends that the trial court committed prejudicial error in failing to instruct the jury to the effect that appellant could be convicted of contributing to the delinquency of a minor, a lessor and necessarily included offense (Welfare and Institutions Code, Sec. 702). That the offense of contributing to the delinquency of a minor is necessarily included in the offense denounced by Section 288 of the Penal Code is now well established (People v. Greer, 30 Cal.2d 589, 600, 184 P.2d 512). Since no instruction on included offenses was requested, appellant cannot now be heard to complain that none was given (People v. Zabel, 95 Cal.App.2d 436, 489, 213 P.2d 60; People v. Nudo, 38 Cal.App.2d 381, 384, 101 P.2d 162; People v. Welsh, 7 Cal.2d 209, 211, 60 P.2d 124). The rule is "that a judgment will not be reversed because the trial court had not instructed as to a lesser crime included in the greater one charged, unless the defendant had requested that the jury be so instructed" (People v. Bailey, 142 Cal. 434, 435, 76 P. 49). Appellant apparently relies upon Section 1159 of the Penal Code, which provides: "The jury * * * may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It has been held that what this section contemplates is the conviction of an accused of the lesser offense "when the evidence is insufficient to justify a conviction for the greater offense charged" (People v. McCoy, 25 Cal.2d 177, 194, 153 P.2d 315, 324). In the case now before us, if appellant touched the prosecutrix in the manner she testified he did, such evidence was clearly sufficient to sustain the conviction of violation of Section 288 of the Penal Code. Furthermore, in the case at bar, appellant's defense was not predicated on the theory that the acts charged against and committed by him might constitute such lesser offense. On the contrary, he denied the commission of any act which would amount to a violation of either the offense charged or any lesser offense necessarily included therein. Since appellant did not request an instruction to the effect that he might be convicted of the lesser offense, coupled with the facts elicited at the trial, and appellant's denial of the commission of any such acts, we are persuaded that no reversible error was committed by the court in failing to give, on its own motion, such instruction (People v. Romersa, 111 Cal.App.2d 173, 177, 244 P.2d 98; People v. Bailey, supra, 142 Cal. at page 436, 76 P. 49).

[17] Appellant directs our attention to the language of our Supreme Court in People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367, 369, that in cases of this kind "The defendant is entitled to have the jurors informed that the charges made against him are 'easily made and difficult to disprove' and that 'the testimony of the prosecuting witness should be examined with caution'." In that regard the record herein reveals that the court admonished the jury as follows: "* * * However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution."

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and FOURT, JJ., concur.

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151 Cal.App.2d Supp. 852

Arthur I. BRASLOW, etc., Plaintiff and Respondent,

v.

E. Allen KELLY, Defendant and Appellant.

C. A. 9249.

Appellate Department, Superior Court,
Los Angeles County, California.
June 4, 1957.

Action against alleged agent for breach of warranty of authority to act as agent for alleged principal in ordering display cabinet manufactured by plaintiff. The Municipal Court, Alhambra Judicial District, David T. Sweet, J., entered judgment adverse to defendant, and defendant appealed. The Superior Court, Appellate Department, Swain, J., held that where, in prior action against principal and agent for plaintiff's cost in manufacturing display cabinet claimed to have been ordered by agent for principal or by agent for himself, judgment was for both principal and agent, such prior action was different from subsequent action against agent alone for breach of warranty of authority as agent, and issues adjudicated in first action would not estop adjudication of issues presented in second action, even though agent, in first action, agent denied he had ordered the cabinet as agent for principal and the same issue was raised in the subsequent action.

Judgment affirmed.

1. Judgment 🔑713(1)

Under doctrine of res judicata, a former judgment operates as a bar against a second action upon the same cause, and, in a later action upon a different claim or cause of action, the former judgment operates as an estoppel or conclusive adjudication as to issues which were actually litigated and determined in the prior action.

2. Judgment 🔑715(3)

Where, in prior action which was against principal and agent for plaintiff's cost in manufacturing display cabinet claimed to have been ordered by agent for principal or by agent for himself and in which no findings were made, judgment was for both principal and agent, prior action was different from subsequent action against agent alone for breach of warranty of authority as agent, and issues adjudicated in first action would not estop adjudication of issues presented in second action, even though, in first action, agent denied he had ordered the cabinet as agent for principal and though the same issue was raised in the subsequent action. West's Ann.Civ.Code, § 2342; West's Ann.Code Civ.Proc., § 427, subd. 8.

3. Action 🔑48(1)

Under Code of Civil Procedure pertaining to joinder of causes of action where the claims arise from the same transaction, joinder is permissive, not mandatory. West's Ann.Code Civ.Proc., § 427, subd. 8.

4. Judgment 🔑725(1)

In subsequent action upon claim or demand different from that in prior action, judgment in prior action is only conclusive as to issues or matters which were essential to or shown to have been involved in the judgment rendered, but, if upon faith of the record, anything is left to conjecture in regard to what was necessarily involved and decided, there is no estoppel, and, in absence of findings, only those issues which were actually included in the judgment or which were necessary thereto are deemed to have been adjudicated. West's Ann. Code Civ.Proc., § 1911.

N. E. Youngblood, Marvin Gross, Beverly Hills, for appellant.

Paul Braslow, Hollywood, for respondent.

SWAIN, Judge.

[1] This case involves the doctrine of res judicata. "The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." Todhunter v. Smith, 1934, 219 Cal. 690, 695, 28 P.2d 916, 918.

We must decide (1) whether the first action, Braslow v. Cabin Crafts, Inc., and Kelly, No. 311641, in the Municipal Court of Los Angeles Judicial District, was upon the same cause of action as the second one, Braslow v. Kelly, No. 5614, in the Municipal Court of Alhambra Judicial District, the action in which this appeal was taken, and if not, (2) whether there were issues in the second action which were actually litigated and determined in the first action.

[2, 3] The first action was upon contract. The complaint sought to hold Cabin Crafts, Inc. for the cost of manufacturing a display cabinet claimed to have been ordered by Kelly as agent for Cabin Crafts. It also sought to hold Kelly as a principal. Denials in the answer presented two defenses: (1) That Kelly had no authority to order the cabinet for Cabin Crafts, and (2) that Kelly never ordered the cabinet. Judgment was for both defendants. The second action is against Kelly alone. It is under Civil Code, § 2342 for breach by Kelly of warranty of authority to act as agent for Cabin Crafts. Whatever definition may be used for cause of action, we are convinced that an action on a contract to recover the purchase price of goods is different from a cause of action for damages for breach of warranty of authority of an agent. In the first it is claimed that there is a contract, in the second it is claimed there is not a contract. The fact that they arose out of the same transaction and could have been joined under Code Civ. Proc. § 427, subd. 8, is not significant because that joinder is permissive not mandatory. Sanderson v. Niemann, 1941, 17 Cal. 2d 563 at page 571, 110 P.2d 1025; Lynch v. Kemp, 1935, 4 Cal.2d 440 at page 442, 49 P.2d 817.

We, also, hold that the issues adjudicated in the first action did not estop the adjudication of issues presented in this action. It is true that in the first action Kelly denied he ordered the goods as the authorized agent of the corporation, and it is true that the same issue is raised in the second action.

According to the settled statement, he so testified and claimed that plaintiff made the model display cabinet on his own responsibility hoping to sell a large number of them to Cabin Crafts. Difficulty is caused by the fact that there are no findings in the first action. It might have been decided on either of two theories: (1) on the theory that Kelly had no authority to order the cabinet at Cabin Crafts' expense and that he did not order it for himself as principal, or (2) on the theory that he did not order the cabinet at all. If the first case was decided on the latter theory, plaintiff would be estopped from re-litigating that issue in the present action. However, the law applicable to the problem which arises when we cannot determine on which of two defenses the former action was decided is set forth in the following authorities:

C.C.P. § 1911: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

[4] Blumenthal v. Maryland Casualty Co., 1932, 119 Cal.App. 563, 566–567, 6 P.2d 965, 967: [Stating the rule] "In an action upon a different claim or demand, however, the former judgment is only conclusive as to such issues or matters as were essential to or shown to have been involved in the judgment rendered [citations]. But if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided there is no estoppel [citations]; and, in the absence of findings, only those issues are deemed to have been adjudicated which were actually included in the judgment or necessary thereto [citations]."

Schumacker v. Industrial Acc. Commission, 1941, 46 Cal.App.2d 95, at page 99, 115 P.2d 571, at page 573: [Referring to C.C.P. § 1911, the court said] "A comparison shows that the rule as stated in our statute does not vary in any material respect from the rule as stated in Cromwell v. County of Sac, 94 U.S. 351, 353, 24 L.Ed. 195. That rule was further discussed by the same court in Russell v. Place, 94 U.S. 606, 24 L.Ed. 214. On page 608 of 94 U.S., 24 L.Ed. 214, the court said: 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' "

The judgment is affirmed.

BISHOP, P. J., and KAUFFMAN, J., concur.

48 Cal.2d 737

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas CARTER, Defendant and Appellant.

Cr. 5910.

Supreme Court of California,
In Bank.
June 21, 1957.
Rehearing Denied July 16, 1957.

Defendant was convicted of murder. From judgment rendered by the Superior Court, Butte County, J. F. Good, J., defendant appealed. The Supreme Court, Traynor, J., held that since state was erroneously allowed to introduce, as rebuttal testimony, evidence that a cap assertedly similar to one which defendant had worn, had been found in slough where decedent's wallet and a wrench had allegedly been found, it was error to deny defendant permission to reopen or for continuance to show that another similar cap had been found on route which he had taken from scene of death to his home.

Reversed.

Spence, Shenk and McComb, JJ., dissented.

1. Husband and Wife ⚷265

Where husband is absent from home, it is wife who controls premises, ordinary household property, and family automobile, and with husband's tacit consent determines who shall and who shall not enter house on business or pleasure and what property may be taken away with them.

2. Searches and Seizures ⚷7(27, 29)

Following defendant's arrest, his wife's free consent to removal of his property from the household by sheriff would preclude such activities from constituting unreasonable search or seizure, but burden of proving such consent would be on prosecution.

3. Criminal Law ⚷899

Defendant, by introducing evidence in a letter which was favorable to him and which had been taken by sheriff waived any objection which he might have had on grounds of unreasonable search or seizure.

4. Criminal Law ⚷394

Where, following defendant's arrest, his wife freely admitted sheriffs to home, whatever evidence they gained from their conversations and observations there was admissible in prosecution.

5. Criminal Law ⚷1137(1)

Where defendant, whose criminologist had been denied access to building wherein death occurred, made no sweeping claim that such denial deprived him of fair trial, but merely requested all physical evidence and photographs be turned over to his criminologist and such was done, his apparent satisfaction constituted a concession that access to all that prosecution had discovered was an adequate substitute for inspection of premises.

6. Criminal Law ⚷361(3)

In murder prosecution against one who had attempted suicide after crime had been committed, it was error to exclude testimony of physician who attended him after the attempted suicide that, in response to question proposed after defendant stated he thought he would die, asking if he wished to clear his conscience, that he stated that he had passed some bad checks but made no mention of the homicide, as such would have proved explanation for attempted suicide, and mere fact that defendant had personally testified to such did not make such testimony merely cumulative.

7. Witnesses ⚷395

In murder prosecution, testimony of defendant's minister that, five days after crime had allegedly been committed, defendant had told him same story of having found the decedent as he had offered at trial was admissible to rebut charge that story was a recent fabrication.

8. Criminal Law ⚷480

In murder prosecution, testimony of blood dynamics expert that he had made experiments by beating various bloody objects with instruments in order to grasp relationship between blood spots and their causes, though conditions were not substantially similar with those in crime alleged, was admissible to show that by training and experience he was able from analysis of size and shape of spots to determine source with some degree of accuracy and to enable jury to test his reliability and such matters were properly within the province of expert testimony.

9. Criminal Law ⚷438

If principal effect of demonstrative evidence such as photographs is to arouse passions of jury and inflame them against defendant because of horror of crime, evidence must be excluded, but if such has probative value which outweighs danger of prejudice, evidence is admissible, even though gruesome and though it may incidentally arouse passions, and question is primarily one for trial court.

10. Criminal Law ⚷438

In murder prosecution wherein a crucial issue was whether decedent's wounds had been caused by a flex-handle wrench assertedly the property of defendant, trial court does not abuse its discretion in admitting colored slides which graphically showed nature of wounds, particularly since it warned jury against allowing them to prejudice jury against defendant.

11. Criminal Law ⚷388

Lie detector tests do not have enough reliability to justify admission of expert testimony based on their results.

12. Criminal Law ⚷351(1)

It was error to admit testimony of one who had been present where decedent had been found, in murder prosecution, that he had agreed to take lie detector tests, thus implying that defendant had so refused.

13. Criminal Law ⚷627½

Where, in cross examination of defendant's wife, state had used a transcript of statement taken from her, it was error to deny defendant opportunity to inspect the document and to show that extracts had been taken out of context and that asserted inconsistencies in her testimony might disappear.

14. Criminal Law ⚷683(1)

Though all evidence that tends to establish defendant's guilt rebuts his case, it is not all rebuttal evidence within statute providing that, after defendant has offered his evidence, prosecution may offer rebutting testimony only, unless the court permits it to offer evidence upon its original case, as proper rebuttal does not include a material part of case in prosecution's possession that tends to establish defendant's commission of crime, but is restricted to that made necessary by defendant's case in sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. West's Ann.Pen.Code, § 1093, subd. 4.

15. Criminal Law ⚷683(1)

The purpose of statute providing that after defendant has offered evidence, prosecution may then offer rebutting testimony only, unless the court permits it to offer evidence upon its original case, is to assure orderly presentation so that trier will not be confused, to prevent undue magnification of certain evidence and to avoid any unfair surprise. West's Ann.Pen.Code, § 1093, subd. 4.

16. Criminal Law ⚷684

In murder prosecution, since by defendant's assertion of innocence, it was implicit that he would not have admitted having gone to a slough where decedent's wallet and wrench which had assertedly been used to kill him and which assertedly belonged to defendant and a red cap, assertedly similar to one which defendant had worn at time in question had been found, court committed error in allowing state to introduce, in rebuttal, evidence that red cap had been found in the slough, where such could have been introduced in case-in-chief. West's Ann.Pen.Code, § 1093, subd. 4.

17. Criminal Law ⚷680(1)

Changes in order of proof called for by statute may be made within discretion of trial court. West's Ann.Pen.Code, § 1093.

18. Criminal Law
⟹649(1), 686(1), 1166½(1), 1168(2)

In murder prosecution wherein state introduced in rebuttal, evidence that a cap assertedly similar to that which defendant had worn at time decedent had been killed had been found in slough near his home where decedent's wallet and murder weapon had allegedly been found, though such evidence should have been introduced in case-in-chief, court committed prejudicial error by denying defendant permission either to reopen or for continuance to present evidence that a similar cap had been found on route which defendant had taken from scene of death to his house. West's Ann.Pen.Code, §§ 1093, 1239(b).

19. Criminal Law ⟹829(3)

In prosecution for murder of one who had been killed at his place of business and whose wallet had been taken, wherein court carefully instructed that defendant's prior burglary conviction could be considered only in assessing credibility, it committed no error in denying tendered instruction on the distinction between robbery and burglary proffered on theory that jury might have thought that burglary, like robbery, involved violence. West's Ann.Pen.Code, § 1239(b).

20. Homicide ⟹289

In murder prosecution, court committed no error in failing to instruct that homicide was not in perpetration of robbery if intent to rob arose after attack on deceased where such theory had not been relied upon at trial. West's Ann.Pen.Code, § 1239(b).

21. Criminal Law ⟹789(2)

It was error to refuse instruction that in a case resting wholly on circumstantial evidence, each fact which is essential to complete chain of circumstances that will establish defendant's guilt must be proved beyond a reasonable doubt.

Robert K. Stone, Chico, Laughlin & McKalson and Robert E. Laughlin, Chico, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., and C. Keith Lyde, Dist. Atty., Oroville, for respondent.

TRAYNOR, Justice.

Defendant was convicted of murder in the first degree, and the jury imposed the death penalty. A motion for a new trial was denied. This appeal is automatic. Pen.Code, § 1239(b).

On September 29, 1955, about 3:35 p.m., Frank Carey, owner of the Log Cabin Bar near Chico, was found unconscious on the floor of the card room of his bar, his head bloody and bruised. He never regained consciousness and died several hours later as a result of his injuries.

Defendant was in the bar from the time Carey opened it about 12:30 p.m. until shortly after 3 p.m., drinking beer, playing the pinball machine, and talking with other customers. Witnesses testified that he was wearing khaki trousers, a dark jacket, and a cap with a pushed-up bill. His grey Dodge pickup truck was parked out in front. The last person to see him in the bar was a salesman who arrived about 3 p.m. and stayed about five minutes. He spoke briefly with Carey and defendant. Carey told him that business had been good that week and that he was holding a twenty-dollar bet on the World Series. About 3:35 p.m. Carey's accountant entered the bar and found Carey unconscious. A no-sale sign was rung up on the cash register, and there was no currency in the drawer.

At about 3:25 p.m. a grey pickup similar to defendant's cut in front of a school bus on the highway near defendant's house, causing the bus driver to stop suddenly to avoid a collision. The pickup entered the driveway of defendant's house. At 4 p.m. defendant's landlord went to the house to collect the rent, which was a month and a half in arrears. Defendant appeared in dark, not khaki, trousers. He promised to pay the rent soon.

Shortly after midnight, Deputy Sheriff Rushton confronted defendant and his wife in a cocktail lounge in Chico and informed defendant that the sheriff wanted to talk to him at the police station. Defendant asked if he could take his wife home first, and Rushton agreed. Defendant, his wife, and Rushton then drove to the Carter house in the pickup, while another officer followed in a patrol car. As they entered the house, defendant handed his wife a notebook, telling her to mail the letter therein. While Rushton waited in the living room, defendant looked in on his children in their beds. He then went into the bathroom and closed the door. Thereafter Rushton heard the latch click and called to defendant several times but got no response. When he heard something fall to the floor, he broke down the bathroom door. He found that defendant had slashed his arm with a razor and was lying on the floor with blood spurting from an artery. Despite defendant's resistance Rushton managed to check the flow of blood. He testified that defendant said to him after coming out of a state of shock, "You wouldn't tell me what you wanted me for, but I knew"; that Rushton asked, "What did you think we wanted you for?" and that defendant did not answer but "just laid back and grinned." Other police officers arrived, an ambulance was summoned, and defendant was removed to a hospital.

Early in November 1955, Carey's wallet, a flex-handle wrench, and a red cap were found under a bridge at Edgar Slough, about two-tenths of a mile from defendant's house. There was no money in the wallet, although Carey was in the habit of carrying substantial sums. One of defendant's neighbors, E. E. Myers, testified that he had lent defendant a set of tools that included a wrench of the same make and size as the one found in Edgar Slough and that this wrench was not among the tools shown to him by the police as those removed from defendant's truck.

Dr. Paul Kirk, a witness for the prosecution, testified that he examined the card room of the Log Cabin shortly after the homicide, and found that the grease on the floor was identical with grease on the wrench discovered in Edgar Slough. He also testified that there was blood on defendant's shoes and the lower part of his khaki trousers, and that the blood was type B, Carey's type. He further testified that he found on the inside of the right rear pocket of the trousers another blood stain and two hairs that had a "microscopic identity" with hair taken from Carey's head. Finally, he testified that one of eleven hairs found in the cap from Edgar Slough was "morphologically indistinguishable" from one-fifth of a sample of defendant's hair.

Defendant took the stand in his own behalf and denied that he had either robbed or beaten Carey. His own account of what he did on September 29th was substantially as follows: He left the Log Cabin shortly after 3 p.m. intending to go home, but after driving a short distance decided to return and try his luck again at the pinball machine. When he entered the bar and did not see Carey, he called several times. Receiving no answer, he looked into the card room. There he saw Carey lying on the floor with his face to the wall, bleeding and breathing hard. He bent over the body and rolled it towards him, and blood spattered on his trousers, shoes, and hands. He reached for a handkerchief in his rear pocket and must have stained it with blood.

Defendant testified that he was terrified by these events and by the realization that many persons had seen him in the bar and if police questioned him they would find out that he had violated his parole from the Washington State Penitentiary to which he had been sentenced for burglary. He therefore did not report his discovery to any one but drove straight home and later changed his trousers. In a statement to the police on September 30th, however, he had denied any knowledge that Carey had been beaten and stated that the blood on his trousers must have been his own.

Defendant explained his attempted suicide by testifying that he was short of money and owed a number of bills, that he had passed several bad checks, and that he was afraid he would be sent back to prison as a parole violator. Moreover, he was generally despondent and had intended for some time to kill himself. The notebook that defendant handed to his wife before his attempted suicide contained a letter to his uncle, written before the attack on Carey, declaring defendant's intention to kill himself.

Before trial defendant moved to suppress evidence allegedly acquired by a search and seizure in violation of defendant's constitutional rights. The motion was denied. During the trial defendant unsuccessfully renewed his objection to the use of some of this evidence. His objection compels examination of the circumstances under which the challenged evidence was obtained.

After defendant attempted to kill himself and Deputy Rushton broke into the bathroom, about half an hour elapsed before defendant was removed in an ambulance. Mrs. Carter testified that during that time she was confused by the numerous police coming in and out of the house and that her five children were upset and crying over the commotion and the sight of their father being carried out on a stretcher.

About 1:15 a.m., some fifteen minutes after defendant had been carried out and all the police had left, Deputy Arbuckle returned to the house. He testified that "The sheriff told me to go back and get the letter Mr. Carter mentioned." When Mrs. Carter answered the door, he told her that "the sheriff wanted me to come back and get the letter," or, according to Mrs. Carter, "he had to see the letter." She handed over the notebook containing the letter, and although she asked if she could keep the notebook itself, Arbuckle stated that it would be better if he took the letter and the whole notebook.

While Deputy Arbuckle was still in the house, two more officers appeared and questioned Mrs. Carter about the clothes defendant had been wearing during the day. They testified that they asked Mrs. Carter if they could see defendant's trousers and that she got them from another room. Mrs. Carter testified that it was the officers themselves who got the trousers. After examining the trousers, the officers left them on the ironing board and departed.

Around 2:15 a.m. Deputy Arbuckle returned to the house again and told Mrs. Carter, "the Sheriff wanted me to bring those trousers up," or, according to Mrs. Carter, "that they would have to have the trousers." Mrs. Carter said nothing and stepped aside; Arbuckle went in, took the trousers from the ironing board, and departed. Arbuckle did not inform Mrs. Carter that she could refuse to turn the trousers over to him, and she testified that she did not know she could refuse. She also testified that the police would not tell her why they were investigating her husband.

Still later, Arbuckle and Rushton returned once again, and, according to their testimony, asked Mrs. Carter if they could have the shirt, or "informed [Mrs. Carter that they] * * * came after the shirt. * * *" They testified that this time they told her she could refuse. She said that the children were upset and she would prefer not to be disturbed again until morning, but the officers said that if they could have the shirt they would not bother her again. Mrs. Carter said all right, if this would be the last time, and Rushton went in and took the shirt from the bathroom.

About 8 a.m. more officers appeared at the house, examined defendant's pickup truck, which was parked either in the driveway or in front of the house, and made a list of the tools in it. They either told Mrs. Carter they were taking the truck away or asked and received her permission to take it away. It is admitted that at no time during these visits to defendant's house did the police have a warrant or was defendant under arrest.

The prosecution contends that the consent of defendant's wife justified the seizure of his property. The effect of a wife's consent to the search or seizure of her husband's property is the subject of sharp disagreement in other jurisdictions. See, e. g., United States v. Heine, 2 Cir., 149 F.2d 485, 488, certiorari denied 325 U.S. 885, 65 S.Ct. 1578, 89 L.Ed. 2000; United States v. Sergio, D.C.E.D.N.Y., 21 F.Supp. 553, 554; Ellis v. State, 130 Tex.Cr.R. 220, 93 S.W.2d 438, 439–440; Cass v. State, 124 Tex.Cr.R. 208, 61 S.W.2d 500, 501–503; but see, e. g., Cofer v. United States, 5 Cir., 37 F.2d 677, 679; Dalton v. State, 230 Ind. 626, 105 N.E.2d 509, 511–512, 31 A.L.R.2d 1071; Simmons v. State, 94 Okl.Cr. 18, 229 P.2d 615, 618; Annotation, 31 A.L.R.2d 1078, 1080–1081, 1091. The problem calls for a determination of whether the wife's relation to her husband and his property is such that there is no invasion of his privacy if she consents.

[1, 2] When the husband is absent from the home, it is the wife who controls the premises, the ordinary household property, the family automobile, and with her husband's tacit consent determines who shall and who shall not enter the house on business or pleasure and what property they may take away with them. Cf. People v. Dominguez, 144 Cal.App.2d 63, 65, 300 P.2d 194. When the usual amicable relations exist between husband and wife (cf. Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545, 546), and the property seized is of a kind over which the wife normally exercises as much control as the husband, it is reasonable to conclude that she is in a position to consent to a search and seizure of property in their home. If Mrs. Carter freely consented to the removal of defendant's property, there was no unreasonable search or seizure. People v. Burke, 47 Cal.2d 45, 301 P.2d 241; People v. Gorg, 45 Cal.2d 776, 782–783, 291 P.2d 469; People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855; People v. Michael, 45 Cal.2d 751, 753–754, 290 P.2d 852; People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974; see Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654. The burden of proving such consent was on the prosecution. Badillo v. Superior Court, 46 Cal.2d 269, 272, 294 P.2d 23.

[3, 4] No question arises as to the seizure of the notebook and letter by Deputy Arbuckle on his 1:15 a.m. visit. The evidence in the letter was favorable to defendant, and by introducing it at the trial himself, he has waived whatever objections he may have had. As to the second visit by Officers Parker and Evans, the evidence supports the conclusion that Mrs. Carter freely consented to their entering the living room to question her about defendant's activities. See People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852. What evidence they gained from their conversation and observation was therefore admissible. Moreover, the evidence that Mrs. Carter freely cooperated with the officers on this visit, produced the trousers when she was requested to do so, and consented to the subsequent taking of the shirt, supports the trial court's conclusion that she also consented to Deputy Arbuckle's taking the trousers when he returned for them.

The state of the record makes it impossible for us to determine whether the evidence gained from the search of defendant's truck was properly admitted. At the hearing before trial on the motion to suppress, the only evidence introduced on this question was Mrs. Carter's testimony that an officer had come to the door and told her that they were taking the truck away, and that she had not said that it would be all right. If her testimony was true, there was no consent. At the trial, before another judge than the one who had ruled on the motion to suppress, the sheriff testified that he had asked for and received permission from Mrs. Carter to remove the truck. If his testimony was true, there was enough evidence to support a finding of consent. The record indicates, however, that in overruling defendant's motion to exclude the evidence, the trial court did not consider Mrs. Carter's testimony in support of the earlier motion, which flatly contradicted the sheriff's testimony. It failed to do so apparently on the ground that it was unnecessary to reconsider a matter already considered by another judge. It indicated that defendant would not be permitted to introduce evidence considered on the earlier motion. On retrial it will be possible for the court, if evidence obtained from the truck is introduced again, to consider all the evidence bearing on the question of Mrs. Carter's consent to the search of the truck and determine whether she or the sheriff is to be believed.

[5] Defendant next contends that the prosecution deliberately destroyed material physical evidence, implying that as a consequence defendant cannot ever be given a fair trial. In his affidavit defense counsel alleges that he requested the district attorney to allow defendant's criminologist to inspect the Log Cabin; that the district attorney informed counsel that the keys to the premises had been returned to the attorney for Carey's executrix; that counsel discovered that the keys had not in fact been returned to the attorney but must have still been in the possession of the prosecution. On January 6th, defense counsel again asked the district attorney to permit defendant's criminologist to inspect the premises. The district attorney replied that an inspection would be permitted on January 14th, but on January 13th he informed defense counsel that the premises had been cleaned up and returned to the Carey family.

If these allegations be true, the state may have disabled itself from ever giving defendant a fair trial. Following the incidents in January, however, defendant did not make any such sweeping claim of prejudice. Instead, he moved the court to compel the district attorney to turn over to defendant's criminologist all physical evidence taken from the Log Cabin, all photographs made there, and the findings of the prosecution's criminologist based on his examination of the premises. Defendant stated that unless his motion were granted there could not be a fair trial. In fact no order of court was necessary, for the district attorney voluntarily produced all that defendant requested. Defendant's apparent satisfaction was a concession that access to all that the prosecution had discovered was an adequate substitute for inspection of the premises by his own criminologist. Moreover, defendant does not contend that specific evidence was suppressed, or that there is any likelihood that his criminologist would have found evidence not unearthed by the prosecution's expert.

[6] Defendant next cites as error the exclusion of certain evidence. The prosecution relied on defendant's attempted suicide as evidence of a guilty mind, and thus as indirect evidence that defendant had administered the beating to Carey. To rebut this inference defendant sought to introduce testimony by Dr. Locarnini that immediately after defendant attempted suicide he was rushed to the hospital in a critical condition; that the doctor thought he would die; that when asked if he thought he would die defendant answered yes; that he answered yes when asked if he wanted to clear his conscience and then stated that he had passed some bad checks but made no mention of the Log Cabin or Carey.

It was error to exclude this testimony, for it provided an explanation for defendant's attempted suicide other than that offered by the prosecution. See People v. Goodwin, 202 Cal. 527, 540–541, 261 P. 1009; People v. Sainz, 162 Cal. 242, 246, 121 P. 922; People v. Anderson, 57 Cal.App. 721, 727, 208 P. 204; 22 C.J.S. Criminal Law § 630, p. 965. The testimony would not be merely cumulative. True, defendant's testimony on the stand and his statement to the district attorney, recorded and played in court, apprised the jury of the reasons defendant gave for his attempted suicide, and these were the same as he gave when he was at the point of death. It does not follow, however, that Dr. Locarnini's testimony would be merely cumulative. Although cumulative in the sense that it was identical in subject matter with this other evidence, the testimony was not cumulative in respect to its evidentiary weight. The jury would be more inclined to believe an explanation given immediately after the attempted suicide, when defendant thought he was going to die, than the same explanation given at a time when hope of life had returned and the opportunity for fabrication intervened. Defendant's suicide note to his uncle before the attack on Carey was some evidence of motivation for his attempted suicide other than guilty knowledge of the attack. Since the note was written before the attack, however, it could not be so persuasive evidence as the statement to Dr. Locarnini. The note made no mention of the bad checks or any other particular reason for suicide. The reason for the exclusion of merely cumulative evidence, that its slight probative value is outweighed by the disadvantage of confusing the jury and obscuring the fundamental issues (see 6 Wigmore, Evidence, 576–578, 581–586 (3d ed. 1940)), fails in the present case because the probative value of the excluded testimony was greater than that of the other evidence introduced on the same issue.

[7] The court also erred in excluding the testimony of defendant's minister. Defendant offered the testimony of Reverend Crouch that on October 4th defendant told him the same story as he told on the stand: that he had left the Log Cabin, and then returned and found Carey lying on the floor of the card room, and in turning him over got blood on his clothes. At the time he told this story to Reverend Crouch, defendant did not know that the blood on his clothes had been analyzed as Carey's type or that hairs similar to Carey's had been found on his trousers. Defendant had a right to introduce this testimony to rebut the prosecution's charge that his story was a recent fabrication. See People v. Hardenbrook, 48 Cal.2d —, 309 P.2d 424; People v. Walsh, 47 Cal.2d 36, 301 P.2d 247; People v. Kynette, 15 Cal.2d 731, 753–754, 104 P.2d 794, certiorari denied 312 U.S. 703, 61 S.Ct. 806, 85 L.Ed. 1136. Again, this evidence would not be merely cumulative. In the tape-recorded interview between defendant and the district attorney, introduced in evidence, defendant did not give the explanation he gave on the stand, but on the contrary disclaimed any knowledge of the attack on Carey. This statement did not, therefore, rebut the charge of recent fabrication but gave it additional support. The statement to Reverend Crouch was the only declaration by defendant that tended to rebut that charge and should have been admitted.

Defendant next cites as error the admission of certain evidence. Dr. Kirk was permitted to testify that he had made certain experiments in blood dynamics: that he had beaten various bloody objects with instruments of different shapes in order to grasp the relationship between blood spots and their causes. Defendant contends that it was error to admit this evidence because the experiments were not conducted under circumstances substantially similar to those in the card room of the Log Cabin when Carey was beaten. It is true that the conditions were not substantially similar, but generally this requirement is imposed only when it is claimed that the results of an experiment are directly relevant to some issue in the case. People v. Wagner, 29 Cal.App. 363, 367–370, 155 P. 649. The prosecution made no attempt to show that because certain spots were produced by a certain cause in the experiments, similar spots on defendant's clothes or the floor of the card room must have been produced by a similar cause. In fact, there was no evidence of the results of the experiments; Dr. Kirk testified only that he had made them.

[8] Evidence that he had made the experiments was introduced to qualify him

as an expert in blood dynamics, to show that by training and experience he was able from an analysis of the size and shape of blood spots to determine their source with some degree of accuracy, and to enable the jury to test the reliability of his opinions by revealing their foundation. For these purposes the evidence was properly admitted. People v. Crooms, 66 Cal.App.2d 491, 496, 152 P.2d 533; Hastings v. Serleto, 61 Cal.App.2d 672, 688–689, 143 P.2d 956. It may be that when a specific experiment is the sole basis for an expert opinion, it would be essential to an adequate foundation that the experiment be made under conditions substantially similar to those that existed under the facts of the case, as it is essential to relevancy when the results of an experiment are introduced as direct evidence on an issue. The experiments in the present case, however, were by no means the sole basis for Dr. Kirk's opinion. He testified to general experience and knowledge of chemistry and physics, and of blood dynamics in particular. The experiments themselves were the last phase of work extending over a number of years, and Dr. Kirk stated that his opinions did not rest solely on their results.

From an analysis of the size and shape of blood spots in the card room, Dr. Kirk gave his opinion as to what their point of origin must have been. Then, from an analysis of the blood spots on defendant's clothes, he stated that if the blood was spattered on the clothes at the time Carey was beaten, the person wearing them must have been not more than two and one half feet from the source of the blood. These inferences required knowledge and experience beyond those of ordinary jurors and could assist them to weigh the evidence more perceptively than they could unaided. People v. Crooms, 66 Cal.App.2d 491, 494–496, 152 P.2d 533; see People v. Cole, 47 Cal.2d 99, 301 P.2d 854; George v. Bekins Van & Storage Co., 33 Cal.2d 834, 843-844, 205 P.2d 1037.

[9] Defendant contends that the court abused its discretion in admitting into evidence certain colored slides of Carey taken at the time of the autopsy. The slides showed the deceased's head, face and neck, and the wounds that had caused his death, and were used by the autopsy surgeon as the basis for his testimony. If the principal effect of demonstrative evidence such as photographs is to arouse the passions of the jury and inflame them against the defendant because of the horror of the crime, the evidence must of course be excluded. People v. Cheary, 48 Cal.2d 301, 309 P.2d 431; People v. Cavanaugh, 44 Cal.2d 252, 266–268, 282 P.2d 53, certiorari denied 350 U.S. 950, 76 S.Ct. 325, 100 L.Ed. 828. On the other hand, if the evidence has probative value with respect to a fact in issue that outweighs the danger of prejudice to the defendant, the evidence is admissible even if it is gruesome and may incidentally arouse the passions of the jury. People v. Cheary, 48 Cal.2d 301, 309 P.2d 431. It is primarily for the trial court in the exercise of its discretion to weigh the importance of putting before the jury all that may reasonably assist them in the determination of guilt against the danger that they will substitute emotion for reason as the basis of their verdict.

[10] In the present case one of the crucial questions was whether Carey's wounds were caused by the flex-handle wrench found in Edgar Slough, and the colored slides graphically showed the nature of these wounds. The autopsy surgeon used the slides to point out that the wounds must have been inflicted by an instrument that was hard, had smooth edges, and was at least six inches in length, and the wounds could have been caused by the wrench. He pointed also to certain irregularities in the wounds, stating that they could correspond to an irregularity in the wrench, and that these irregularities were probably more accurately depicted in the slides than in his blackboard diagrams. In these circumstances the court did not abuse its discretion in admitting the slides in evidence, particularly since it carefully warned the jury against allowing the slides to prejudice them against defendant.

[11, 12] The court did commit error, however, in not excluding a statement by one Bennett, a man who had also been in the Log Cabin and was an important suspect in the case, that he had been willing to take a lie detector test. The court ordered stricken his further testimony that, "and some other people wouldn't take [such a test] * * *," but in view of the testimony the court permitted to stand, the implication survived that defendant had refused to take a lie detector test and that his refusal furnished some evidence of guilty knowledge. Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results. People v. Wochnick, 98 Cal.App.2d 124, 126–128, 219 P.2d 70; People v. Porter, 99 Cal. App.2d 506, 510–511, 222 P.2d 151. It therefore follows that a suspect's willingness or unwillingness to take such a test is likewise without enough probative value to justify its admission. The suspect may refuse to take the test, not because he fears that it will reveal consciousness of guilt, but because it may record as a lie what is in fact the truth. A guilty suspect, on the other hand, may be willing to hazard the test in the hope that it will erroneously record innocence, knowing that even if it does not the results cannot be used as evidence against him.

Defendant next contends that it was error to deny him the right to inspect a document used in the cross-examination of his wife. Mrs. Carter stated on cross-examination that she could not remember if defendant was wearing a red cap when he left the house on the morning of September 29th. The prosecutor then asked her if she remembered being interviewed by the sheriff on September 30th when a stenographer was present, and read from the stenographer's transcript questions put to Mrs. Carter, and her answer that she believed defendant had been wearing a cap. Defense counsel requested and was denied the right to inspect the transcript.

[13] We have recently held that the defendant in a criminal case can compel production when it becomes clear during the course of a trial that the prosecution has in its possession relevant and material evidence that is not confidential, because "the state has no interest in denying the accused access to all evidence that can throw light on issues in the case * * *." People v. Riser, 47 Cal.2d 566, 305 P.2d 1, 13. We were there concerned with the defendant's right to inspect statements that he reasonably believed could be used to impeach the prosecution's witnesses, but the reasons for the decision apply with equal force to a statement the prosecution has used in impeaching the defendant's witness and that the defendant now seeks to inspect for the purpose of rehabilitation. The prosecutor may read to the jury extracts from the transcript selected with an eye to putting the witness in the worst possible light by emphazing the gap between his prior statement and his present testimony. It is clearly unfair to deny the defendant an opportunity to show that the extracts have been taken out of context, and that when read with other parts of the statement the alleged inconsistency disappears. To be effective such an opportunity must include the right to see the transcript the prosecution has used; the witness' memory of what he said is not enough. See People v. Stevenson, 103 Cal.App. 82, 88–92, 284 P. 487; Meadors v. Commonwealth, 281 Ky. 622, 136 S.W.2d 1066, 1068–1069; 6 Wigmore, Evidence, 477 (3d ed. 1940).

On rebuttal the prosecution was allowed to introduce in evidence the red cap found in Edgar Slough. Defendant contends that by withholding this important evidence instead of presenting it as part of its case in chief, the prosecution gained an unfair advantage over defendant. The prosecution contends in reply that since defendant denied on the stand that he had been to Edgar Slough or left the wallet or wrench there, the cap was properly admitted to rebut this testimony or impeach defendant's credibility.

[14–15] Section 1093(4) of the Penal Code provides that after the defendant has offered his evidence the prosecution may then offer "rebutting testimony only, unless the court, for good reason, in furtherance of justice * * *" permits it to offer evidence upon its original case. In a sense all evidence that tends to establish the defendant's guilt over his protestations of innocence rebuts the defendant's case, but it is not all rebuttal evidence within the purpose of section 1093(4). The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. See People v. Byrd, 42 Cal.2d 200, 211–212, 266 P.2d 505, certiorari denied 348 U.S. 848, 75 S.Ct. 73, 99 L.Ed. 668; People v. Nye, 38 Cal.2d 34, 38–39, 237 P.2d 1; People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527; 6 Wigmore, Evidence, 510–511, 516 (3d ed. 1940). A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start.

[16] The red cap found in Edgar Slough was crucial evidence tending to show that defendant had put the wallet and wrench in the slough and therefore had beaten and robbed Carey. Defendant's plea made it clear that he would not admit having gone to the slough, and his denial on the stand furnished no new matter for rebuttal. The evidence should have been put in as part of the case in chief. See People v. Rodriguez, 58 Cal.App.2d 415, 418–419, 136 P.2d 626.

[17] Changes in the order of proof called for by section 1093 can be made within the sound discretion of the trial court. Cf. People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527. In the present case, however, the prosecution offers no reason why the cap could not have been introduced in chief, but since defendant did not make completely clear to the trial court the objection that he now urges, we would not be justified in finding that there has been an abuse of discretion. On the retrial of this case an order of proof will no doubt be observed that is consonant with the purposes of section 1093.

[18] Defendant next contends that the court abused its discretion in denying his motion to reopen the case to introduce evidence that on the 11th of October a red cap, similar to the one found in Edgar Slough and to the one owned by defendant, had been found on the corner of Fifth Street and Esplanade in Chico on the route defendant had taken from the Log Cabin to his house.

The record is not altogether clear whether this was a motion to reopen or a motion for a continuance. During the extended discussion in chambers there were several references to a possible continuance, but defendant's counsel early stated, "Now I would have to request that I be permitted to reopen to explore on surrebuttal the finding of this hat," and in formally denying defendant's motion the court stated, "Under the circumstances, I am denying the motion to reopen at this time." It does not appear that for defendant's purposes a continuance was essential. The important thing was to put before the jury the fact that a second red cap, similar to the one worn by defendant, had been found on the corner of Fifth and Esplanade on October 11th. The district attorney himself suggested that a stipulation of these facts could perhaps be worked out, and indeed they were not in dispute. Even had a short continuance proved necessary to enable defendant to put the facts before the jury, it should have been granted.

The finding of the second cap was highly relevant; it might even have become a decisive consideration in defendant's favor. The trial court itself declared, upon the district attorney's argument that the finding of the second cap was irrelevant, "But one of the key circumstances in your case is a red hat." The prosecution relied heavily on the fact that a red cap similar to the one worn by defendant had been found with the wrench and Carey's wallet in Edgar Slough in November. Had the jury known of the finding of the second red cap, the probative value of the first might have been sharply reduced.

During the discussion in chambers the sheriff produced a red cap found in the evidence room of his office. The fact that this cap could not at that moment be conclusively identified as the cap found on the corner of Fifth and Esplanade was no reason to deny defendant's motion. Defendant had only to show that a red cap had been found, not to produce any particular red cap. Moreover, any confusion as to the identity of the cap was attributable to the sheriff's office, not to defendant. After the red cap was found at Fifth and Esplanade, it was sent to Dr. Kirk to be tested for blood stains. He found none. The cap was then returned to Deputy Longacre in the sheriff's office who presumably put it in the evidence room. Soon after he retired from police work. A few weeks before trial the cap could not be found, but after a search of the evidence room a red cap was found; it was this cap that the sheriff produced in chambers. The district attorney suggested that it could be the one found at Fifth and Esplanade, or that it could be another. The sheriff could not recall that any third red cap had come into his office. There was nothing to indicate that the cap produced was not the original red cap.

The court was not justified in denying defendant's motion on the ground that his counsel knew about the second red cap before trial but took no steps to obtain it. The extent of counsel's knowledge appears from the following extracts from the record:

> "Mr. Stone: But I must state to the Court that only this morning did I discover—was I informed for the first time that the sheriff's office of Butte County, between September 29 and the date of this trial—and I don't know the date—found or had turned in to them in Chico a red baseball cap, one that is not in evidence, and that there has been no showing—there has been no reason for it whatsoever. It was found, as I understand it, at 5th and the Esplanade, which is between the Log Cabin and the defendant's residence on the route which the defendant himself says he took. I am also informed that it is of the same type and description as the one presently in evidence. In other words, it is red, it is a baseball cap, and also that it is greasy,"

and later in the discussion—

> "Mr. Stone: Sometime back Mr. Carter in my discussion with him stated to me that he had been questioned about a hat, that there was no statement by Mr. Carter to me as to where the hat was found, when it was found. He told me that he had not been shown the hat. I had no way of knowing in view of the fact that he had told me there was no hat shown to him as to whether or not this was simply an effort—.
>
> "The Court: Was 5th and Esplanade mentioned?
>
> "Mr. Stone: Not to my recollection, no, Your Honor.
>
> "Mr. Lyde: I wonder if the Court would ask whether or not he mentioned a street.
>
> "Mr. Stone: I believe, as I recall, what Mr. Carter told me, he said it was found uptown.
>
> "Mr. Lyde: Well, there, you see. We never told him we found the one

> in the slough. At least I don't believe I did. Bruce may have. Go ahead, Mr. Stone.
>
> "Mr. Stone: But I would want to simply point out to the Court that when Mr. Carter told me that he had not been shown the hat that I thought this perhaps was simply an effort in view of the statements made by Cox, which appeared in the newspaper, a statement by Beer—and I had talked to Beer and Cox—and he had a hat on—I thought perhaps this was an attempt to simply by the prosecution to endeavor to get a confession out of the defendant and I put no weight on this thing at all. Now, you also recall, Your Honor, that—. Well, I won't go any further. I have answered as best I can."

In some circumstances it might be proper to find that such information imposes on counsel the burden of pursuing every evidentiary possibility on pain of being denied the right to reopen for later discovered evidence. In the present case, however, because of the closeness of the proof, the vital character of the evidence defendant sought to introduce, the seriousness of the charge, and the absence of any substantial considerations weighing against reopening the case, it was clearly improper.

Neither defendant nor his counsel knew that a red cap similar to defendant's had been found on the corner of Fifth and Esplanade. The prosecution did not so advise them. They had only fragmentary information that some cap had been mentioned by the police. They would understandably not appreciate the significance of this information if, as seems likely, it came at a time antedating the discovery of the red cap in the slough, when it had not yet become important for defendant to prove that the red cap in the slough was not his cap.

Moreover, there were no substantial reasons against reopening the case. Defendant had only just rested, argument had not begun and the jury had not been instructed, and it does not appear that granting defendant's request would have entailed any great inconvenience. In a trial that had already consumed thirteen days, it was not unreasonable to request an extension of a few hours to put before the jury evidence that in justice should have been considered, as the trial court itself must have recognized when it said in reference to informing the jury of the finding of the second cap, "I don't think I could deprive him [defendant] of that opportunity and still give him a fair trial." This decisive consideration should have overcome arguments based on the notion that a criminal trial is a rigorously adversary proceeding in which a party must seize his opportunities when presented or forever lose them.

People v. Buckowski, 37 Cal.2d 629, 233 P.2d 912, and People v. Fountain, 170 Cal. 460, 150 P. 341, do not support the trial court's ruling in the present case. The defendants in those cases had in their possession long before trial as much information as the prosecution, and all that was necessary to enable them to obtain the evidence they wished. In each case the defendant sought to postpone indefinitely the beginning of trial rather than to reopen to admit specific evidence already at hand. The materiality of the evidence that each claimed could be found during a continuance was remote and speculative, whereas the evidence defendant sought to introduce in the present case was relevant and material. Finally, in the Buckowski case, where the question was whether the defendant had committed the homicide, the evidence against him was overwhelming, whereas in the present case the evidence was such that additional evidence might well have affected the result.

[19] Defendant's final objections go to the court's failure to give certain instructions. Defendant contends that the court should have instructed on the distinction between robbery and burglary, because the jury knew that defendant had been convicted of burglary in another state and might have thought that burglary like robbery involved violence against the person

of another. This argument implies that knowledge of defendant's conviction could directly affect the jury's determination of guilt. The court carefully instructed the jury, however, that it could take defendant's prior conviction into account only in assessing his credibility, and there is no reason to think that it did not obey this instruction. On the issue of credibility, it was irrelevant whether or not defendant's prior conviction had been for a crime of violence.

[20] Nor was there error in the court's failure to instruct that the homicide was not in the perpetration of a robbery if the intent to rob arose after the attack on the deceased. At no time during the trial did defendant rely on the theory that such an instruction would have embodied. He did not contend that he thought of robbing Carey only after attacking him; on the contrary he denied either attacking or robbing him. In each case that he invokes, People v. Hudson, 45 Cal.2d 121, 124–126, 287 P.2d 497, and People v. Carnine, 41 Cal.2d 384, 387–392, 260 P.2d 16, the defendant admitted killing and robbing the victim and relied only on the defense that the intent to rob had not been formed until after the homicide. The court in the present case was not required to give an instruction that would have had no foundation in the evidence or in any theory on which the case was tried. See People v. Eggers, 30 Cal.2d 676, 687, 185 P.2d 1, certiorari denied 333 U.S. 858, 68 S.Ct. 728, 92 L.Ed. 1138.

[21] The court refused to give an instruction that in a case resting wholly on circumstantial evidence, "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." More, it positively informed the jury that the law was otherwise. In People v. Watson, 46 Cal.2d 818, 830–831, 299 P.2d 243, we held that the refusal to give such an instruction was error. A fortiori there was error here.

Defendant contends that still other errors were committed by the court and that there was misconduct on the part of the district attorney. Since the acts complained of are not likely to attend a new trial, it is not necessary to consider them here. On the basis of the errors considered earlier it is clear that defendant has not had a fair trial. The closeness of the proof indicates that absent these errors the jury might have reached a different verdict.

The judgment and order are reversed.

GIBSON, C. J., concurs.

CARTER, Justice (concurring).

I concur in the judgment of reversal and generally in the reasoning set forth in the majority opinion. I feel, however, that error also was committed in the admission of Dr. Kirk's testimony concerning his experiments with the pattern made by blood spattering from an object made of wood, sponge rubber and a thin plastic sheet. The admission of such testimony invaded the province of the jury as it was based on conditions far removed from those actually existing at the time the crime was committed. Such testimony from a person as noted in criminology as Dr. Kirk could have had no other effect than to impress and prejudice the jury particularly in a case as closely balanced as the one here under consideration.

This court held in People v. Woon Tuck Wo, 120 Cal. 294, 296–297, 52 P. 833, that unless such experiments are shown to have been made under essentially the same conditions that existed in the case on trial, the tendency is to confuse and mislead rather than enlighten the jury. It most certainly cannot be said that an object made of wood, sponge rubber and a plastic sheet constituted the same thing as a human head. Further, as noted in the majority opinion, the prosecution made no attempt to show that because certain spots were produced by a certain cause in the experiments, similar spots on defendant's trousers or on the floor of the card room must have been produced by a similar cause. "Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court from the nature of the experiments that the jury will be enlightened rather than confused. In many circumstances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful." People v. Wagner, 29 Cal.App. 363, 369–370, 155 P. 649, 652; see, also, People v. Ely, 203 Cal. 628, 265 P. 818; People v. Parker, 4 Cal.App.2d 421, 424, 40 P.2d 836; McGough v. Hendrickson, 58 Cal.App.2d 60, 136 P.2d 110.

Defendant's story was that the spots on his clothing were due to blood spraying on him as he handled the deceased's body when he discovered it after the beating. Dr. Kirk's testimony was to the effect that the blood could not have gotten on defendant in that manner but could have gotten there only if he had administered the beating. It was the jury's prerogative to draw its own conclusion from the evidence without expert testimony based on totally dissimilar facts.

For this reason, as well as those stated in the majority opinion, I concur in the reversal of the judgment.

SCHAUER, J., concurs.

SPENCE, Justice (concurring and dissenting).

I agree with certain portions of the opinion prepared by Mr. Justice Traynor, but I disagree with other portions and dissent from the conclusion that the judgment and order denying a new trial should be reversed.

More specifically, I agree with those portions which declare certain of defendant's claims of error to be without merit. On the other hand, I cannot agree with certain portions of the discussion which sustain some of defendant's claims of prejudicial error. It would serve no useful purpose, however, to enter into a discussion of each of the several claims, but a reference to one such claim appears appropriate.

One of defendant's principal claims of prejudicial error rests upon the failure of the trial court to give defendant's requested instruction to the effect that in a case resting wholly upon circumstantial evidence, "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." This refusal is declared by Mr. Justice Traynor to constitute prejudicial error. I cannot agree.

This court held in People v. Watson, 46 Cal.2d 818, 830–831, 299 P.2d 243, that the requested instruction was a proper instruction, but that in the light of the instructions given, there was no prejudicial error in the failure to give it. The same is true here. The trial court gave numerous instructions in this general field including CALJIC 21, 24, 25 and 26. Additionally, the trial court specifically instructed: "Before the jury may find a defendant guilty, the law requires that all of the essential elements of the crime charged, and each fact necessary to establish the commission of the crime by the defendant must be proved beyond a reasonable doubt and to a moral certainty." The quoted instruction embodies the principle found in defendant's requested instruction, and the subject was therefore adequately covered.

Furthermore, I find nothing in the record to justify the statement that the trial court "positively informed the jury that the law was otherwise." During a colloquy between court and counsel on the voir dire examination of the jurors, and relating to an objection to a lengthy question on another point, the trial court did make a statement that "Each circumstance does not require proof to a moral certainty and beyond a reasonable doubt." Counsel for defendant immediately said: "That wasn't my point. That was not the point. Perhaps I can state it in another way." The trial court then said: "I could not have answered the question yes or no without numerous other factors to be considered." Counsel for defendant then reframed his lengthy question, and the reframed question was answered without objection.

In my opinion, the trial court's statement was correct and in any event, it could not have been reasonably construed as contrary to the trial court's formal instructions on the subject under discussion. It has never been held that "each circumstance," as distinguished from "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt" (as stated in the requested instruction) or "each fact necessary to establish the commission of the crime by the defendant" (as stated in the given instruction) must be proved beyond a reasonable doubt. Certain facts or circumstances may appear in a lengthy record, which facts and circumstances may not be essential to the determination of the guilt of a defendant; but it is only the "essential" or "necessary" facts in the chain of circumstances which must be proved by the quantum of proof required to sustain a criminal conviction. As above indicated, the trial court did instruct the jury that "each fact necessary to establish the commission of the crime by the defendant must be proved beyond a reasonable doubt and to a moral certainty." I therefore find no prejudicial error in the failure to give the requested instruction.

It may be assumed that in the lengthy record covering more than 1,700 pages, some error may be found. A reading of that record convinces me, however, that the evidence presented a chain of circumstances so tightly linked about defendant that there is not the slightest doubt concerning defendant's guilt of the cold-blooded murder of his 77-year-old victim in the perpetration of robbery. I find no error of such nature as to sustain a claim that there was any likelihood that a result more favorable to defendant would have been reached in the event that such error had not occurred. Under these circumstances, I believe that this is a typical case for the application of the constitutional mandate, which provides that no reversal shall be ordered "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. VI, § 4½; People v. Watson, supra, 46 Cal.2d 818, 837–838, 299 P.2d 243.

I would affirm the judgment of conviction and the order denying a new trial.

SHENK and McCOMB, JJ., concur.

Rehearing denied: SHENK, SPENCE, and McCOMB, JJ., dissented.

48 Cal.2d 672

COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

L. C. FAUS et al., Defendants,

L. C. Faus, Francis P. Graves, Paul Overton, Mary G. Faus, Katharine Graves Armstrong and Alice Graves Stewart, Defendants and Appellants.

L. A. 24444.

Supreme Court of California,
In Bank.

June 21, 1957.

Rehearing Denied July 16, 1957.

Proceeding by county to condemn portions of an abandoned right-of-way in center of street. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment after trial by jury which fixed the value of the condemned property, and defendants appealed. The Supreme Court, McComb, J., held that refusal to give instructions that price paid by public corporation for other property having right of condemnation by virtue of eminent domain would not be proper basis for determination of market value of property condemned, was error.

Judgment reversed, and new trial ordered.

Gibson, C. J., and Spence and Shenk, JJ., dissented.

Opinion, 304 P.2d 257, vacated.

1. Eminent Domain ⚿222(4)

In proceeding to condemn portions of an abandoned right-of-way in center of street, refusal to give requested instruction that price paid for other property by public corporation having right of condemnation by virtue of eminent domain, would not be proper basis for determination of market value of property condemned, was error.

2. Evidence ⚿142(1)

In condemnation proceeding, evidence of prices paid for similar property in the vicinity, including prices paid by condemner, was admissible on direct examination and cross-examination of witness who was presenting testimony on issue of value of condemnee's property. West's Ann. Code Civ.Proc., §§ 53, 1872.

3. Courts ⚿90(6)

Rule of stare decisis is not so imperative or inflexible that it precludes a departure therefrom in any case, but its application must be determined in each case by court's discretion, and previous decisions should not be followed to extent that error may be perpetuated and that wrong may result.

4. Courts ⚿100(1)

There is no constitutional objection to a reviewing court's making a choice for itself, in overruling an earlier decision, whether the new rule declared by it shall operate prospectively only or apply retrospectively, and such determination is dependent upon the equities in each case.

5. Courts ⚿100(1)

Generally, decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision was bad law but that it was never the law.

6. Courts ⚿100(1)

Where constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with such decision, the contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in a subsequent decision, and, therefore, the later decision will be given prospective, not retrospective, effect.

7. Courts ⚿100(1)

Where case was tried by trial judge and attorneys for both parties upon theory of law which had been announced by the Supreme Court but which was, upon appeal of the case to the Supreme Court, overruled by the Supreme Court, and neither contract nor property rights had vested in either party by virtue of the previous decisions, effect of the overruling of the previous decisions would be retrospective in operation, and the new rule would be available to both parties upon a retrial.

◆

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, S. V. O. Prichard, Hollywood, Charles F. Reiche, Los Angeles, Walhfred Jacobson, City Atty., Long Beach, Joseph B. Lamb, Asst. City Atty., Long Beach, John Anson, Irl D. Brett and Thomas G. Baggot, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, John H. Larson, Richard L. Riemer, Arthur Loveland and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in a condemnation proceeding after a trial by jury which fixed the value of their property to be acquired by plaintiff.

Defendants are the owners of certain elongated strips of realty situated in the cities of Alhambra and San Marino. These strips are portions of an abandoned right of way in the center of Huntington Drive that formerly provided the streetcar route from Los Angeles northeasterly through the Santa Anita area. The vacant right of way is 60 feet wide and divides Huntington Drive. Parcel 20–2, bounded by Stoneman Avenue, Atlantic Avenue and the two sides of Huntington Drive, is 113.71 feet in length. Parcel 20–3 runs easterly from Stoneman to Granada Boulevard, a distance of 1,435.13 feet. The northerly half of each parcel is located within San Marino; the southerly half within Alhambra.

Plaintiff has condemned a 30-foot strip running along the southerly edge of each parcel for the purpose of widening Huntington Drive.

The only witnesses on behalf of plaintiff, Frank C. Wood and J. B. Irvin, testified that they based their estimates of market value of the subject property "primarily" upon prices paid on 12 sales of rights of way, eight of which had been made to government agencies possessing the power of condemnation. Five consisted of strips of land that had no street access whatsoever, unlike the situation existing here. Several of the parcels purchased by government agencies with power of condemnation were in fact situated "15 or 20 miles" from defendants' property.

At the close of witness Wood's cross-examination, defendant moved to strike his testimony on the market value of the subject property upon the ground that it was based upon two incompetent considerations, to wit, (1) consideration of incompetent sales to public bodies with power of condemnation, and (2) the witness' conception that the market value of the property was its value in use to the condemning county and not its highest and best use to the public generally. This motion was denied. A similar motion was not made at the end of witness Irvin's testimony; however, in view of the previous ruling of the court it is apparent that such a motion would have been futile.

At the end of the trial defendant offered the following instructions, which the trial judge refused:

"You are instructed that the price fixed by an agreement between the owner of property and public corporations, such as the State of California, County of Los Angeles, or municipal corporation, seeking to condemn the land by virtue of eminent domain or having the power so to do, cannot be taken as a criterion of the market value of other land in the vicinity. The prices so fixed by compromise, when there can be no other purchasers, and the seller has no option to refuse to sell and can only elect between the acceptance of the price offered and the delay, uncertainty and trouble for legal proceedings of an assessment, is not a reasonable or fair test of just compensation for the defendant's property. It is in no sense a sale in the market.

"You are instructed that the price paid by a public corporation such as the State of California, County of Los Angeles, or any municipal corporation, for other property, said party having the right of condemnation by virtue of eminent domain, is not a proper basis for a determination of market value of the property here in question. Such sales are not a fair criterion of value for the reason that they are in the nature of a compromise. The fear of the one party or the other to take the risk of legal proceedings ordinarily results in the one party's paying more or the other party's taking less than is considered to be the fair market value of the property. For these reasons such sales are not proper evidence of value in any case, whether in a proceeding by the same condemning party or otherwise."

These questions are presented for our determination: *First: Did the trial court err in refusing to give the instructions requested by defendant set forth, supra?*

[1] *Yes.* In passing upon the contention that two instructions almost identical with the requested instructions in this case were correct and properly given in a condemnation case, this court said in City of Los Angeles v. Cole, 28 Cal.2d 509, 517, 170 P.2d 928, 933: "Contrary to appellants' claim, the challenged instructions correctly state the law governing the jury's de-

termination of the market value problem in the light of the evidence adduced. As claimed by respondent, these instructions are in part a paraphrase and in part a precise reproduction of a quotation from Mr. Lewis in his treatise on Eminent Domain (1st Ed., § 447; 3d Ed., § 667) as discussed with approval in the early case of City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 436, 34 P. 1083."

Based on the foregoing authorities the trial court erred in refusing to give the requested instructions to the jury. Although we have concluded that these authorities should no longer be controlling for the reasons set forth below, the judgment will be reversed so that the parties herein may try the issue of value according to the rule herein adopted.

Second: In view of the provision in section 53 of the Code of Civil Procedure that "* * * if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case," this question is presented: *In a condemnation proceeding, is evidence of the prices paid for similar property in the vicinity, including prices paid by the condemner, admissible on (a) direct examination, and (b) cross-examination of a witness who is presenting testimony on the issue of the value of the condemnee's property?*

[2] *Yes.* Section 1872 of the Code of Civil Procedure provides: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel."

The reasons in support of the admissibility of such evidence are stated by Professor Wigmore in his treatise on the law of Evidence (3d ed. 1940), vol. 2, section 463, pp. 503 et seq., as follows: "When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of *value,* so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they *are* the value; i. e. since value is merely a standard or measure in figures, those sums taken in net potential result are that standard.

"But the evidential question is not concerned with the many subsidiary principles of the law of Damages, or *standard of value,* that come into play. Whether an unaccepted offer of purchase at a certain figure may be looked to as determining value, or whether the price of a sale or the cost of making may be looked to,—these are questions which arise because value is a test formed by averaging results and because it is necessary to define the range over which the true idea of value permits the estimate to go. That is not an evidential process, but a process of average calculation. So, too, the question whether the value of the article at another time or another place may be resorted to depends on whether, in defining the range of data, it is fair for the purposes in hand to allow marketability at another place or time to be considered; there the process is still one of defining the range of the value-idea.

* * *

"There is, however, one question indirectly involving a rule of Evidence,—the question whether the value of *another article* is receivable in order to show the value of the *article in issue.* As the price at a sale is, by the law of Damages, conceded to be an element in the test of value (except perhaps in forced sales), this question is usually presented in the form, whether a *sale of other property* is admissible as evidence of the value of the property in question.

"In answering this question, it is found that the two leading principles already expounded come into joint application,—the principle of Relevancy and the principle of Auxiliary Policy. According to the former, the value or sale-price of the other property is relevant only when the property is *substantially similar in conditions;* according to the second, it may be excluded, though relevant, if it involves in the case in hand a disproportionate *confusion of issues* and loss of time.

* * * * * *

"It is enough to note (1) in answer to the argument from Relevancy, that since value is a money-estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential and is so treated in commercial life; all the argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy; (2) in answer to the argument from Auxiliary Probative Policy, it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial Court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to receive it. * * *

"Except in a few jurisdictions, this class of evidence is received." (See also Note II, 118 A.L.R. 870; Note II, 174 A.L.R. 387.)

The following excerpt from McCormick on Evidence (1954), section 166, page 348, is here pertinent: "*Other Sales of Similar Property as Evidence of Value.* In case of ordinary personal property, where market value is sought, of course the most obvious resort is to evidence of what other similar property, whether wheat, shoes, horses, or what not, currently sold for on the market at that place. * * *

"Any tract of land is considered unique, and consequently it is in cases of land valuation, and especially in condemnation cases, that the question of admissibility of evidence of prices paid on other sales is most frequently discussed. A few states have been unwilling to admit such evidence save in exceptional circumstances. This seems to put too heavy a strain on opinion evidence and the general knowledge of the jurors, and the view of the majority of courts which admits such evidence, within safeguarding limits, seems preferable. These safeguards are the following: The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted a wide discretion.

"Since the market value sought is the estimate of what a willing [buyer] would have paid a willing [seller], prices on other sales of a forced character are inadmissible. * * * [E]vidence of the price paid [by the condemner] should come in if the condemner can satisfy the judge that the price paid was sufficiently voluntary to be a reasonable index of value. In any event, the sale must be genuine, and the price must be actually paid or substantially secured." (See also dissenting opinion of Carter, J., in City of Los Angeles v. Cole, 28 Cal.2d 509, 523–524, 170 P.2d 928.)

In taking this position it is recognized that we are overruling a line of decisions in this state that announce a contrary rule. The former rule was contrary to logic, unrealistic, and followed in only a few other states. It was merely a rule of procedure. Therefore, it becomes our duty not to follow decisions that we are convinced are erroneous and obsolete. (See, Traynor, J., People v. La Macchia, 41 Cal.2d 738, 754, 264 P.2d 15; Carter, J. and Schauer, J., Heimann v. City of Los Angeles, 30 Cal.2d 746, 760, 185 P.2d 597; Ashburn, J., County of Los Angeles v. Faus, Cal. App., 304 P.2d 257, 270.)

[3] The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each

instance by the discretion of the court. Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result.

This view finds support in our own decisions. Mr. Justice Sloss, in San Pedro, L. A. & S. L. R. Co. v. City of Los Angeles, Cal., 179 P. 390 [2], accurately states the rule: "On the appeal in L.A. No. 4600 we are, however, at liberty to consider the appellant's contention that the former decision of this court was erroneous, and that it should not be followed. That decision has, to be sure, the persuasive force attaching to any deliberate expression of the court. No property rights appear, however, to have been acquired on the faith of the ruling, and if, upon further consideration, we should feel satisfied that a wrong conclusion was reached, it is right and proper that we should so declare, to the end that the true rule, as we now see it, should be established and enforced." The foregoing rule is applicable in the instant case.

The reason given for excluding evidence of sales of similar property in the early case of Central Pacific R. Co. of California v. Pearson, 35 Cal. 247, is not persuasive, is specious, and should no longer be followed. The court, 35 Cal. at page 262, stated its reason for excluding evidence as to particular transactions as follows: "But, while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, they cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have been compelled to pay in other and like cases—notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable."

Any statements in the following cases contrary to the rule we now approve are overruled: People v. La Macchia, 41 Cal.2d 738, 264 P.2d 15; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597; City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928; City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737; City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681; Central Pacific R. Co. of California v. Pearson, 35 Cal. 247.

Statements in the following cases contrary to the rule announced in this decision are disapproved: City of Los Angeles v. Frew, 139 Cal.App.2d 859, 294 P.2d 1073; People, etc. v. Union Machine Co., 133 Cal.App.2d 167, 284 P.2d 72; Atchison T. & S. F. Ry. Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 57 P.2d 575; City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378; Los Angeles Gas & Elec. Corp. v. Etienne, 83 Cal.App. 645, 257 P. 123; Reclamation Dist. No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098.

Third: Should the law as now established by this court be given retrospective or prospective effect?

[4] The law is settled that there is no constitutional objection to an appellate court's making a choice for itself, in overruling an earlier decision, whether the new rule declared by it shall operate prospectively only or apply retrospectively. (Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 363 et seq., 53 S.Ct. 145, 77 L.Ed. 360; cf. Traynor, J., Sutter Basin Corp. v. Brown, 40 Cal.2d 235, 249, 253 P.2d 649; People v. Ryan, 152 Cal. 364, 369, 92 P. 853; People v. Maughs, 149 Cal. 253, 263, 86 P. 187; 17 Minn.L.Rev. 811; 28 Ill.L.Rev. 277; 11 N.C.L.Rev. 323.)

[5] The determination by the court is dependent upon the equities in each case. It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the for-

mer decision was bad law but that it never was the law.

[6] A well-recognized exception to this general rule is that, where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in a subsequent decision. Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision. (7 R.C.L. (1951), Courts, § 36, p. 1010.)

[7] Applying the foregoing principles to the facts in the instant case, it is apparent that it was tried by the trial judge and attorneys for both parties upon a theory of law heretofore announced by this court that we are now overruling. It is also evident that neither contract nor property rights have vested in either party by virtue of our previous decisions on the points here involved. Therefore, this case falls within the general rule set forth above and not within the exception. The rule now announced is available to both parties upon a retrial.

The judgment is reversed and a new trial is ordered.

CARTER, TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

It appears to me that the majority has adopted a novel type of judicial technique in reaching its conclusion that the judgment should be reversed. It reverses upon the single ground that the trial court erred in refusing to give certain instructions requested by defendants. The majority bases its reversal solely upon the alleged authority of City of Los Angeles v. Cole, 28 Cal. 2d 509, 170 P.2d 928, and the cases cited therein; but the majority then proceeds to overrule the very cases upon which its reversal is based, declaring that "these authorities should no longer be controlling." In other words, the trial court's ruling is declared to be both erroneous and not erroneous within the confines of a single opinion. Thus it is impossible to know what rule the majority establishes as the law of the case to govern the trial court on a retrial of the cause. Furthermore, the majority fails to discuss whether the error, if any there be, was prejudicial, thereby ignoring the constitutional mandate prohibiting the reversal of a judgment unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. VI, § 4½.

I am of the opinion that the record discloses no prejudicial error, and that the judgment should therefore be affirmed. With respect to the specific ground upon which the majority bases its ambivalent declaration of error, I am of the view that the trial court did not err in refusing to give defendants' requested instructions. Neither City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 170 P.2d 928, 932, nor any other cited case, is authority for the majority's holding that such refusal constituted error.

In the Cole case, the property involved was in an area which had been designated for a Civic Center, and much of the property required for that purpose had been acquired or was being acquired. Many condemnation proceedings had been commenced. In other words, all property was being acquired under condemnation or the immediate threat of condemnation. The condemner was, in reality, buying under compulsion and the sellers were selling under compulsion. Under these circumstances and "in the light of the evidence adduced," we held in the Cole case that it was proper to instruct the jury that "*the price paid by plaintiff condemner* for other property is not a proper basis for determining the market value of the property here in question," and that "the price fixed by an agreement between the owner of property and *a public corporation seeking to condemn* his land by virtue of eminent domain cannot be taken as a criterion of the market value of other land in the vicinity." 28 Cal.2d 516–518, 170 P.2d 928, 932–933; emphasis added.

In the present case, the twelve prior sales in question were not sales to plaintiff but were sales by the Pacific Electric and the Huntington Land Company to public bodies, other than plaintiff, and to private individuals, of portions of abandoned rights-of-way. There is nothing in the record to show that there was any threat of condemnation present at the time that any of such sales were made. On the contrary, the evidence shows that these sales were sales "on the open market without compulsion." Under these circumstances, the prior sales here were clearly distinguishable from the prior sales in the Cole case.

Similarly, the instructions in the Cole case were materially different from defendants' requested instructions here, even though some of the language was similar. The vice of the defendants' requested instructions here is that they purported to cover every sale made to any public body "having the power" of condemnation. No such broad declaration was made in the instructions in the Cole case. The concept embodied in the requested instructions here is erroneous, and said instructions cannot be said to be "almost identical" with those given in the Cole case. As was said in O'Malley v. Commonwealth, 182 Mass. 196, 65 N.E. 30, 31: "We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market rather than a compulsory settlement. The board has power to purchase as well as to condemn land."

So here, the other public bodies had power to purchase, and did purchase, and there is no evidence to show that any of the sales made either to public bodies or to private individuals were made under compulsion or threat of condemnation. The requested instructions were therefore erroneous and were properly refused.

The other main ground urged by defendants for reversal is that the trial court committed prejudicial error in refusing to strike the testimony of plaintiff's experts. The majority opinion refers to this ruling on the motion but does not discuss or pass upon defendants' contention. In my opinion, the trial court properly denied the motion to strike such testimony.

Plaintiff's experts did not base their opinions *solely* upon the price paid by other public bodies, but these opinions were also based on the price paid by private individuals for portions of abandoned rights-of-way. These experts also considered some 40 private sales of property in the vicinity but not located on the narrow right-of-way in the middle of a divided highway. They conceded that they had "practically" rejected the prices paid on these 40 sales in determining the value of the right-of-way property but they gave ample reason for so doing. Their testimony also showed ample reason for determining that the prior sales of abandoned right-of-way property was the best criterion available to determine the value of the narrow strip in question. In view of the qualifications of these experts and the reasons given by them, the mere fact that they based their opinions *principally* on such prior sales of abandoned right-of-way property was not a sufficient ground for striking their entire testimony.

On the other hand, defendants' witnesses took the position exemplified by Mr. Frisbie's testimony. He said: "I have taken into consideration the sale of properties on both sides of Huntington Drive, and *have considered that that right-of-way strip had a value just as high as the properties on both sides.*" (Emphasis added.) The unsoundness of this conclusion is apparent. The sales of property along Huntington Drive other than right-of-way property were sales of lots of normal size, which lots were not part of a narrow strip in the middle of a divided highway. Those sales were of property which was zoned for a normal use by an ordinary purchaser. The narrow strip in the highway was zoned for transportation, park, and recreation purposes only, and was too narrow to permit the building of any useful structure within normal setback lines. There appeared to be little likelihood of a change in the zoning or the set-back ordinances, and all experts apparently conceded that the highest use of the narrow right-of-way strip was for some form of transportation purposes. In the absence of any demand for such property by ordinary purchasers and in view of the property's availability only for limited uses, it seems obvious that the valuations of plaintiff's experts more nearly reflected the "market value" than did those of defendants' experts. The jury fixed a valuation substantially higher than that fixed by plaintiff's experts, and the jury's award also included substantial severance damages even though plaintiff's experts were of the opinion that no such severance damages were involved.

It therefore appears to me that defendants have had a fair trial, and that they have received an award which represents "just compensation" for the property involved. Const. art. I, § 14. In fact, it is doubtful whether upon a second trial, defendants would receive an award in an amount as great as that heretofore fixed by the jury.

The novelty of the judicial technique adopted by the majority is more clearly illustrated by the second portion of the majority opinion. Upon the theory that a certain problem is "presented upon [this] appeal" (Code Civ.Proc. § 53), the majority declares that the following question is presented: "In a condemnation proceeding, is evidence of the prices paid for similar property in the vicinity, *including prices paid by the condemner, admissible on (a) direct examination,* and (b) cross-examination of a witness who is presenting testimony on the issue of the value of the condemnee's property?" (Emphasis added.) The majority answers this question in the affirmative and in doing so, it purports to overrule a long line of decisions of this court commencing with Central Pacific R. Co. of California v. Pearson, 1868, 35 Cal. 247, and ending with People v. La Macchia, 1953, 41 Cal.2d 738, 264 P.2d 15, together with numerous decisions of the district courts of appeal.

The truth of the matter is that no such question is presented upon this appeal. All parties introduced without objection, on cross-examination of the experts, any evidence which they desired concerning "the prices paid for similar property in the vicinity" upon which the opinions of the experts had been based; but no party introduced or sought to introduce any such evidence on direct examination of the experts. Furthermore, none of the sales to which the experts referred involved sales to the "condemner," and therefore no party sought to introduce evidence on either direct or cross-examination of any "prices paid by the condemner." It is therefore understandable that all parties agreed on the oral argument before this court that the quoted question as stated by the majority is not presented upon this appeal.

The unusual procedure of injecting a false issue into this case can probably be explained only by the apparent eagerness of the majority to find a vehicle for effecting the change of a long-standing and well-established rule of evidence with which the majority does not agree. Regardless of the question of whether that rule should or should not be changed, the present appeal obviously does not constitute an appropriate vehicle for that purpose. In fact, it appears that the majority's injection of this issue into this appeal has resulted in an abortive disposition of the appeal on the merits as presented by the record and by the parties. Certain it is that the reversal requires the majority, for the purpose of the reversal only, to take a position directly contrary to the position stated by three members of the majority in their dissenting opinion in City of Los Angeles v. Cole, supra, 28 Cal. 2d 509, 519, 170 P.2d 928. I am certain that no member of this court, regardless of whether he may have joined in the majority or minority opinion in the Cole case, is of the view that defendants' requested instructions in the present case were proper, and that such requested instructions should have been given. It bears repeating, however, that the trial court's failure to give said requested instructions is the sole basis for the reversal ordered by the majority here.

Before concluding, and in spite of the fact that the issue discussed in the second portion of the majority opinion is not involved on this appeal, I feel impelled to express my disagreement with the majority's action in overruling and disapproving a long line of decisions which have established the rules of evidence applicable in condemnation cases. I am of the opinion that the established rules have operated satisfactorily and that they should not be changed. The change favored by the majority would permit an expert witness, on direct examination, to testify concerning the details of every sale of other property which he has considered in arriving at his opinion of the value of the property under consideration. The established rule to the contrary was adopted in this state in order to avoid unnecessarily time-consuming procedures in the administration of justice. The established rule is realistic and practical. Condemnation cases ordinarily involve rather protracted trials, and it is not desirable to adopt a new rule which will make them more protracted unless there is some compensating advantage in the change. I find no reason to believe that there will be any such compensating advantage; and in this day and age when every endeavor is being made to expedite the administration of justice, it appears undesirable to adopt a new rule of doubtful value which will tend to defeat that endeavor. It may be conceded that, as an abstract proposition, a plausible argument may be made, and has been made by some text writers, for the rule which the majority would adopt; but all the text writers, regardless of their views, apparently agree that the adoption of such rule would inevitably result in the prolongation of trials in condemnation cases.

At present, the direct examination of an expert is ordinarily not unduly prolonged. He usually bases his opinion on his claimed general knowledge of sales of similar property if there have been such sales. The field of permissible cross-examination of the expert is very broad. He may be examined on such cross-examination concerning the details of all sales upon which he may have based his opinion. The actual cross-examination, however, is often carefully limited by the cross-examiner. He is sometimes content to obtain an answer to the single question of the amount which the expert is receiving for his expert testimony. Again, he may only be interested in showing that the expert has failed to consider certain prior sales which the cross-examiner deems similar. In other cases, he may be content with an endeavor to show that some sales upon which the expert relied were sales of dissimilar property or were sales made under dissimilar circumstances. Thus there is little time lost on the direct and cross-examination of many experts.

Under the changed rule, the expert would not only be permitted, but would be practically required, to go into detailed facts upon direct examination concerning every sale which he had considered in forming his opinion. If he should fail to do so, he might find that the court would sustain objections later upon the ground that the questions should have been asked on direct and therefore would not constitute proper redirect examination. This would have the tendency to bring into the case on direct examination numerous collateral issues, thus necessarily making the direct examination of every expert unduly prolonged. It therefore appears that there is sound reason for sustaining the established rule. It is unnecessary to labor this point as it is sufficiently explored in the prior opinions of this court and of other courts. People v. La Macchia, supra, 41 Cal.2d 738, 264 P.2d 15; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597; City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 170 P.2d 928; City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737; City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681; Central Pacific R. Co., of

California v. Pearson, supra, 35 Cal. 247; City of Los Angeles v. Frew, 139 Cal.App. 2d 859, 294 P.2d 1073; People, etc. v. Union Machine Co., 133 Cal.App.2d 167, 284 P.2d 72; Atchison, T. & S. F. Ry. Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 57 P.2d 575; City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378; Los Angeles Gas & Elec. Corp. v. Etienne, 83 Cal.App. 645, 257 P. 123; Reclamation Dist. No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098. For the reasons stated in these numerous authorities, I would adhere to the established rules.

Returning now to the only questions involved on this appeal, I am of the view that the trial court committed no error in the challenged rulings; and that the majority's reversal is regrettably based solely upon the failure of the trial court to give certain requested instructions, when I feel certain that no member of this court believes that said instructions should have been given. It is for these reasons that I take exception to the judicial technique employed by my associates who have signed the majority opinion.

I would affirm the judgment.

SHENK, J, concurs.

GIBSON, Chief Justice.

I dissent.

The instructions requested by defendants are materially different from those given in City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928. In that case we approved instructions to the effect that the price paid by *plaintiff condemner* for other property is not a proper basis for determining the market value of the property sought to be condemned for the reason that such sales are not a fair test of just compensation. The instructions refused here state that the price paid by any public corporation *having the right or power of condemnation* is not a proper basis for the determination of market value. It is obvious that the requested instructions would broaden the rule so as to preclude evidence of other sales to a public body even though the transaction was in fact free of any compulsive elements. The majority opinion is therefore incorrect in stating that the requested instructions are "almost identical" with those approved in City of Los Angeles v. Cole, supra. I believe that the requested instructions erroneously state the law applicable to the facts of this case and that the court properly refused to give them. In this connection it should be noted, as pointed out by Justice SPENCE in his dissent, that the majority overrules City of Los Angeles v. Cole, supra, the authority relied upon to reverse the judgment, and holds that evidence of other sales to a condemner is admissible. The majority also overrules a long line of cases and announces a new rule holding that evidence of the prices paid for similar property in the vicinity is admissible on *direct* examination, although in the present case no such evidence was offered on direct examination, and the parties concede that the question was not raised at the trial. I would affirm the judgment.

Rehearing denied: GIBSON, C. J., and SHENK and SPENCE, JJ., dissented.

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48 Cal.2d 766

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul J. DURONCELAY, Defendant and Appellant.

Cr. 6008.

Supreme Court of California,
In Bank.
June 21, 1957.

Prosecution for drunken driving causing personal injury. Defendant was convicted in Superior Court, Merced County, Gregory P. Maushart, J., and defendant appealed from the judgment and from order denying new trial. The Supreme Court, Gibson, C. J., held that the taking of a blood sample for an alcoholic test without the defendant's consent would not be regarded as unreasonable search and seizure where the extraction was made in a medically approved manner and was incident to the lawful arrest of the defendant who was reasonably believed to have committed the crime with which he was charged, and results of the alcoholic test were properly admitted in evidence.

Judgment and order affirmed.

Carter, J., dissented.

Opinion, 303 P.2d 617, vacated.

1. Criminal Law ⚷394

In prosecution for drunken driving causing personal injury, evidence did not warrant a finding that blood sample which was tested for alcoholic contents was obtained from the defendant with his consent. West's Ann.Vehicle Code, § 501.

2. Criminal Law ⚷393(1)

The privilege against self-incrimination relates only to testimonial compulsion and not to real evidence.

3. Constitutional Law ⚷266

The taking of defendant's blood for an alcoholic test in a medically approved manner did not constitute brutality or shock the conscience and defendant who did not consent was not denied due process of law.

4. Arrest ⚷71

Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest.

5. Criminal Law ⚷388

Searches and Seizures ⚷7(12)

The taking of a blood sample for an alcoholic test without consent of the defendant could not be regarded as an unreasonable search and seizure where the extraction was made in a medically approved manner and was incident to the lawful arrest of the defendant who was reasonably believed to have violated statute providing that one who drives an automobile while under the influence of intoxicating liquor and causes personal injury is guilty of a felony and blood test was admissible in later prosecution. West's Ann.Vehicle Code, § 501; West's Ann.Pen. Code, § 836; West's Ann.Code Civ.Proc., § 1963, subds. 15, 33.

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Donald R. Fretz, Public Defender, Merced, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and James M. Sanderson, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was convicted by a jury of violating section 501 of the Vehicle Code which provides that one who drives an automobile while under the influence of intoxicating liquor and causes personal injury is guilty of a felony.

The accident happened at about 10 p. m. as defendant was driving his automobile in a westerly direction on Yosemite Avenue in Merced County. A boulevard stop sign for westbound traffic was located at the intersection where Yosemite Avenue terminated, and, directly across the intersection there was a "reflectorized" warning sign on the bank of an irrigation ditch. Defendant's automobile went through the intersection and collided with the bank of the ditch knocking down the warning sign. An eyewitness testified that the automobile was "going pretty fast" and that there was no illumination from its brake lights to indicate that the brakes had been applied. There was also evidence that there were no skid marks on the road.

Kenneth Riggs who owned an ambulance and held the position of coroner, drove his vehicle to the scene of the accident and found that defendant was unconscious and that one of two men riding with defendant was injured. The three men were sitting in the front seat of the automobile, and the passenger farthest to the right had a wine bottle in one hand and a can of beer in the other. There were beer cans on the floor of the automobile, and each of the men had an odor of alcohol on his breath. A highway patrolman who arrived at the scene before the ambulance departed and who conducted an investigation noticed that there was an odor of alcohol in the car.

Defendant was taken to a hospital, and, after he regained consciousness, he vomited matter which had a strong smell of alcohol. Riggs, the ambulance driver, had been requested by the highway patrol officer to obtain a sample of blood from defendant to be used for an alcohol test, and he asked defendant whether he consented to having the sample taken, informing him that it would be used for such a test. According to Riggs, defendant, who was "quite sick at the time and throwing up," did not give a negative answer, and, to the best of his knowledge, Riggs received an answer to take the sample, although he could not recall "the exact words, or that it actually was a yes." When a nurse approached with a needle, defendant withdrew his arm, and Riggs held the arm while she extracted the blood. On cross-examination Riggs was questioned on the subject of defendant's consent and testified as follows:

> "Q. * * * I believe you said that you did not get a negative answer and you therefore assumed that you got an affirmative answer, is that right? A. Yes, I think I did say it just about like that. I can't recall. He was not in any condition to come out and say, 'Yes, go ahead and take a blood alcohol.' He couldn't say that much because he didn't say that many words all the time he was in the hospital. * * *
>
> "Q. * * * would you assume therefore that he could answer yes or no? A. Yes, with a little prodding he could, because it took about 30 minutes to get who he was and where he was from. * * *
>
> "Q. And I think that it is your testimony therefore that he did not say yes, is that right? A. No, I would say that he did not say no.
>
> "Q. Well, could you say that he did say yes? A. I took it, and so I would say that he said yes, or I wouldn't have taken it. * * *
>
> "Q. * * * you did not get an affirmative answer, is that right? A. I still won't say that he said—if he said, 'No', the blood alcohol wouldn't have been taken.
>
> "Q. Well, I understand that it is your position that he didn't say no. Did he say yes? A. Well, I tell you, between the holding of the pan and the bottle and his heaving, I can't tell that he said yes, but I would say that he didn't say no."

The nurse who extracted the blood testified that, when defendant was asked for his consent, he gave no answer.

[1] The blood sample taken from defendant had an alcohol content of .22%. A criminologist testified that everyone is under the influence of alcohol when the alcohol content in his blood reaches .15% and that, in his opinion, the person from whom the sample was taken was no longer capable of operating a motor vehicle with his normal degree of skill and judgment.

We are of the opinion that the only reasonable conclusion permitted by the testimony of Riggs and the nurse who assisted him in taking the blood sample is that, when asked for his permission, defendant made no verbal response to indicate whether he consented or refused. Because of defendant's condition, it would have been extremely difficult for him to give an answer, but, when the nurse approached him with the needle, he reacted by withdrawing his arm.[1] Under the circumstances, a finding that defendant consented is unwarranted, and we must therefore determine whether the results of the blood test were admissible in the absence of defendant's consent to the taking of the sample.

[2, 3] It is settled by our decision in People v. Haeussler, 41 Cal.2d 252, 257, 260 P.2d 8, that the admission of the evidence did not violate defendant's privilege against self-incrimination because the privilege relates only to testimonial compulsion and not to real evidence. We also held in the Haeussler case that the taking of the defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience and that, therefore, the defendant had not been denied due process of law under the rule applied in Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. This holding is in accord with the recent decision of the United States Supreme Court in Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 411, 1 L.Ed.2d 448, where blood for an alcohol test was taken by a doctor while the defendant was unconscious. The court pointed out that blood tests had become routine in everyday life and concluded that "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience,' Rochin, supra, 342 U.S. at page 172, 72 S.Ct. at page 209, nor such a method of obtaining evidence that it offends a 'sense of justice,' Brown v. [State of] Mississippi, 297 U.S. 278, 285–286, 56 S.Ct. 461, 464–465, 80 L.Ed. 682." There is no claim in the present case that the blood sample was not withdrawn in a medically approved manner. The blood was extracted by a registered nurse, and her testimony shows that she sterilized defendant's arm and used sterilized instruments.

The question remains as to whether the taking of defendant's blood constituted an unreasonable search and seizure in violation of his constitutional rights. We did not decide that question in People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8, because its determination was not necessary in view of the rule then followed in this state that illegally obtained evidence was admissible. Nor was it decided in Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, for the reason that New Mexico, where the judgment under review had been entered, permitted introduction of such evidence. The question is now squarely before us, however, since, subsequent to our decision in the Haeussler case, we adopted the exclusionary rule in People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905.

[4] It is obvious from the evidence that, before the blood sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time. Pen. Code, § 836. There is no claim that defendant was not arrested within a reasonable time or that the arrest was not made on the basis of the facts known to the officer who investigated the accident, and we must presume that there was a lawful arrest, in the absence of any showing to the contrary. People v. Farrara, 46 Cal.2d 265, 268–269, 294 P.2d 21; People v. Beard, 46 Cal.2d 278, 280, 294 P.2d 29; see Code Civ.Proc. § 1963, subds. 15, 33. Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest. People v. Simon, 45 Cal.2d 645, 648–649, 290 P.2d 531; People v. Boyles, 45 Cal.2d 652, 655, 290 P.2d 535; People v. Martin, 45 Cal.2d 755,

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[1] It is clear from the record that the trial court did not admit the results of the alcohol test on the basis of a finding that defendant had consented to the blood test but on the theory that, even if there was no consent, the evidence was admissible under our decision in People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8.

762, 290 P.2d 855. Under the circumstances, a search, for example, of defendant's pockets or his automobile to obtain additional evidence of the offense would have been proper, regardless of whether he consented thereto. The question to be determined here is whether the taking of a sample of his blood for an alcohol test was a matter of such a different character that it must be regarded as an unreasonable search and seizure.

As we have seen, the extraction of defendant's blood was accomplished with medical precautions by a registered nurse, and it is settled that such conduct is not brutal or shocking. Defendant does not challenge the accuracy of the alcohol test, and it merits emphasis that, while the accounts of eyewitnesses are often uncertain and conflicting on the issue of intoxication, blood alcohol tests are so subject to reliable scientific analysis that 23 states have enacted statutes sanctioning the use of such tests. See Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, 451–452, footnote 3. Nor should it be ignored that a test of this kind may serve to exonerate, as well as to convict.

[5] The incidence of death and serious injury on the highways has undeniably assumed tragic dimensions and has been due in a significant degree to the effects of alcohol upon drivers. See National Safety Council Accident Facts—1955, pp. 43–71. So long as the measures adopted do not amount to a substantial invasion of individual rights, society must not be prevented from seeking to combat this hazard to the safety of the public. The extraction of blood for testing purposes is, of course, an experience which, every day, many undergo without hardship or ill effects. When this fact, together with the scientific reliability of blood alcohol tests in establishing guilt or innocence, is considered in the light of the imperative public interest involved, the taking of a sample for such a test without consent cannot be regarded as an unreasonable search and seizure where, as here, the extraction is made in a medically approved manner and is incident to the lawful arrest of one who is reasonably believed to have violated section 501 of the Vehicle Code.

We conclude that there was no violation of defendant's rights and that the results of the alcohol test were properly admitted in evidence.

The judgment and the order denying a new trial are affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I am of the opinion that the taking of the blood sample for a blood alcohol test in the absence of consent by defendant constituted an unreasonable search and seizure in violation of his constitutional rights. I feel that the taking of blood from defendant is a far different thing from the search of his car at the time of the accident. The available evidence leads to the inference that rather than consenting, defendant tried to refuse to permit the blood sample to be taken.

In People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8, in which I dissented, the question of unreasonable search and seizure was not decided. I was of the opinion there, as I am here, that the taking of such a blood sample for the purpose of obtaining evidence to be used against the nonconsenting person is both a deprivation of due process and an unreasonable search and seizure in violation of both the federal and state Constitutions. The only justification for taking blood from a person who does not consent thereto is that it is deemed necessary by competent medical personnel in order to save the person's life. Taking of a blood specimen from a nonconsenting person to obtain evidence which may be used against him is also a denial of the privilege against self-incrimination.

In Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 412, 11 L.Ed.2d 448, on which the majority relies here, Mr. Chief Justice Warren dissented with Mr. Justice Black and Mr. Justice Douglas concurring. Mr. Chief Justice Warren said:

> "The judgment in this case should be reversed if Rochin v. [People of] California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183,* is to retain its vitality and stand as more than an instance of personal revulsion against particular police methods. I cannot agree with the Court when it says, 'we see nothing comparable here to the facts in Rochin.' It seems to me the essential elements of the cases are the same and the same result should follow.
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> "There is much in the Court's opinion concerning the hazards on our nation's highways, the efforts of the States to enforce the traffic laws and the necessity for the use of modern scientific methods in the detection of crime. Everybody can agree with these sentiments, and yet they do not help us particularly in determining whether this case can be distinguished from Rochin. That case grew out of police efforts to curb the narcotics traffic, in which there is surely a state interest of at least as great magnitude as the interest in highway law enforcement. Nor does the fact that many States sanction the use of blood test evidence differentiate the cases. At the time Rochin was decided illegally obtained evidence was admissible in the vast majority of States. In both Rochin and this case the officers had probable cause to suspect the defendant of the offense of which they sought evidence. In Rochin the defendant was known as a narcotics law violator, was arrested under suspicious circumstances and was seen by the officers to swallow narcotics. In neither case, of course, are we concerned with the defendant's guilt or innocence. The sole problem is whether the proceeding was tainted by a violation of the defendant's constitutional rights.
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> "In reaching its conclusion that in this case, unlike Rochin, there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if petitioner had been conscious and had voiced his objection. I reject the distinction.
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> "Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented. The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in Rochin—the references

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* This case originated in California. A majority of this court held that Rochin's constitutional rights had not been invaded. Mr. Justice Schauer and I dissented from the denial of a petition for hearing, People v. Rochin, 101 Cal.App.2d 140, 143, 149, 225 P.2d 1, 913. The United States Supreme Court reversed the District Court of Appeal, Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183.

to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used'[1]—the Court finds Rochin distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

"Apart from the irrelevant factor of physical resistance, the techniques used in this case and in Rochin are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."

Mr. Justice Douglas, with whom Mr. Justice Black joined, wrote, in addition, a separate dissenting opinion in which he said:

"The Court seems to sanction in the name of law inforcement the assault made by the police on this unconscious man. If law enforcement were the chief value in our constitutional scheme, then due process would shrivel and become of little value in protecting the rights of the citizen. But those who fashioned the Constitution put certain rights out of the reach of the police and preferred other rights over law enforcement.

"One source of protection of the citizen against state action is the Due Process Clause of the Fourteenth Amendment. Our decisions hold that the police violate due process when they use brutal methods to obtain evidence against a man and use it to convict him. Rochin v. [People of] California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; Chambers v. [State of] Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716. But the conception of due process is not limited to a prohibition of the use of force and violence against an accused. In Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948, we set aside a conviction where subtle, nonviolent methods had been used to exact a confession from a prisoner. For it was obvious that coercion might be the product of subtlety as well as of violence. We should take the same libertarian approach here.

"As I understand today's decision there would be a violation of due process if the blood had been withdrawn from the accused after a struggle with the police. But the sanctity of

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"[1] Actually, the struggle in Rochin occurred in the defendant's home after the officers had broken in. He was arrested and taken to a hospital, and there was no evidence that he struggled there."

the person is equally violated and his body assaulted where the prisoner is incapable of offering resistance as it would be if force were used to overcome his resistance. In both cases evidence is used to convict a man which has been obtained from him on an involuntary basis. I would not draw a line between the use of force on the one hand and trickery, subterfuge, or any police technique which takes advantage of the inability of the prisoner to resist on the other. Nor would I draw a line between involuntary extraction of words from his lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body when the evidence obtained is used to convict him. Under our system of government, police cannot compel people to furnish the evidence necessary to send them to prison. Yet there is compulsion here, following the violation by the police of the sanctity of the body of an unconscious man.

"And if the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him. The indignity to the individual is the same in one case as in the other, for in each is his body invaded and assaulted by the police who are supposed to be the citizen's protector."

The views expressed by Mr. Chief Justice Warren and Mr. Justice Douglas are particularly applicable to the case at bar. Here we do not have an unconscious person but one who, with the only strength he had, tried to refuse to have the blood test taken. A majority of this court is of the opinion, however, that since the blood sample was taken with all medical precautions the conduct of the law enforcement officers was neither brutal nor shocking and, as in the Breithaupt case, because blood tests are everyday occurrences which are undergone by persons consenting thereto for one reason or another, there is nothing wrong with a blood test taken from one who either does not consent or is incapable of making his wishes known. I do not agree and the time will come when this court will be forced by the Supreme Court of the United States to revamp its theories on this subject as it has been forced to do in the past in other instances. Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

It appears to me that this case illustrates the whittling-down process which a majority of this court has engaged in since the Cahan case was decided. People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905. Prior to the Cahan case I had long advocated the inadmissibility of evidence illegally obtained, and finally a majority of this court saw fit to adopt the view that evidence so obtained was not admissible. However, by its holding here that evidence obtained by force from a nonconsenting person was not unlawfully obtained, the salutary rule of the Cahan case is evaded.

As I said in my dissenting opinion in People v. Haeussler, 41 Cal.2d 252, 263, 265, 260 P.2d 8, 16, "Because I believe in the dignity and security of the individual and agree with the framers of the Bill of Rights that 'the right of the people to be secure in their *persons,* houses, papers, and effects, against unreasonable searches and seizures' should 'not be violated,' (emphasis added) I cannot sanction the conduct of the prosecution officers in this case, and would, therefore, reverse the judgment."

For the foregoing reasons I would reverse the judgment.

48 Cal.2d 704

John Dyson POWELL, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of LOS ANGELES, Respondent.

L. A. 24522.

Supreme Court of California,
In Bank.

June 21, 1957.

Prohibition proceeding to restrain Superior Court from proceeding with petitioner's trial for embezzlement. The Supreme Court, Schauer, J., held that prohibition to stay the trial was not the proper remedy, but that petitioner had made out a case entitling him to mandamus to compel the pretrial inspection of petitioner's signed statement and typewritten transcript of tape recording made in office of police chief.

Peremptory writ of mandamus granted.

Opinion, 306 P.2d 59, vacated.

1. Criminal Law ⚷627½

Application for pretrial inspection of a signed confession or admission or transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice. West's Ann.Pen.Code, § 925.

2. Criminal Law ⚷627½

Defendant accused of embezzling public funds would be permitted, in the interests of justice, to pretrial inspection with right to take copies of his signed statement and typewritten transcript of tape recording made in police office, where such evidence was material to the issues and would be admissible at trial.

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Gladys Towles Root, Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., Los Angeles, Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

SCHAUER, Justice.

Petitioner seeks by prohibition to restrain respondent court from proceeding with the trial of petitioner under an indictment charging him with the embezzlement of public funds. Although a stay of proceedings granted on the order to show cause issued by the District Court of Appeal, Second Appellate District, Division Two, when the petition for the writ was before that court, was automatically continued in effect upon the granting of a hearing by this court, we nevertheless issued our order expressly continuing such stay, because of apparent uncertainty on the part of counsel and the trial court as to its continued effectiveness. We have concluded that although in seeking prohibition to stay his trial petitioner has mistaken his remedy, he has nevertheless made out a case entitling him to mandamus to compel the pretrial inspection of certain documents hereinafter specified.

As grounds for relief, petitioner alleges the denial by the trial court of his motion for an order authorizing petitioner and his attorney to inspect and make copies of a signed statement of petitioner made in the office of a chief of police and "also for the typewritten transcript of the tape recording made" some five days later in the same police office. It is further alleged in the petition for the writ that the motion "was supported by affidavits of your petitioner and his attorney, which contained allegations that the defendant was not able to recall, nor was he able to relate to his attorney the things contained in the aforesaid statements. That such documents may be necessary for the defendant [petitioner] to refresh his recollection; that the evidence contained in the statements is material to the issues of liability, if any, of the defendant, and that the statements * * * would be admissible at the time of trial, and that no copies of the above statements have been given to the defendant. * * * No affidavits were filed on behalf of the District Attorney or the Chief of Police * * *." Petitioner further alleges, and respondents admit,[1] that the motion was denied on the ground, among others, that in a criminal proceeding the accused is not entitled to a pretrial inspection of his written confession.

Respondents also "admit that the evidence contained in the statements is material to the issues of the said case * * * and would be admissible at the time of trial * * * as evidence on behalf of the People * * * as constituting confessions or admissions; admit that no copies of the said statements have been given to petitioner * * *" but "deny [on lack of information or belief] that such or any documents may be necessary for petitioner to refresh his recollection."

In People v. Riser (1956), 47 Cal.2d 566, 305 P.2d 1, defendant, accused of two homicides, moved before trial for an order directing the prosecution to allow him to inspect statements made to police by certain witnesses immediately after the homicides. The motion was denied. During the trial defendant caused a subpoena duces tecum to issue commanding production of the originals of the same statements, one of which had already been referred to by a witness on cross-examination; on motion of the prosecution the subpoena was vacated on the ground that the statements were inadmissible as evidence. On appeal this court, holding (47 Cal.2d 566, 305 P.2d 15) that the trial court's view as to admissibility of the statements was without support and that it was error to vacate the subpoena, stated that (47 Cal.2d 585, 305 P.2d 12–13), "Originally at common law the accused in a criminal action could not compel production of documents or other evidence in the possession of the prosecution. [Citation.] Production was denied before trial on the ground that to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor. [Citations.]

"Whatever the force of these arguments when directed to pretrial discovery, they have little or no application when production is sought by subpoena during trial of statements referred to on cross-examination. * * * The decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production when it becomes clear during the course of trial that the prosecution has in its possession relevant and material evidence. * * * Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case. * * * To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts. [Citations.]" It is, of course, statutory law in California that a defendant be provided with a transcript of the evidence taken by a grand jury. (Pen.Code, § 925.)

In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike. In the recent case of Dowell v. Superior Court (1956), 47 Cal.2d 483, 304 P.2d 1009, this court granted mandamus to compel inspection prior to trial of a personal injury action, of a statement taken from plaintiff in the hospital by defendant company's claims investigator the day after plaintiff had been injured. There, as here, plaintiff averred that he had forgotten what he had said in the statement. In holding that he was entitled to inspect and take a copy of the statement this court noted that the " 'trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings of which the inspection of documents is one method * * *' [Citations.]," and commented further "that the principles of equity enter into the determination of an application for discovery and also in a mandamus proceeding to compel appropriate action." (At page 486 of 47 Cal.2d, at page 1011 of 304 P.2d.)

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[1] As herein used, the term respondents refers to both respondent court and the district attorney of Los Angeles as the real party in interest.

[1] Although in the Dowell case it was further held that application for inspection was authorized by section 1000 of the Code of Civil Procedure, which has been held inapplicable to criminal proceedings (People v. Wilkins (1955), 135 Cal.App.2d 371, 377–378 [4]; 287 P.2d 555; People v. Ratten (1940), 39 Cal.App.2d 267, 271 [3], 102 P.2d 1097; see also Gonzales v. Superior Court (1935), 3 Cal.2d 260, 262–263, 44 P.2d 320), it nevertheless is a widely recognized rule that application for pretrial inspection of a signed confession or admission or transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice. (See State v. Cicenia (1951), 6 N.J. 296, 78 A.2d 568, 570–571 [6]; Shores v. United States (8 Cir., 1949), 174 F.2d 838, 844.) In the Cicenia case the court quoted and adopted the rule and the reasoning, with respect to the confession and statements of defendant himself, expressed in State v. Haas (1947), 188 Md. 63, 51 A.2d 647, 653, as follows: "There can be no doubt that the recognition of the right in a trial court to permit the defendant to examine his confession in advance of the trial was not recognized at common law. But law is a growth and a great many matters, commonplace to us now, were not thought of many years ago. * * * [T]he tendency in the courts of this country is to permit discretion in the trial judge. The argument made against any such discretion is based upon a fear that the State, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses. Whatever merit that argument has as applied to a situation where it is contended that the accused has a *right* to inspect the evidence, it has no application, we think, to a situation where the trial judge in each case and on each application, determines what should be done in the interest of justice. There are cases in which it would be clearly unjust to deny such an application and, on the other hand, cases are conceivable in which it might improperly hamper the prosecution to grant such an application." (See also State v. Murphy (1923), 154 La. 90, 97 So. 397, 402; United States v. Rich (1922), 6 Alaska 670, 672; People v. Gerold (1914), 265 Ill. 448, 107 N.E. 165, 174; Cloniger v. State (1922), 91 Tex.Cr.R. 143, 237 S.W. 288, 290; Sprinkle v. State (1925), 137 Miss. 731, 102 So. 844.)

And in State v. Tippett (1927), 317 Mo. 319, 296 S.W. 132, 135, it was held that defendant, who was charged with leaving the scene of an accident without stopping and giving his name and residence and without reporting to authorities after his automobile struck and killed another, was entitled to inspect a statement relative to the accident given to the prosecution by one Tucker. The court there stated: "This was a document, and, provided it tended to impeach Tucker, was admissible on the part of defendant for that purpose. The general rule denying the inspection of documents in the hands of an adverse party has been greatly relaxed in modern cases. In civil cases an inspection of documents in the hands of opposing parties, such as papers, contracts, and corporation records, upon motion, have been allowed. The cases seem to hold that it is a matter of indifference whether the document to be examined may be of actual benefit to the party filing the motion to inspect. If from the motion the document may be material, the right of inspection obtains. In the instant case the request for inspection relates to a statement given by Tucker relative to Fitzpatrick losing his life. * * * The motion then shows that the statement may be material. We are unable to perceive why the privilege should not obtain in a criminal case. * * * The prosecuting attorney is both an officer of the state and of the court, and his duty extends no further than an impartial, fair, and just trial of defendant. * * * That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial."

[2] The case for inspection is thus at least as strong[2] in the present instance as in Dowell v. Superior Court (1956), 47 Cal.2d 483, 304 P.2d 1009. We conclude that petitioner has presented adequate reasons for ordering the issuance of mandamus.

Let a peremptory writ of mandamus issue requiring the respondent court to set aside its order denying the petitioner an inspection of the documents in question and to issue an appropriate order of inspection with the right to take copies as sought.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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[2] Here petitioner makes the allegation (absent in the Dowell case), that the documents he seeks "may be necessary * * * to refresh his recollection."

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152 Cal.App.2d 71

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Claude COLE, Defendant and Appellant.

Cr. 5835.

District Court of Appeal, Second District, Division 2, California.

June 24, 1957.

Defendant was convicted of possession of marijuana, and applied for writ of error coram nobis. The Superior Court, Los Angeles County, Herbert V. Walker, J., denied application, and defendant appealed. The District Court of Appeal, Fox, J., held that defendant's contention that judgment was direct result of arrest, search and seizure in violation of his constitutional rights raised questions legal in nature and could not be considered on application for writ of error coram nobis.

Affirmed.

1. Criminal Law ⚿1158(1)

Implied finding that defendant failed to establish by preponderance of credible evidence that he had been deprived of substantial legal rights by extrinsic fraud was binding upon appeal.

2. Criminal Law ⚿641

State appointed counsel for defendant is not representative of state or under domination of prosecutor and is entirely free to act on behalf of his client.

3. Criminal Law ⚿997(6)

Defendant's contention that judgment was direct result of arrest, search and seizure in violation of his constitutional rights raised questions legal in nature, and could not be considered on application for writ of error coram nobis.

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James Claude Cole, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from an order denying his application for a writ of error *coram nobis.*

Defendant was charged by information with violating section 11500 of the Health and Safety Code (possession of marijuana), and with three prior felonies. Although defendant was initially represented by private counsel, such counsel was "relieved" and the Public Defender was appointed to represent the defendant.

On March 30, 1956, defendant entered a plea of guilty, admitted the second and third prior convictions, as alleged, but denied the first alleged prior, which was later stricken in the interest of justice. On April 20th probation was denied and defendant was sentenced to the state prison. No appeal was taken from the judgment.

In his application to vacate and set aside the judgment defendant makes two contentions: (1) that he was induced to enter a plea of guilty by reason of the advice of his counsel that "he [the deputy public defender] had it fixed with the district attorney" that upon a plea of guilty, defendant would be granted probation, thus preventing the revocation of his parole; and (2) that the judgment was the direct result of arrest, search and seizure in violation of his constitutional rights. Neither of these grounds justifies a reversal.

The pertinent legal principles relative to the scope and function of the writ of error *coram nobis* were recently stated by this court in People v. Flores, 147 Cal.App.2d 243, 305 P.2d 90, 92: " 'The office of that writ is to bring the attention of the court to such facts as existed at the time of the trial that would have constituted a valid defense, but which, without negligence on the part of the defendant, were not presented, either through duress, fraud or excusable mistake and which, not appearing on the face of the record, would have effected an acquittal of the petitioner or, at least, have caused a more favorable judgment to be entered against him (citations).' There is a strong presumption that the judgment is correct. [Citations.] To prevail in a *coram nobis* proceeding a defendant has the burden of establishing by a preponderance of credible evidence that he was deprived of substantial legal rights by extrinsic causes. [Citations.] Also, the petitioner must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered at any time substantially earlier than the time of filing his petition. [Citation.] Finally, granting relief in such a proceeding rests largely in the sound discretion of the trial court and its decision will not be reversed except for an abuse of that discretion. [Citations.]" This court also pointed out in People v. Martorana, 118 Cal.App.2d 332, 334, 257 P.2d 998, 1000, that " 'Neither the trial court nor the appellate court is bound "to accept at face value the allegations of the petition" for the writ.' "

[1] Defendant's claim that the public defender told him that "he had it fixed with the district attorney" that upon a plea of guilty defendant would receive probation, presents purely a factual question. In view of defendant's obvious interest in the matter and his prior felony convictions, the trial court was not required to accept as true his statement although it was not contradicted. People v. Flores, supra, 147 Cal.App.2d at page 246, 305 P.2d at page 92; People v. Bobeda, 143 Cal.App.2d 496, 500, 300 P.2d 97; People v. Curtis, 104 Cal.App.2d 219, 223, 230 P.2d 877. There was no corroboration of defendant's story that his attorney represented that he had made a deal with the district attorney whereby defendant would receive probation upon a plea of guilty. The trial court was thus called upon to weigh defendant's uncorroborated statement against the "strong presumption" that the judgment was proper. It is implicit in the trial court's decision that defendant failed to establish by a preponder-

ance of credible evidence that he was deprived of substantial legal rights by extrinsic fraud. This determination of the factual issue is binding upon appeal. People v. Bobeda, supra.

[2] In both his opening and closing briefs defendant refers to the public defender as "a state appointed agent." He intimates that his court-appointed counsel was in some manner a representative of the state and under the domination of the prosecutor and that therefore he was not entirely free to act on behalf of his client. There is no merit whatever in this intimation. In re Hough, 24 Cal.2d 522, 150 P.2d 448, provides a complete answer. In that case it is stated, 24 Cal.2d at page 529, 150 P.2d at page 452, "The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents."

[3] Defendant's contention that the judgment was the direct result of arrest, search and seizure in violation of his constitutional rights cannot be considered in this proceeding for it is established that "The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal." People v. Martinez, 88 Cal. App.2d 767, 771, 199 P.2d 375, 378. As stated in People v. Tuthill, 32 Cal.2d 819, 822, 198 P.2d 505, 506, "the writ does not lie to correct errors of law." It is clear that questions involving defendant's constitutional rights were legal in character and therefore cannot be considered in this proceeding. People v. Cook, 97 Cal.App.2d 284, 285, 217 P.2d 498.

The order is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

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152 Cal.App.2d 195

In the Matter of the ESTATE of Wallace CASWELL, Deceased.

Robert C. Kirkwood, Controller of the State of California, Appellant.

Jennie J. Caswell, Administratrix of the Estate of Wallace Caswell, Deceased, Respondent.

Civ. 9008.

District Court of Appeal, Third District, California.

July 1, 1957.

Hearing Denied Aug. 27, 1957.

Estate proceeding. The Superior Court, Stanislaus County, David F. Bush, J., entered an order fixing inheritance taxes due by reason of decedent's death, and state controller appealed. The District Court of Appeal, Van Dyke, P. J., held that a decree entered by a probate court on a petition for determination of persons entitled to distribution is binding upon the state in inheritance tax proceedings in respect to levy of such taxes, since they depend in the first instance on the probate court's findings as to the right to take property through the estate proceedings.

Order affirmed.

1. Executors and Administrators 🔑314(2)

A proceeding on a petition praying that probate court determine who is entitled to distribution is a proceeding in rem, and if statutory notice be given, the entire world is called before the court and it acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate. West's Ann.Probate Code, § 1080.

2. Executors and Administrators 🔑315(6)

A decree entered by a probate court on a petition for determination of persons entitled to distribution is binding upon the state in inheritance tax proceedings in respect to levy of such taxes since they depend in the first instance on the probate court's findings as to the right to take property through the estate proceedings. West's Ann.Probate Code, § 1080.

James W. Hickey, Chief Inheritance Tax Atty., Joseph D. Lear, Asst. Chief Inheritance Tax Atty., Sacramento, for appellant.

Brown, Brown & Bacon, Ralph M. Brown, Modesto, and Wareham C. Seaman, Stockton, for respondent.

VAN DYKE, Presiding Justice.

This appeal is taken by the State Controller from the order of the Superior Court of Stanislaus County fixing the inheritance taxes due by reason of the death of Wallace Caswell. Wallace died intestate December 3, 1949, and his surviving wife, Jennie, was appointed administratrix of his estate. She inventoried as property of the estate subject to probate, all property, and only property, which stood in Wallace's name at the time of his death. Thereafter she filed a petition in the probate proceedings, seeking a determination that the property so inventoried was community property. The notice provided by Section 1200 of the Probate Code was given. The matter was heard and the court rendered its decree adjudging the inventoried property to be community. The decree has become final. After the decree was final the inheritance tax appraiser filed a report in which he treated the inventoried property as having been the separate property of Wallace, thus ignoring that part of the court's decree that declared it to be community. So treating it, he fixed the tax on the shares of the various persons, including Jennie, whom he concluded took the property on Wallace's death. It is, of course, obvious that if the inventoried property was in fact community property Jennie would take the whole through distribution of the estate of her husband. Jennie filed objections to the report, asserting that the inventoried property was community and that the tax should be assessed on that basis. The report and the objections thereto came on to be heard. The court, considering the decree as res judicata against the state, held the inventoried property to be community and ordered that the tax be adjusted accordingly. Thereupon the appraiser filed an amended report on the basis of the court's order, which amended report the court confirmed. This appeal by the State Controller followed.

[1, 2] Appellant's primary contention is that the decree in probate was not binding upon the state in the inheritance tax proceeding. This contention cannot be sustained. Section 1080 of the Probate Code provides that any person claiming to be entitled to distribution of any part of an estate may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution. The proceeding thus initiated is a proceeding in rem and the statutory notice being given, the entire world is called before the court and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, subject only to being reversed, set aside or modified on appeal. The decree is as binding upon him if he fails to appear and present his claim as if his claim, after presentation, had been disallowed by the court. Such a decree binds the state in respect of inheritance taxes to be levied since they depend in the first instance on the probate court's findings as to the right to take property through the estate proceedings. Estate of Radovich, 48 Cal.2d 116, 308 P.2d 14. The true nature of the petition filed by Jennie places it within the provisions of said section 1080. It is only fair to say that appellant's primary contention that the state was not bound preceded the foregoing decision in the Estate of Radovich. Upon that decision becoming final, appellant addressed a letter to this court, calling our attention to the decision and stating that appellant presumed this court must now hold against its contention unless the case before us can be distinguished. We see no escape from the conclusion that the decision in the Estate of

Radovich settles the questions presented on this appeal.

The order appealed from is, therefore, affirmed.

SCHOTTKY, J., and WARNE, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

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152 Cal.App.2d 149

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Ralph GIBSON, Defendant and Appellant.

Cr. 3338.

District Court of Appeal, First District,
Division 2, California.
June 28, 1957.

Defendant was convicted of violation of West's Ann.Pen.Code, § 288a. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment, and from judgment of conviction and order denying a new trial, defendant appealed. The District Court of Appeal, Lernhart, J., pro tem., held, inter alia, that since offense was allegedly committed upon her daughter, under West's Ann.Pen.Code, § 1322, defendant's wife was competent to testify against him, and that reference by prosecuting attorney in closing argument to jury to her failure to testify was not prejudicial to defendant, where court directed jury to disregard such comment.

Judgment affirmed.

1. Witnesses ⊂=52(7)

Defendant's wife was a competent witness against him under statute in prosecution for section 288a violation allegedly committed upon wife's daughter. West's Ann.Pen.Code, §§ 288a, 1322.

2. Criminal Law ⊂=730(1)

Comment by prosecuting attorney in closing argument to jury on inability to present testimony of defendant's wife over his objection in prosecution for section 288a violation was not prejudicial to defendant, where wife was in fact a competent witness and trial court directed jury to disregard such comment. West's Ann.Pen.Code, §§ 288a, 1322.

3. Criminal Law ⊂=351(1)

Evidence as to whether defendant testified at preliminary examination is admissible for impeachment purposes only.

4. Criminal Law ⊂=1038(3)

Where evidence that he had not testified at preliminary examination was elicited on cross-examination of defendant without objection and defendant did not request or submit prepared instruction limiting such evidence to impeachment purposes either at time it was elicited or when prosecuting attorney, in closing argument to jury, referred to defendant's failure to testify, defendant could not complain on appeal of failure to give limiting instruction.

5. Criminal Law ⊂=1035(3), 1037(1)

Where there is little evidence to aid jury, misconduct of court or counsel may be a vital factor in determining whether a fair trial was had, but even in such cases, objection must be made when error is committed in order to rely thereon on appeal.

6. Criminal Law ⊂=1171(1)

Reference by prosecuting attorney in closing argument to jury to failure of defendant to testify at preliminary examination was not prejudicial to defendant, where evidence as to failure to testify had been elicited without objection on cross-examination of defendant and no instruction limiting such evidence to impeachment purposes had been requested or submitted by defendant.

7. Criminal Law ⊂=304(2)

The size of front seat of an automobile is a matter of common knowledge.

8. Criminal Law ⚷651(1)

In prosecution for section 288a violation, denial of request that jury view automobile in which offense was allegedly committed was not abuse of discretion. West's Ann.Pen.Code, §§ 288a, 1119.

9. Criminal Law ⚷650

In prosecution for section 288a violation, allegedly committed in front seat of automobile, denial of request that defendant be permitted to demonstrate with aid of a legless balloon that it would be impossible for him, because of size and injured leg, to get into the positions described by complaining witness was not abuse of discretion. West's Ann.Pen.Code, §§ 288a, 1119.

◆

O. A. Goth, Redwood City, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

LERNHART, Justice pro tem.

This is an appeal from a judgment of conviction and order denying a motion for a new trial. Ralph Gibson, defendant and appellant, was found guilty by a jury of violation of Section 288a of the Penal Code. Probation was denied and appellant was sentenced to imprisonment in the state prison.

The complaining witness was the stepdaughter of appellant who, at the time of the alleged offense, was fifteen years of age and resided with her mother and appellant.

At about seven p. m. on the evening of August 19, 1956, appellant, having finished the liquor available in his home, decided to go to the store to purchase more. He took his stepdaughter, Susan, with him. They drove to Brentwood in the family car, a four door 1954 Dodge, and purchased some beer and whiskey. They then drove around for awhile, appellant eventually parking on Skyline Boulevard. Appellant drank some beer and they discussed why Susan would not call him father. There is a conflict in the testimony as to who kissed whom at this time.

After they left this place, they continued driving until they reached the coast highway. They headed toward San Francisco, and appellant turned around and parked. It was a dark, foggy night and the traffic was light. Appellant started drinking again and continued questioning Susan about why she would not call him father. Susan testified that the acts constituting the charged offense took place here, and that thereafter she kicked the car door open and got out. She ran up the road. A car driven by Mr. John K. Murphy was approaching and Susan stopped them. It was about 12:30 a. m. Susan was crying and appeared to be scared. She got into Murphy's car. Appellant backed up toward the car, but Murphy pulled around his car and left.

On August 20, 1956, at about 2 p. m., Officer Bernard Esparza went to the home of appellant and Susan made a statement substantially similar to her testimony at the trial. The officer asked appellant if Susan's statement was true and the answer was "yes." Later at the county jail, appellant told Deputy Sheriff O'Brien that he had made that statement only to satisfy his wife. Appellant testified in court that Susan would go to church and Sunday School and did not lie.

Appellant's contention was that he kept Susan out that late to find out why she would not enter Mori's Point earlier in the day with his wife and him. He contends that he did not fondle Susan and had told her to get a ride since it was too foggy and he had been drinking too much to drive. He also states that it was impossible for him to commit the act in the position described by Susan because of a lack of flexibility in his right leg due to a prior fracture.

Appellant's first contention is that the prosecuting attorney committed prejudicial misconduct in his argument to the jury.

a. By reference to the failure of appellant's wife to testify.

The prosecution attempted to call the appellant's wife as a witness. Appellant objected on the ground that she was not a competent witness. In his closing argument to the jury, the prosecutor commented as follows:

> "Now of course, we couldn't bring you the testimony of the mother. It is a rule of law that a wife does not have to testify against the husband, if the husband so requests. We have no question of a rule of law, and so we haven't the testimony of the mother to say what was said, at that time.
>
> "Mr. Goth: I am going to object to that as prejudicial misconduct, making any reference whatsoever as to the wife and why she did not testify, and I have authorities for that particular point.
>
> "I ask that the jury be instructed to disregard it.
>
> "The Court: Disregard it. Stay away from it, Mr. Carey."

Appellant contends that the statement gives the implication that he alone prevented his wife from testifying and thereby prevented the jury from hearing the whole story. Appellant has cited several cases to sustain his contention that remarks such as those which occurred in this matter constitute error. People v. Piazza, 84 Cal.App. 58, 257 P. 592; People v. Klor, 32 Cal.2d 658, 197 P.2d 705; People v. Walden, 129 Cal.App. 71, 18 P.2d 105; People v. Harmon, 89 Cal.App.2d 55, 200 P.2d 32.

However, while the remarks were criticized by the court under the facts of the cases, they were held not to be prejudicial. In several cases, the error was cured by an instruction to the jury. In the case at bar, while no formal instruction was given, the jury was told to disregard the statements.

In People v. Walden, supra, 129 Cal.App. at page 76, 18 P.2d at page 107, the court stated:

> "Perhaps no criminal case is ever tried where the ideal is maintained unqualifiedly. Naturally in the heat of contest and in the enthusiasm of argument the strict rules of conduct are sometimes overstepped. Were all such cases reversible therefor, the administration of criminal law would break down completely through niceties of requirements too fine for practical application. The true test is whether or not the defendant has been given a fair trial, the law and the ordinary and common traits of human nature considered * * *."

Appellant has cited People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481, a case which the court did reverse because of comments by the prosecution on the fact that the wife did not testify. However, in that case neither side called the wife as a witness and the court allowed the comments in over an objection by the defense.

[1] Under the facts of this case, the wife was a competent witness under Penal Code Section 1322. This is conceded by appellant. Penal Code Section 1322 reads as follows:

> "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except * * * in cases of criminal violence * * * upon the child or children of one by the other * * *."

In People v. James, 9 Cal.App.2d 162, 48 P.2d 1011, the court, in describing the word "violence," refers to People v. Bradbury, 151 Cal. 675, 91 P. 497. That case stated that violence is synonymous with physical force, that the kind of physical force is immaterial; it may consist in the taking of indecent liberties with a woman or laying hold of and kissing her against her will.

In the case at bar, appellant was convicted of a violent act against his wife's daughter. Thus, his wife was a competent witness.

[2] Since not only was the wife a competent witness, but the court directed the jury to disregard the comments made by the prosecution, there was no prejudice to the appellant.

b. By reference to the failure of appellant to testify at the preliminary examination.

In his argument to the jury, the prosecuting attorney commented on the fact that there had been a preliminary hearing at which appellant failed to testify. Appellant objected to this comment. The court sustained the objection and then consented to the comment since the question had been asked and answered on cross-examination. No objection had been made by appellant at that time.

While there is no authority relating to comments on the refusal to testify at preliminary hearings, appellant cites People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437, where the court held that a witness may be asked whether or not he testified before a grand jury preliminary to indictment. The court limited this question to impeachment purposes only. Appellant contends that the prosecution's statements in the case at bar were not for the purpose of impeachment, but were relating his failure to testify to his guilt or innocence. It is appellant's contention that, if the question and comments were proper for impeachment purposes only, a duty rested upon the prosecution attorney and the court to explain that limited purpose to the jury.

Respondent distinguishes the Montgomery case, supra. In that case, the defendant had requested the court to give an instruction limiting the testimony and the court had refused. In the case at bar, appellant never requested such an instruction. It is respondent's contention that in the absence of a request the trial court is not required to give an instruction limiting the purposes for which evidence can be considered. People v. Holbrook, 45 Cal.2d 228, 233, 288 P.2d 1.

Respondent further argues that his statements do not indicate any other purpose than impeachment and that appellant objected before he was able to explain why he was mentioning the preliminary examination.

[3, 4] This court concludes that the evidence relating to testifying at a preliminary examination is permissible for impeachment purposes only. However, under the facts of this case, appellant should have objected to the admission of the testimony on cross-examination and should have requested an instruction limiting the purpose of the evidence at that time or at the latest when the evidence was referred to in the closing argument. Since appellant did not request such an instruction in either instance nor submit a prepared instruction on this point, he has waived his right and cannot claim it on appeal. In People v. Grace, 88 Cal.App. 222, 234, 263 P. 306, 312, the court stated,

> "* * * We have examined the record and find that no such instruction was requested by the court, and hence the appellant at this time is not in position to find fault, if perchance the jury failed to consider the evidence for the limited purpose offered."

[5, 6] We agree with appellant's contention that in case such as this, where there is little evidence to aid the jury, misconduct by the court or counsel can play a vital factor in determining whether or not a fair trial was had. But even in these cases, the defense counsel must make his objections when the error is committed and not later on appeal. It is the court's opinion that there was no prejudice to the appellant in this instance.

Appellant's second argument is that the trial court abused its discretion in denying the jury an opportunity to view the automobile in question.

Appellant requested that the jury be allowed to view the automobile and that he be allowed to demonstrate that it would be impossible for him, because of his size and injured leg, to get into the positions described by the complaining witness. The court refused, but suggested that this might be possible if a facsimile of a human body were provided. Appellant then obtained a balloon type model of the human form approximately the size of the complaining witness. This balloon was without legs. The court again refused to allow the jury to observe appellant in the automobile. Appellant contends that this was a clear abuse of discretion on the part of the trial court.

Respondent argues that it is within the discretion of the trial court to allow the jury to view the place where the alleged offense occurred. He cites Penal Code, § 1119 as authority. That section reads as follows:

> "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted * * * to the place, or to such property, which must be shown to them * * *."

It is contended that the use of the word "may" indicates that the court either has entire discretion or that it will not be overturned unless there is clear abuse.

[7, 8] The size of the front seat of an automobile is of common knowledge and it was clearly within the court's discretion to refuse the request that the jury view it. People v. McFadden, 2 Cal.App.2d 228, 37 P.2d 1044.

[9] The court's refusal of appellant's offer to demonstrate the alleged positions with the aid of a legless balloon was also within its discretion. A legless, weightless balloon clearly does not represent an adequate substitute for a human body.

The court concludes that no prejudicial error was committed.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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152 Cal.App.2d 75

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John E. TERRY, Defendant and Appellant.

Cr. 2751.

District Court of Appeal, Third District, California.

June 24, 1957.

Defendant was convicted of burglary in the second degree. The Superior Court, Butte County, J. F. Good, J., rendered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that the record showed that defendant did not personally and by use of language waive trial by jury.

Judgment reversed.

1. Criminal Law 🔑1159(5)

The intention with which accused entered house of another is a question of fact and where the circumstances of a particular case and the conduct of accused reasonably indicate that his purpose in doing so was to commit a larceny or any felony, verdict of guilty of burglary will not be disturbed on appeal.

2. Burglary 🔑45

In prosecution for burglary, conflicting evidence presented a question of fact as to whether accused, who entered and hid himself in attic of tavern, did so with intent to commit larceny after tavern had closed.

3. Jury 🔑29(6)

In order to establish valid waiver of trial by jury, record must show clearly and affirmatively that accused personally and by use of language expressly waived jury trial.

4. Jury 🔑29(6)

On appeal from conviction for second degree burglary, record showed that waiver of jury trial was by defense counsel and that defendant did not personally and by use of language waive trial by jury.

James B. Thompson, Carmichael, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a conviction of burglary in the second degree. The information charged that "The said John E. Terry did on or about the 30th day of October, 1956, * * * wrongfully, willfully, and unlawfully enter the attic of Seybold's Tavern with intent to commit larceny therein, * * *"

Upon arraignment Mr. Robert W. Anderson was appointed by the court to defend appellant. Through counsel the appellant stated that he was ready to plead and waived the reading of the information. The Clerk's Transcript contains two references to the waiver of a jury trial. At page 6 thereof: "When questioned by the Court, defendant in person pleads 'not guilty' of offense as charged in the information, and through counsel pleads 'not guilty by reason of insanity' and waives trial by jury." On page 13 of the Clerk's Transcript the following appears: "This case comes on regularly for trial on defendant's plea of 'not guilty' before Hon. J. F. Good, Judge, sitting without a jury, jury having been waived in open court by the defendant, * * *"

The court appointed and ordered two psychiatrists to examine the appellant to determine whether he was mentally ill.

The appellant was tried by the court, sitting without a jury, and found guilty as charged. The case was then continued for determination of appellant's plea of "not guilty by reason of insanity."

The court, sitting without a jury, found the appellant sane at the time of commission of the offense and adjudged him guilty as charged.

Appellant, through counsel appointed by this court, makes a number of contentions in arguing for a reversal of the judgment, chief among which are (1) that the evidence is insufficient to support the conviction and judgment, because, although appellant was unlawfully in the attic, there is no substantial evidence to support a finding that he entered there with the specific intent to commit larceny; (2) that appellant was improperly denied a jury trial, because a jury trial must be waived by both the accused and defense counsel and a waiver by counsel alone is not sufficient.

The evidence may be summarized as follows: On the evening of October 29, 1956, Mr. Donald Seybold was tending bar at Seybold's Tavern. About 10:30 p. m. the appellant came into the bar and ordered a 7-Up. Appellant remained in the bar for about half an hour during which time he went to the rest room several times, matched with Mr. Seybold for the phonograph and lost, and attempted to create an argument with other patrons, without success. He left the bar around 11:00 p. m.

Around midnight appellant again entered the bar and proceeded directly to the rest room. He walked hurriedly through the bar and looked back over his shoulder, watching the bartender. Thereafter, Mr. Seybold heard something bump an air duct in the attic over the bar, and although Mr. Seybold did not see appellant in the attic, he stated that he knew where he was. He checked the rest room and found that appellant was not there. Mr. Seybold waited approximately an hour before summoning the police.

Entrance could be gained to the attic through an opening in the ceiling in the men's rest room. There was no door covering the opening, and there was nothing of value in the attic which could be carried away.

Although the officer called as a witness identified himself and called to appellant without receiving an answer, upon shining his light around he discovered appellant coiled up in a small recess, and when he shined his light in appellant's face and told him to come out, appellant stated, "Okey, I'm coming. I'm coming." The appellant obeyed the order and gave no resistance.

When appellant was asked what he was doing in the attic he replied that he "was inspecting the plumbing." A search of the appellant failed to reveal any weapons or any property belonging to Mr. Seybold. Appellant was taken to the police station, and he pretended to be drunk but dropped this pretense after being inside the station.

Officer Clark testified that on the morning after his arrest appellant stated that he did not remember anything because he had "blacked out."

Appellant testified that he didn't remember going into the attic or being in Seybold's Tavern at any time during the time in question. The last thing he remembered was that he heard voices, and that "they was trying to kill me, trying to poison me." Appellant was also unable to recall anything which transpired after he entered the attic until he awoke the next morning in jail. When asked if he had gone into the attic to hide from the voices, appellant testified, "No because I don't tell * * * I don't tell. I just try to fight it out because they would think I was real crazy or something." After being placed in jail, appellant tried to commit suicide by cutting his throat.

We cannot agree with appellant's contention that the evidence is not sufficient to show an intent to commit theft. We believe that such an intent can well be inferred from the evidence that appellant watched the bartender as he made his way to the rest room; that he concealed himself almost completely in the attic at an hour so near to closing time, and refused to answer the police officer's calls; that he gave a false explanation for his being in the attic; that he had no money at the time of his arrest; and that he feigned intoxication when taken to the police station after his arrest.

[1] As stated in People v. Kittrelle, 102 Cal.App.2d 149, at page 156, 227 P.2d 38, at page 41:

> "The intention with which an accused enters the house of another is a question of fact and where the circumstances of a particular case and the conduct of the accused reasonably indicate his purpose in doing so is to commit a larceny or any felony a verdict of guilty of the crime of burglary will not be disturbed on appeal. People v. Swenson, 28 Cal.App.2d 636, 639–640, 83 P.2d 70; People v. Winters, 93 Cal. 277, 282, 28 P. 946."

[2] We think the evidence is clearly sufficient to support an inference that appellant entered and hid himself in the attic with the intent to commit larceny after the tavern had closed at two o'clock, and while the evidence might also support an inference that appellant was attempting to hide from those imaginary people whom he claimed were trying to do him harm, there is only a conflict which has been decided against appellant.

Appellant's second contention that he did not express in open court his waiver of a jury trial is more serious and requires a reversal of the judgment.

The minutes of November 9, 1956, as hereinbefore set forth, state: "When questioned by the Court, defendant in person pleads 'not guilty' of offense as charged in the information, and through counsel pleads 'not guilty by reason of insanity' and waives trial by jury." And the minutes of December 4, 1956, state: "This case comes on regularly for trial on defendant's plea of 'not guilty' before Hon. J. F. Good, Judge, sitting without a jury, jury having been waived in open court by the defendant * * *." There is nothing further in the record as to the proceedings at the time of the arraignment on November 9th.

Appellant contends that the only reasonable construction of the minutes of November 9th is that defendant through counsel waived trial by jury. We agree with this contention. The later entry in the minutes at the time the case came on for trial, reciting "jury having been waived by the defendant," can only properly be construed as referring to the so-called waiver of November 9th.

The most recent decision dealing with this issue is People v. Barnum, 147 Cal. App.2d 803, 305 P.2d 986, 989 (hearing denied), in which the court said:

> "Article I, Section 7 of the state constitution provides, in part, that: 'A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel'. It has been held repeatedly that the consent of the defendant must be expressed by him personally and may not be implied. People v. Garcia, 98 Cal. App. 702, 277 P. 747; People v. Wilkerson, 99 Cal.App. 123, 278 P. 466; People v. Barba, 100 Cal.App. 557, 280 P. 549; People v. Spinato, 100 Cal. App. 600, 280 P. 691; People v. Wyatt, 101 Cal.App. 396, 281 P. 629; People v. Woods, 126 Cal.App. 158, 14 P.2d 313; People v. Washington, 95 Cal. App.2d 454, 213 P.2d 70; People v. Shannon, 110 Cal.App.2d 153, 241 P.2d 1007; People v. Pechar, 130 Cal.App. 2d 616, 279 P.2d 570; People v. Benjamin, 140 Cal.App.2d 703, 295 P.2d 477. In each of these cases in which a petition for hearing before the Supreme Court has been filed such petition has been denied. In People v. Pechar, 130 Cal.App.2d 616, 619, 279 P.2d 570, 572, the court held that the consent of a defendant waiving a trial by jury must be expressed 'by the use of language.'"

[3] It is clear from the foregoing authorities that the record must show clearly and affirmatively that the defendant personally and "by the use of language" expressly waived a trial by jury.

[4] Respondent concedes that if it is determined by this court that appellant did not express in open court his waiver of a jury trial, then reversible error was committed. We are satisfied that the record in the instant case shows that the waiver of a jury trial was by appellant's then counsel and that appellant did not personally and "by the use of language" waive a trial by jury. Our conclusion upon this issue makes it unnecessary to discuss the remaining contentions of appellant.

The judgment is reversed.

VAN DYKE, P. J., and WARNE, J., pro tem., concur.

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152 Cal.App.2d 25

BORGES DUSTERS, Inc., Plaintiff and Appellant,

v.

SOUTHMOST AVIATION, Inc., Defendant and Respondent.

Civ. 5443.

District Court of Appeal, Fourth District, California.

June 20, 1957.

Action for damages to plaintiff's aircraft allegedly caused by negligence of agent and servant of defendant which resulted in collision between plaintiff's aircraft and aircraft of defendant. The Superior Court of Imperial County, Elmer W. Heald, J., set aside and vacated service on defendant and plaintiff appealed. The District Court of Appeal, Mussell, J., held that plaintiff had failed to prove that defendant was doing business in state at time of alleged collision and therefore, order quashing service on defendant was justified.

Order setting aside and vacating service of summons and complaint affirmed.

1. Appeal and Error 🔑544(2)

Where appeal record consists only of clerk's transcript, the question of sufficiency of evidence to support order is not open.

2. Appeal and Error 🔑907(3)

Upon appeal from order on motion to quash service, where only clerk's transcript was attached to appeal record, District

Court of Appeal would assume that there was substantial evidence to support order.

3. Appeal and Error ⚷907(3)

Where an appeal has been taken on the judgment roll alone, findings of trial court are to receive such construction as will uphold rather than defeat its judgment, and whenever, from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made.

4. Trial ⚷404(1)

Trial court's findings should receive a liberal construction to uphold rather than to defeat judgment.

5. Corporations ⚷668(16)

In action for damages to an aircraft owned by plaintiff based on theory that agent and servant of defendant had negligently caused defendant's aircraft to collide with plaintiff's aircraft, plaintiff failed to prove that defendant was engaged in doing business in state at time of alleged collision and therefore motion to quash service of summons and complaint was justified. West's Ann.Corp.Code, § 6501.

◆

Mobley M. Milam, Calexico, for appellant.

Sturdevant & Morrow, El Centro, for respondent.

MUSSELL, Justice.

This is an action for damages to an aircraft owned by plaintiff. It is alleged in the complaint that on or about April 8, 1954, while said aircraft was parked at the Calexico Airport, an agent and servant of defendant, Southmost Aviation, Inc., carelessly and negligently caused an aircraft of said defendant to collide with the plaintiff's aircraft, damaging it in the sum of $1,029.10. It is further alleged, on information and belief, that the defendant, Southmost Aviation, Inc., was a corporation organized and existing under and by virtue of the laws of the State of Texas and that at all times mentioned therein said corporation was engaged in doing business in the State of California.

Pursuant to an affidavit filed by the attorney for plaintiff, the trial court ordered that service of the summons and complaint on the defendant be made by personal delivery to the Secretary of State as provided in section 6501 of the Corporations Code. Service of the summons and complaint in this manner was effected by the sheriff of Sacramento county on January 11, 1956. Southmost Aviation, Inc., made a special appearance in the action and moved the court to set aside the said service of summons. This motion and supporting affidavit are not included in the clerk's transcript. It is stated in respondent's brief, and is not denied by the appellant that the motion was made on the grounds that the defendant "was not then, and never had, done business in the state of California."

The clerk's transcript shows that on March 29, 1956, the following ruling was made by the court:

> "The hearing on the motion to set aside service of summons in the above entitled action having been heretofore argued and submitted to the Court, at this day, it is by the Court ordered that said motion be and the same is hereby granted."

On April 5, 1956, the following formal order was signed by the court:

> "On reading and filing the affidavit filed herewith, and on motion of Charles F. Sturdevant, Jr., for the defendant, Southmost Aviation, Inc., and after hearing Mobley M. Milam in opposition thereto;
>
> "It Is Hereby Ordered, that the service of summons as to Southmost Aviation, Inc., in the above-entitled action be set aside and vacated."

[1-4] Plaintiff appeals from this last mentioned order and contends that there was no basis for the court's ruling thereon. We are not in accord with this contention. The record on appeal here consists only of the clerk's transcript and on such an appeal,

the question of the sufficiency of the evidence to support the order is not open. It can only be attached for errors which affirmatively appear on the face of the judgment roll and here we must presume that in the oral proceedings and hearing on the motion there was substantial evidence to support the order. White v. Jones, 136 Cal.App.2d 567, 569, 288 P.2d 913. Where an appeal has been taken on the judgment roll alone the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made. The findings should receive a liberal construction to uphold rather than to defeat the judgment. Warburton v. Kieferle, 135 Cal.App.2d 278, 281, 287 P.2d 1.

[5] Where, as here the validity of service of process was challenged, the burden was upon plaintiff to prove that Southmost Aviation, Inc. was doing business in the State of California at the time of the alleged collision. As is said in Proctor & Schwartz v. Superior Court, 99 Cal.App.2d 376, 379, 221 P.2d 972, 974:

> "In West Publishing Co. v. Superior Court, 20 Cal.2d 720, 726, 128 P.2d 777, 780, our Supreme Court says: 'Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be "doing business" in the jurisdiction where the service is made to sustain its validity. [Citations.]'
>
> "It is settled in this state that when it appears that a defendant is a foreign corporation, and the validity of the service of process is challenged, the burden is upon the plaintiff to prove that such defendant was doing business in the state. [Citations.]"

Plaintiff failed to present any evidence by affidavit or otherwise to meet this burden of proof and chose to rely on the allegations, on information and belief, that Southmost Aviation, Inc. was engaged in doing business in this state. The order from which this appeal was taken recites that a hearing was had on the motion and that the attorney for plaintiff was heard in opposition thereto. Apparently, his opposition consisted only of his oral argument to the court at the hearing.

The order setting aside and vacating the service of the summons and complaint is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

152 Cal.App.2d 135

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Peggy GUSUKUNA, Defendant and Appellant.

Cr. 5774.

District Court of Appeal, Second District, Division 3, California.

June 26, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Louis H. Burke, J., of (1) bookmaking upon the result of horse racing, (2) occupying apartment with books, papers and paraphernalia for purpose of recording bets, and (3) recording bets and she appealed. The District Court of Appeal, Parker Wood, J., held that officer's observation, through door opened in response to his knock, of bookmaking paraphernalia was sufficient to justify his reliance upon information given him as to bookmaking by defendant at said address, and arrest thereafter made by him was lawful, even though he had no warrant for defendant's arrest; and held that bookmaking paraphernalia taken from room was admissible in evidence in this subsequent prosecution, even though officer had had no search warrant.

Affirmed.

1. Arrest ⚷63(4)

"Probable cause" for arrest by peace officer without warrant exists if man of ordinary caution or prudence would be led to believe and conscientiously entertain strong suspicion of guilt of accused.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

2. Arrest ⚷63(4), 71

Officer's observation, through door opened in response to his knock, of bookmaking paraphernalia was sufficient to justify his reliance upon information given him as to bookmaking by defendant at said address, and arrest thereafter made by him was lawful, even though he had no warrant for defendant's arrest; and bookmaking paraphernalia taken from room was admissible in evidence, in subsequent prosecution, even though officer had had no search warrant. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

3. Arrest ⚷71

A search without a warrant is valid, where it is incidental to lawful arrest, if it is reasonable and made in good faith; and a seizure, during such search, of evidence related to crime is permissible.

4. Gaming ⚷98(3, 5)

Conviction for (1) bookmaking upon result of horse racing, (2) occupying apartment with books, papers and paraphernalia for purpose of recording bets, and (3) recording bets, was sustained by evidence. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

Forno & Umann and Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Morris Schachter, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged, in three counts, with violating section 337a, subdivisions 1, 2, and 4 of the Penal Code, viz.: bookmaking upon the result of horse racing; occupying an apartment with books, papers and paraphernalia for the purpose of recording bets; and recording bets. Trial by jury was waived. Defendant was adjudged guilty as charged. She appeals from the judgment and the order denying her motion for a new trial.

Appellant contends that the arrest was not lawful; and that the People's exhibits were obtained as the result of unlawful search and seizure and were erroneously received in evidence. She argues to the effect that there was no probable cause for the arrest.

About March 17, 1956, Officer Boulter received a written inter-departmental complaint or form from the administrative vice department of the Los Angeles Police Department, which stated that a woman by the name of Peggy was taking bets over the telephone and from the street at 920 West 11th Street, and that she lived in apartment 300 at that address. The complaint also contained a description of the woman.

On March 24, 1956, about 1:45 o'clock, Officers Boulter and Andrews parked across the street from said address, and approximately 100 feet north on Bixel Street, from which place they could observe the front of the apartment. They did not have a search warrant or a warrant for the arrest of defendant.

Officer Kenneth Boulter testified that soon after they arrived there the defendant came out of the apartment house, and he "observed her talking with three different people on the street and they exchanged what appeared to me [him] was currency and then she would go back into her apartment"; she did not give anything in exchange for the currency; after he had had defendant under surveillance about an hour, he went to her apartment and knocked on the door; defendant asked who it was; he replied, "Kenny"; defendant opened the door, and he asked her for the results of the eighth race at Gulf Stream; she replied that Needles had won by approximately five lengths; at that time he could see, from the door, a telephone, the National Daily Reporter, and two pieces of paper with writing on them which appeared to be betting markers; those things were on the telephone table in the apartment; he walked into the apartment; when he was in the apartment he identified himself as an officer and he placed defendant under arrest; he saw a scratch pad and a ballpoint pen beside the telephone; he went to the front window and summoned Officer Andrews who was on the street, and after his arrival they recovered the evidence (the pieces of paper with ink writing thereon, National Daily Reporter, scratch pad, and pen); defendant told the officers that she had written on the scratch paper, that is all she had written that day, she took bets from her friends and called the bets to a man before each race, and she received five per cent commission.

It was stipulated that Officer Boulter is an expert in the devices and means of bookmaking. He testified further that in his opinion the pieces of paper with writing on them were betting markers and were bets on horses running on March 24, 1956, at tracks throughout the country; the markings on the papers, which represented about 55 bets, coincided with numbers on the National Daily Reporter of that date. He also testified that they recovered a house key from her, which she had used to lock the apartment door.

Officer Andrews testified that when he entered the apartment he saw all the exhibits, except the door key, upon a table in the apartment, and he also saw a telephone on the table; the telephone rang and he answered it; a female voice asked for Peggy, and he replied she was not there; then the voice asked if he was Charley, and he replied in the affirmative; then the person gave him a wager on a horse that was running at Tanforan that day; when he answered the telephone again, a female voice asked "who" won the daily double at Tanforan, and she requested that Peggy call and let her know about it because she "had something going on that."

There was testimony by a handwriting expert to the effect that in his opinion the handwriting on Exhibit 6 (an exemplar of defendant's handwriting) is the same handwriting as that on Exhibit 1 (the betting markers).

Defendant did not testify.

[1] A peace officer may, without a warrant, arrest a person when a felony has been committed and the officer has reasonable cause for believing the person arrested to have committed it. Pen.Code, § 836. "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254. In Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, a man told the Chief of Police of San Diego that bookmakng was in progress at a certain bar and that a waitress there by the name of Mona would generally be found near the telephone and that she occasionally answered it, and she took bets from the customers in the bar. The chief of police did not know the man who gave the information. The chief gave the information to police officers who went to the bar and observed a waitress, with slips of paper in her hand, standing at the bar on which there was a telephone, a scratch pad, and a pencil. There was a name plate on her belt with the name "Mona" on it. When an officer (who had not identified herself as an officer) asked to see what the waitress had in her hand the waitress attempted to crumple the papers which she was holding. The question was whether the information given by the unidentified man to the chief and communicated by the chief to the arresting officers was sufficient

in the light of the other evidence to constitute reasonable cause for the arrest. The court said (46 Cal.2d at page 294, 294 P.2d at page 38): "[E]vidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable." It was said further therein (46 Cal.2d at page 295, 294 P.2d at page 38) that such evidence may be supplied "by the personal observations of the police." It was said further (46 Cal.2d at page 295, 294 P.2d at page 39): "Although petitioner's [waitress'] conduct observed by Officer Sunday in the bar would not of itself constitute reasonable cause to believe she was committing a felony, it was sufficient to justify Officer Sunday's reliance on the information given her of petitioner's bookmaking." It was held therein that there was reasonable cause for the arrest, search and seizure.

[2, 3] In the present case, the officers had received information, by a written communication from the administrative department of the police department, to the effect that a woman by the name of Peggy was taking bets by telephone and from the street at the address above stated. The officers had kept the apartment house under surveillance and observed the defendant come out of the apartment house, talk to three persons on the street and receive from them something which appeared to be currency. When defendant opened the door of her apartment, in response to a knock on the door by the officer, he asked for the result of the eighth race at Gulf Stream and she replied that Needles had won. While the officer was at the open door he saw bookmaking paraphernalia by the telephone on the telephone table. The arrest was made after he had observed those articles on the table and after he was in the apartment. The observations of the arresting officer, prior to the arrest, were sufficient to justify his reliance upon the information given him as to bookmaking by defendant at said address. There was reasonable cause for the arrest, and the arrest was lawful.

It is apparent that the search was an incident to the arrest. The search and seizure consisted of taking the betting markers, scratch sheet, scratch pad, and the pen which were on the telephone table. "It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible." People v. Winston, 46 Cal.2d 151, 162, 293 P.2d 40, 46. The search and seizure were lawful.

[4] The evidence was sufficient to support the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., concurs.

George F. FOX, III and Virginia C. Fox, his wife, Plaintiffs and Respondents,
v.
James P. ACED and Bertha B. Aced, his wife, also known as Bertha E. Burgh, Defendants and Appellants. *
Civ. 17142.

District Court of Appeal, First District, Division 1, California.
June 21, 1957.
Hearing Granted Aug. 13, 1957.

Action for breach of an agreement to exchange property. Judgment for plaintiffs in the Superior Court, County of San Mateo, Murray Draper, J., and the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that defendants breached the agreement; that it was committed in bad faith; and that damages of the plaintiff were correctly computed.

Judgment affirmed.

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* Opinion vacated 317 P.2d 608.

1. Exchange of Property 🔑4

Where final draft of addendum to agreement for exchange of property was written by defendants, ambiguity, if any, should be resolved against defendants.

2. Exchange of Property 🔑4

Where an agreement for exchange of property provided that in event either party was unable to "deliver property within 90 days from date of contract upon the terms specified" the contract should be void, defendants were not relieved from liability for breach of the agreement under the quoted phrase on the ground that the construction of a certain building had not been completed which in their lease purchase agreement with another they had agreed to erect upon the property.

3. Exchange of Property 🔑8(4)

In action for breach of an exchange agreement for exchange of property, evidence established that defendants' breach was committed in "bad faith" within the statute authorizing recovery of difference between price agreed to be paid and value of property agreed to be conveyed at time of the breach. West's Ann.Civ.Code, § 3306.

4. Exchange of Property 🔑8(5)

"Bad faith" within the statute authorizing recovery of difference between price agreed to be paid and value of property to be conveyed at time of breach is shown, where there is a deliberate refusal to perform or a refusal to convey, where, through its own negligence, one party has put it out of his power to fulfill the obligations of his contract. West's Ann.Civ. Code, § 3306.

See publication Words and Phrases, for other judicial constructions and definitions of "Bad Faith".

5. Contracts 🔑93(4), 303(1)

A mistake of law is not ground for avoidance of a contract nor does mistaken advice as to a person's legal obligation excuse his complete failure to perform his contract.

6. Exchange of Property 🔑8(5)

Where agreement provided for exchange of property and provided that in event either party was unable to deliver his property within 90 days the contract should be void, defendants' erroneous interpretation of the 90 day clause did not preclude a finding of "bad faith" notwithstanding defendant relied upon the advice of his attorney. West's Ann.Civ.Code, § 3306.

7. Exchange of Property 🔑8(5)

Where parties agreed to exchange properties, finding of "bad faith" within the statute on the part of wife of the defendant was justified though she took no part in the negotiations or subsequent dealing, where she did sign the agreement, and her failure to perform while awaiting instructions from her husband to perform could be deemed a breach, which was as deliberate as that of her husband. West's Ann.Civ.Code, § 3306.

8. Exchange of Property 🔑8(5)

In action for breach of an agreement to exchange property, $750 award for services rendered plaintiffs by their attorney in the transactions in examining title to defendants' property in preparing the necessary papers was proper. West's Ann.Civ. Code, §§ 3306, 3307.

9. Vendor and Purchaser 🔑351(1)

The statute respecting the measure of damages for breach of an agreement to convey realty indicates by the phrase "expenses properly incurred in examining title and preparing the necessary papers" and "recoupment of the price paid" a legislative intent that the purchaser be reimbursed for his out of pocket money expenditures reasonably made or incurred in connection with his sale, whether made or incurred, before or after the signing of the agreement to convey. West's Ann.Civ.Code, § 3307.

10. Constitutional Law 🔑70(3)

Arguments as to the equity of a statute should be addressed to the Legislature and not the judiciary.

11. Vendor and Purchaser 🔑330

The statute authorizing recovery of difference between price agreed to be paid and value of property agreed to be conveyed at time of breach, being a special provision, prevails over general provisions relating to damages, and is not governed or modified by the statute, prescribing measure of damages when a purchaser defaults. West's Ann.Civ.Code, §§ 3306, 3307.

12. Vendor and Purchaser 🔑330

The statute prescribing measure of damages when purchaser defaults allows the vendor expenses incurred by the purchaser's breach but not expenses that would have been incurred had the contract been performed. West's Ann.Civ.Code, § 3307.

13. Exchange of Property 🔑8(5)

In action for breach of agreement to exchange property where services of attorney were rendered in an endeavor by plaintiff to collaborate with defendants in solution of problems stemming from condition of the title to their land, allowance to plaintiffs for services of the attorney on finding bad faith breach of agreement by defendant was proper. West's Ann.Civ. Code, § 3306.

14. Exchange of Property 🔑8(5)

In action for breach of an agreement to exchange property, allowance to plaintiffs of rentals which accrued from the defendants' property after execution of the agreement as a credit against price which the plaintiffs agreed to pay for the property based upon provision declaring rents should be pro rated 30 days from date of execution of the contracts, and a clause stating that date of closing would be no later than 90 days than date of the contract, was proper. West's Ann.Civ.Code, § 3306.

Wexler & Wexler, Millbrae, for appellants.

Carr, McClellan, Ingersoll & Thompson, Robert R. Thompson, Richard C. Amick, Burlingame, for respondents.

FRED B. WOOD, Justice.

On July 2, 1954, plaintiffs George and Virginia Fox and defendants James and Bertha Aced entered into an exchange agreement whereby the plaintiffs were to convey a certain house and lot to defendants in exchange for certain industrial property, which latter was subject to a lease and purchase agreement between defendants as lessor-vendor and Sequoia Metalcraft Co. and others as lessee-vendees. An addendum to the exchange agreement provided as follows:

> "In the event either First Party [plaintiffs] or Second Party [defendants] is unable to deliver his property within ninety (90) days from the date of this contract, upon the terms specified, then this contract shall be null and void and each party, in that event, shall hereby release the other of and from all liability hereunder.
>
> "First Party agrees to pay Fourteen Thousand & No/100 ($14,000.00) Dollars cash on closing of this transaction. Rents to be prorated thirty (30) days from date of execution of this contract and payable on closing. Taxes, insurance, utilities and all other expenses relative to the upkeep of the subject properties are to be prorated as of the date of closing, which is to be no later than ninety (90) days from the date of this contract. Each party will pay expenses on property now owned by him until actual closing. Second Party agrees to complete all obligations now owing to lessee and to hold First Party harmless for any and all claims made by lessee thereunder."

In this action for damages the trial court found that the defendants breached the agreement. Damages were assessed in the amount of $2,950.

(1) *Did defendants breach the exchange agreement? Yes.*

Defendants claim they were unable, within the 90 days, to "deliver" the industrial property "upon the terms specified" and thereby were released from all liability under the agreement by the provisions of the first sentence of the addendum.

They predicate such inability upon the further claim that the construction of a certain building had not been completed, a building which in their lease-purchase agreement with Sequoia Metalcraft Co. they had agreed to erect upon the industrial property.

This poses the question whether the completion of such construction was among the "terms specified" in the exchange agreement. It was not expressly so specified in that clause of the agreement whereby defendants promised to convey the industrial property "free and clear of all encumbrances excepting easements, restrictions and rights of way of record and said Lease Agreement and said purchase agreement [between defendants and Sequoia Metalcraft Co.] and any tax liens which are the responsibility of the tenant [Sequoia Metalcraft Co.]". Indeed, an intent not to include such completion among the "terms specified" seems indicated by defendants' promise (expressed in the last sentence of the addendum) "to complete all obligations now owing to lessee [Sequoia Metalcraft Co.] and to hold First Party [plaintiffs] harmless for any and all claims made by lessee thereunder." Such a promise seems well calculated to meet the situation which would obtain if when this sale is consummated the seller has not yet completely performed all his obligations toward the tenant, including completion of the building: the sale may proceed regardless of such completion.

[1] Moreover, the final draft of the addendum was written by defendants. The ambiguity, if any, should be resolved against them. In addition, the realtor through whom the parties negotiated (they did not deal directly with each other) testified that defendant James Aced explained to him that a lien filed against the property by one of the building contractors (Marshall Electric Co.) was in litigation and that Mr. Aced explained that he thought he could have this lien released quickly, but that he wanted 90 days to get rid of it. "That is why we set up the 90 day closing."

[2] We concur, therefore, in the opinion of the trial judge, expressed in his memorandum directing the preparation of findings and judgment, that "[p]erformance of defendant's obligation to Sequoia to complete the building was not a condition to his delivery of the property."[1]

The Marshall Electric Co. lien was paid off nearly 30 days before the expiration of the 90 day period. The only other lien involved was that of the general building contractor (Carlray Co.) in the amount of $10,000, only $1,400 of which defendant disputed as being for extras ordered by the tenant. About two weeks before the expiration of the 90 days plaintiffs paid the $1,400 on behalf of the tenant, so that the only lien remaining on the 90th day was one which defendant James Aced testified he did not question. He conceded the lien could have been liquidated by use of a portion of the money which plaintiffs had already put in escrow to defendants' credit. He was agreeable to paying it and insisted only upon completion of the building or a release from the tenant.[2]

[3, 4] Defendants failed and refused to convey. The finding that they breached the

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[1] We note in passing that within the 90 days the tenant, Sequoia Metalcraft Co. executed a release and acceptance of the building.

[2] Upon this appeal, defendants advance the argument that the Carlray lien was not ripe to be paid and canceled because the building was not completed within the 90 days. They should have presented that question to the trial court. They did not do so. James Aced's testimony clearly conveyed the idea that he was ready to pay that lien after Mr. Fox paid the $1,400. He did not suggest that completion or noncompletion of the building affected his obligation to pay that lien one way or the other.

exchange agreement is amply supported by the record.

(2) *Was defendants' breach committed in "bad faith" within the meaning of that term as used in section 3306 of the Civil Code? Yes.*

The trial court found that "defendants' failure and refusal to perform said agreement on their part was deliberate, willful, capricious and without just cause and excuse, and without just or lawful reason therefor." This finding, if supported by the evidence, spells "bad faith" within the meaning of that term as used in section 3306.[3]

Defendants contend, first, that there could be no bad faith because, they say, they were not obligated to convey if unable to complete the building within the 90 days. That is but a repetition of their contention that there was no breach, which we have found erroneous.

[5, 6] Next, they argue that, if erroneous, defendants' interpretation of the 90 day clause was in the utmost good faith especially in view of the fact that Mr. Aced in so doing relied upon the advice of his attorney. But a mistake of law is not a ground for avoidance of a contract (Gardner v. Watson, 170 Cal. 570, 577, 150 p. 994) nor does mistaken advice as to a person's legal obligation excuse his complete failure to perform his contract (Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 290–291, 29 p. 640). Such ignorance of one party to a contract does not entitle him deliberately to defeat the other party of his rights under the contract.

Significantly, there was substantial evidence that James Aced did nothing constructive toward settling the several problems which he claimed prevented his performance. Indeed, there is evidence that he sought to impose new terms and conditions, demanded additional consideration to that specified in the agreement, and expressed unwillingness to consummate the transaction because of a personal dislike for Mr. Fox.

[7] Finally, say the defendants, there was no evidence of bad faith upon the part of Mrs. Aced because she took no part in the negotiations or in the subsequent dealings. Her husband testified: "She knows nothing about any of these things. She has signed documents when I asked her to sign, * * * but she knows nothing about what has happened." She did sign this agreement and thereby made the promises expressed in it. Her failure to perform those promises (awaiting instructions from her husband to perform) should be and is deemed a breach which was as deliberate as that of her husband.

(3) *Were the damages correctly computed? Yes.*

[8] Defendants question the allowance of $750 for services rendered plaintiffs by their attorney in this transaction, which the trial court in its findings characterized as "expenses properly incurred by the plaintiffs in examining title to the defendants' property and preparing the necessary papers in connection with the said exchange agreement."

Defendants do not question the reasonableness of the fee for the services rendered. Their criticism is that it is a lump sum allowance for some services that were chargeable and for other services that were

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3. "Bad faith is shown where there is a 'deliberate refusal to perform' (Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859, 863) or a refusal to convey, 'where through his own negligence he has put it out of his power to fulfill the obligations of his contract' (Johnson v. Schimpf, 197 Cal. 43, 48, 239 P. 401, 402) or 'without just cause or excuse, he refuses to perform'. Engasser v. Jones, 88 Cal.App.2d 171, 177, 198 P.2d 546, 549." Pixley v. First Federal Sav. & Loan Ass'n, 110 Cal.App.2d 427, 432, 243 P.2d 100, 103–104. See also Johnson v. Goldberg, 130 Cal.App.2d 571, 578, 279 P.2d 131, deliberate refusal to perform constitutes bad faith, question of bad faith one of fact; Rasmussen v. Moe, 138 Cal.App.2d 499, 503, 292 P.2d 226, not necessary to show fraud but only a deliberate refusal to perform without just cause or excuse.

not chargeable to them as expenses included in the measure of damages prescribed by section 3306 of the Civil Code. They especially challenge any allowance for services which plaintiffs' attorney rendered during the negotiation of the exchange agreement itself. Such services included the examination of the lease-purchase agreement between the defendants and their tenant Sequoia Metalcraft Company and the rendition of an opinion concerning its meaning and effect; the consideration of and an opinion concerning the two building contractors' liens on defendants' property which a preliminary title report disclosed, and the work of writing and rewriting the exchange agreement itself.

[9] We think such inclusions were proper. The applicable statute draws no line between expenses of this character incurred before and those incurred after the execution of an agreement to convey real property: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Civil Code, § 3306.

The expression "expenses properly incurred in examining the title and preparing the necessary papers" is coupled with a provision for recoupment of "the price paid" which clearly indicates a legislative intent that the purchaser be reimbursed for his out-of-pocket money, expenditures reasonably made or incurred in connection with the sale, whether made or incurred before or after the signing of the agreement to convey.

[10–12] Defendants argue, in effect, that when in a bad faith case a statute gives a purchaser the benefit of his bargain (the difference between the price agreed to be paid and the value of the estate to be conveyed) it is inequitable to allow him any expenses that were incurred prior to the signing of the agreement. That is a question for legislative not judicial consideration. This statute gives the purchaser his expenses "incurred in examining the title and preparing the necessary papers" in any event. In a bad faith case it merely adds the expenses, if any, "incurred in preparing to enter upon the land." Section 3306, "being a special provision, prevails over general provisions relating to damages" (Vineland Homes, Inc., v. Barish, 138 Cal.App.2d 747, 760, 292 P.2d 941, 951) and, naturally, is not governed or modified by other special provisions such as section 3307 of the Civil Code which prescribes the measure of damages when a purchaser defaults, is silent as to "expenses" and has been so construed as to allow the seller expenses caused by the purchaser's breach but not expenses that would have been incurred had the contract been performed (Royer v. Carter, 37 Cal.2d 544, 550, 233 P.2d 539).

[13] The legal services rendered after the signing of the exchange agreement included some negotiations between the parties concerning methods of consummating the transaction in view of the questions raised by defendants concerning certain liens, their claim that the building had not been completed and their desire for an acquittance of some sort in that regard from the plaintiffs. Defendants say that such services do not pertain to "examining the title and preparing the necessary papers." That is too narrow a view of the statute. Those services were rendered in an endeavor by plaintiffs to collaborate with the defendants in the solution of problems with which the latter said they were confronted, stemming from the condition of the title to their land. We see no basis for a reviewing court to undertake to reverse the finding of the trial court under such circumstances.

[14] The other item which defendants challenge is the sum of $1,200 which represented the amount of rentals which accrued from the defendants' property between the 30th and the 90th days after the execution of the agreement. The trial court allowed this sum as a credit against the price which plaintiffs had agreed to pay for defendants' property, based upon a clause of the agreement which declared that "rents" would be "prorated thirty (30) days from date of execution of this contract and payable on closing" and a clause which stated that the "date of closing" would be "no later than ninety (90) days from the date of this contract."[4] In view of the latter clause, the expiration of the 90 days marked the date of defendants' breach of their obligation to convey.

This allowance seems entirely proper under the added measure of damages ("the difference between the price agreed to be paid and the value of the estate agreed to be conveyed") prescribed by section 3306 of the code "in case of bad faith." The rentals from defendants' property began accruing to plaintiffs' credit on the 30th day and continued to accrue until the 90th day, the closing date and the date of defendants' breach. They represented a matured credit of $1,200 at the time of defendants' breach and to that extent reduced the "price agreed to be paid" by the plaintiffs (§ 3306) when they signed the exchange agreement.

Defendants invoke a quite separate and distinct proration clause of the agreement and illogically seek to apply to it the rental proration clause. They refer to the clause which said that "[t]axes, insurance, utilities and all other expenses relative to the upkeep of the subject properties are to be prorated as of the date of closing which is to be no later than ninety (90) days from the date of this contract. Each party will pay expenses on property now owned by him until actual closing." This clause obviously dealt with a different subject (expenses, not rentals) and by its very terms had not begun to operate at the time of the breach of defendants' obligation to convey.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Maureen CONNOLLY, Plaintiff and Respondent,

v.

PRE-MIXED CONCRETE COMPANY, a corporation, and Albert LeRoy Stevens, Defendants and Appellants. *

Civ. 5416.

District Court of Appeal, Fourth District, California.

June 24, 1957.

Rehearing Denied July 22, 1957.

Hearing Granted Aug. 20, 1957.

Action for personal injuries sustained by plaintiff when, while riding a horse, she was struck by a cement truck owned by defendant company and operated by an employee. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Mussell, J., held that there was no substantial evidence to sustain application of last clear chance doctrine and therefore it was prejudicial error for trial court to instruct jury with respect thereto.

Judgment reversed.

1. Negligence 🔑83.1, 135(6)

It is only exceptional case to which doctrine of last clear chance may be applied and mere fact that there is ample evidence to show that a defendant is negligent, without any substantial evidence of the existence of other elements as to contributory negligence on part of plaintiff, will not warrant application of doctrine.

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[4] It happened that no rents accrued in respect to plaintiffs' property during that period, to use as an offset against the item under discussion.

* Opinion vacated 319 P.2d 343.

2. Appeal and Error ⚷1064(1)
Negligence ⚷138(4)

Charging jury upon doctrine of last clear chance when there is not substantial evidence to support doctrine is reversible error.

3. Automobiles ⚷214, 246(38)

Where plaintiff had been proceeding slowly on horseback westward on shoulder on north side of road when truck owned by defendant had turned toward her from street and plaintiff had held up her hand and had signaled driver to slow or stop, but plaintiff's horse had whirled around and was struck by truck, plaintiff used ordinary care under circumstances and element of last clear chance doctrine, that of plaintiff's contributory negligence, had not been established and therefore instruction on last clear chance was not justified.

4. Negligence ⚷83.8, 135(6)

Time element is all-important factor in application of last clear chance doctrine, and if doctrine is to be applied there must be substantial evidence to show that defendant had a last clear chance to avoid accident by use of ordinary care, following the time that the injured party had lost any similar opportunity to avoid the accident by use of such care.

5. Appeal and Error ⚷1064(1)
Automobiles ⚷244(59), 246(58)

In action for personal injuries sustained by plaintiff when, while riding horse on shoulder of highway, she was struck by cement truck, which was owned by defendant and operated by defendant's employee, after plaintiff's horse had whirled around upon approach of truck, evidence did not justify application of last clear chance doctrine and it was prejudicial error for trial court to instruct jury with respect thereto.

◆

Luce, Forward, Kunzel & Scripps, San Diego, for appellants.

Butler, Kaminar & Sorbo, San Diego, and Melvin M. Belli, San Francisco, for respondent.

MUSSELL, Justice.

This is an action for the recovery of damages for personal injuries sustained by plaintiff when, while riding a horse, she was struck by a cement truck owned by the defendant Pre-Mixed Concrete Company and operated by Albert LeRoy Stevens, an employee of said company. The accident occurred at about 1:45 p. m. on July 20, 1954, on Friars Road in San Diego, an east-west, two-lane highway, and near its intersection with Colusa Street, which runs north and south. Stevens, driving the truck south on Colusa Street, turned east on Friars Road at a speed 15 to 25 miles per hour. The truck had a defective exhaust system and made considerable noise. As he turned the corner, Stevens saw plaintiff and two other girls on horseback riding toward him on Friars Road, approximately three-fourths of a block away. Plaintiff was in the lead on the shoulder on the north side of the road, Miss Linda Thornton about one length behind her and Miss Steiler was on the south side of the road.

Stevens testified that on coming around the corner, the horses, hearing the truck, "started dancing, prancing around, and moving in and off the road, off on the shoulder, back and forth, in general, just milling around"; that as he came around the corner "It would have been easy enough to stop in 20 feet, a considerable distance from the horses"; that all three of the girls were waving their arms and yelling "stop, stop". He testified that the girls waved at him but he could not hear what they were saying; that he thought they wanted him to slow down and "speculated" they wanted him to stop; that "I shifted before coming to the place where the accident took place. I was getting my truck to slow down and then lessen the noise. I depressed the clutch to cut out as much noise as possible and ease through between the horses and then proceed on to get the truck and sound away from the horses"; that after passing the horse on the south side of the road, he looked in his mirror and saw one other horse and rider and a riderless horse, and that he did not know what went on at the back of the truck.

Plaintiff testified that she heard the noise of the truck before it came around the corner, at a speed of from 20 to 25 miles per hour; that as the truck rounded the corner, it swerved toward the middle "because the horses were staggered on both sides * * * and as it came down, we all looked at it, we all shouted and raised our hands and did everything in our power to slow him down and make him stop because the horses were practically frantic"; that as the truck went by, her horse whirled to the left and completely around, and as it whirled, it threw her leg out and the side or end part of the truck caught her leg; that as soon as she was hit the horse started galloping off the center of the road and she fell off; that she tried to get up and walk away and her leg gave out; that she laid down and then saw that her leg was injured.

Kathryn Walker, a registered nurse, who was driving a car westerly on Friars Road, testified that she saw the three girls on horseback, two on the north side of the road and one on the south; that the truck was just coming around the corner when she first saw it and it was traveling 20 to 25 miles per hour; that the driver picked up speed; that at the time of the impact, plaintiff was on her own side of the road and the front part of the truck was over the middle of Friars Road; that she went over to plaintiff and observed that she was bleeding profusely; that plaintiff's wound was a "real jagged laceration and you could see the bone. You could see the muscles and the wound was pushed up into the fleshy part of the calf. It started down low on the shin bone and was about nine or ten inches"; that she applied a tourniquet and kept it on until the ambulance came.

Linda Thornton testified she first saw the truck when it rounded the corner into Friars Road and that it was about three quarters of a block away; that "The truck was coming around the corner and it was going so fast and making so much noise that we knew there would be trouble, so all three of us put up our hands to signal him to stop and I believe all three of us shouted to him to stop. He came right on down the road and I don't recall that he slowed up and the noise seemed to be about the same as he came down; that they were walking their horses and that Maureen's horse shied and collided with the truck and I saw her horse run alongside the truck for a few seconds. It looked as if it was touching the truck while it was running. Then my own horse whirled around and by the time I had her under control, Maureen had fallen off her horse and was crawling off the side of the road."

A police officer who examined the truck after the accident testified that he noticed a piece of cloth and what appeared to be pieces of flesh on the left rear mudguard; that he found blood about two feet south of the center line of the road and about 150 feet east of Colusa Street; that the asphalt portion on Friars Road at that place is about 18 feet wide and has dirt shoulders approximately 4 feet in width.

A jury returned a verdict in favor of plaintiff and against defendants and assessed damages in the amount of $95,000 Defendants appeal from the judgment entered in accordance with the verdict and their first contention is that it was prejudicial error for the trial court to instruct the jury on the last clear chance doctrine. It is conceded that the instruction given is in substance a last clear chance instruction. However, appellants argue that the evidence did not justify the court in the giving of it to the jury.

In Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 306 P.2d 432, 440, the formula prescribing the conditions for the application of the doctrine of last clear chance is restated as follows:

> "The doctrine of last clear chance may be invoked if, and only if, the

> trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger; (2) that defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom; and (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure."

It is further stated in said decision, 47 Cal.2d at page 738, 306 P.2d at page 438:

> "In analyzing the required conditions for the application of the doctrine as set forth in said decisions, it should be noted that the time element is the all important factor. In other words, if the doctrine is to be applied and a recovery is to be permitted despite the contributory negligence of the injured party, there must be substantial evidence to show that the defendant had a last clear chance to avoid the accident by the use of ordinary care following the time that the injured party had lost any similar opportunity to avoid the accident by the use of such care. Under such circumstances, the injured person's contributory negligence does not bar a recovery, for it has been said that 'When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery.' Girdner v. Union Oil Co., supra, 216 Cal. 197, 204, 13 P.2d 915, 918."

[1, 2] In Doran v. City & County of San Francisco, 44 Cal.2d 477, 283 P.2d 1, 6, it is held that:

> "The ordinary case presenting the issues of negligence and contributory negligence is governed by the traditional rules which cover those issues, and which make contributory negligence a bar to recovery by the injured party. The last clear chance doctrine, which relieves an injured party of the results of his own contributory negligence and permits him to recover despite such negligence, is applicable only in the exceptional case in which there is substantial evidence to support a favorable finding on each of the several required elements above enumerated. And as above indicated, if any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence."

It is further held therein that it is only the exceptional case to which the doctrine of last clear chance may be applied, and that the mere fact that there is ample evidence to show that a defendant is negligent, without substantial evidence of the existence of the other required elements, will not warrant the application of the doctrine, and that the question of whether there is any substantial evidence, conflicting or otherwise, which could justify the application of the doctrine in a given case is a question of law, and in the absence of such evidence, it is error for the trial court to instruct the jury concerning that doctrine. In Galbraith v. Thompson, 108 Cal.App.2d 617, 622, 239 P.2d 468, it is held that charging the jury upon the doctrine of last clear chance when there is no substantial evidence to support the theory is reversible error.

[3–5] In the instant case we find no substantial evidence that the plaintiff was negligent. Friars Road is a public highway. Plaintiff was proceeding slowly westward on the shoulder on the north side of this road, when the truck turned toward her from Colusa Street. She held up her hand and signaled the driver to slow down or stop. When the truck driver did not stop she proceeded on westerly, keeping on the shoulder of the road and was almost past the truck when her horse suddenly wheeled around to the left, facing east, throwing her right leg out and catching it on the rear corner of the truck. While it is suggested that plaintiff might have dismounted from her horse and thus extricated herself from a position of danger, it is not unreasonable to assume that to attempt to so dismount in front of the oncoming truck would have been more dangerous than to remain on her mount. We conclude that plaintiff used ordinary care under the circumstances, and since there is no substantial evidence of her negligence, it follows that the first necessary element for the application of the doctrine of last clear chance was not established. As is said in Doran v. City & County of San Francisco, supra, 44 Cal.2d at page 486, 283 P.2d at page 5, "if any one of these elements is absent, the doctrine does not apply." It also appears that there is no substantial evidence that the truck driver had the last clear chance to avoid the accident. The uncontradicted evidence shows that as the truck was passing safely between horses on the north and south sides of the road, plaintiff was then proceeding safely westward, passing the truck. The driver was not aware that plaintiff's horse had suddenly wheeled around and caused plaintiff's leg to strike the truck until after the accident occurred. We cannot say that he should have known that plaintiff's horse would wheel around as it did. It is said in Rodabaugh v. Tekus, 39 Cal.2d 290, 296, 246 P.2d 663, 666, quoting from Poncino v. Reid-Murdock & Co, 136 Cal. App. 223, at page 227, 28 P.2d 932, at page 934:

> "* * * it was further said: 'In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had a *chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party.'"

And as the court said in Doran v. City and County of San Francisco, supra, the time element is the all-important factor, and if the doctrine is to be applied there must be substantial evidence to show that the defendant had a last clear chance to avoid the accident by the use of ordinary care, following the time that the injured party had lost any similar opportunity to avoid the accident by the use of such care. Plaintiff was in a position of danger when her horse suddenly wheeled around, and it cannot be said that the truck driver then had a clear chance to avoid the accident.

We conclude that there is no substantial evidence in the record to sustain the application of the last clear chance doctrine and that it was prejudicial error for the trial court to instruct the jury with respect thereto.

Appellants, in a supplemental brief, argue that the judgment is excessive and is not supported by any substantial evidence, and that the damages awarded are speculative and uncertain of occurrence. However, since we have concluded that the judgment must be reversed because of the error in instructing the jury as to the last clear chance doctrine, it is unnecessary to here pass upon the questions relative to the damages allowed. Under the circumstances shown by the record these questions should be open for determination on a retrial of the action.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

152 Cal.App.2d 66

Rosemary NEGVESKY, Plaintiff and Respondent,

v.

Astor ALSTON, Robert Alston, Individually and doing business as a co-partnership, and Security Insurance Company of New Haven, Connecticut, Defendants,

Security Insurance Company of New Haven, Connecticut, Appellant.

Civ. 22219.

District Court of Appeal, Second District, Division 1, California.

June 24, 1957.

Action based on a judgment for injuries to recover on a liability policy for injuries sustained by plaintiff who was injured when automobile driven by purchaser from the insured was being tested. Judgment for plaintiff in the Superior Court, Los Angeles County, Roger A. Pfaff, J., and the insurer appeals. The District Court of Appeal, Drapeau, J. pro tem., held that the evidence did not establish that the policy was secured through fraud of the insured, that the findings were sufficient, and that excluding evidence of previous bad checks of the insured was not prejudicial.

Judgment affirmed.

1. Insurance ⚷137(1)

When a policy is issued and delivered under an arrangement whereby credit is extended to the insured for payment of the premium, insurer is liable for a loss occurring during the credit period.

2. Insurance ⚷668(3)

Whether a policy has been issued on credit so as to impose liability on the insurer for a loss occurring during the credit period is a question of fact.

3. Insurance ⚷137(1)

Where a policy is in effect, it is immaterial whether the insured failed to make payment of the premium as respects the liability of the insurer for a loss occurring during the credit period.

4. Appeal and Error ⚷1010(1)

If there is any substantial evidence in the record to support the trial court's findings, it is not within the power of the reviewing court to disturb it.

5. Insurance ⚷665(3)

In action based on a judgment for injuries on liability policy for injuries sustained by plaintiff when struck by automobile being tested by purchaser from the insured, where policy was issued and delivered by insurer and was in effect on day of the accident and credit was given the insured for payment of the premium, evidence supported finding against the insurer's contention of fraud and misrepresentation in procuring the policy. West's Ann.Ins.Code, § 11580(b) (2).

6. Appeal and Error ⚷989

An appellate court's power ends when it finds any substantial evidence in the record that will support a finding of the trial court.

7. Insurance ⚷670

In action on a liability policy for injuries sustained by plaintiff who was struck by an automobile being tested by purchaser from the insured, findings which did no more than restate in negative form the basic finding that the policy was in full force and effect on date of the accident notwithstanding the extension of credit to the insured, were proper. West's Ann.Ins.Code, § 11580(b) (2).

8. Appeal and Error ⚷1056(1)

In action on a liability policy issued on credit where first check of the insured for payment of premium was returned for insufficient funds, exclusion of evidence of previous bad checks of the insured was not prejudicial.

9. Evidence ⚷129(5)

In action on a liability policy where check of insured for payment of premium was returned for insufficient funds, offer to show by testimony of police officer that there were several charges against insured for issuing checks without sufficient funds in the bank was properly excluded, where, at best, the offer was of the charges only, and it was not shown who kept the records or what authenticity they had.

Eugene S. Ives, Los Angeles, for appellant.

Dryden, Harrington, Horgan & Swartz, and Vernon G. Foster, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The facts in this case, told chronologically, are as follows:

Astor Alston and Robert Alston, copartners, were selling used cars, and running a garage in Hawthorne, Californa. March 10, 1952, they applied to an authorized agent of Security Insurance Company for a policy of liability insurance that, among other things, would cover any person driving an automobile in their possession and with their consent.

On April 8, 1952, the insurance company issued the policy, which was for one year. On April 9th their agent countersigned the policy and delivered it to the Alstons. The agent was authorized to effect binding insurance by his countersignature on policies.

The agent told the Alstons that the premium was $1,578.31. The Alstons told the agent they didn't have the money to pay the premium just then. The agent then agreed with them that they could pay the premium in three equal installments, over a period of sixty days. The first installment was due April 15, 1952.

In this connection the agent testified:

> "Q. Now, at the time that you delivered this policy to him, he told you that his financial situation was such that he would have to set up a schedule of payments because of the fact that he had cars coming in in the future and he would have to make the payments as those cars were disposed of; isn't that correct? A. Correct.
>
> "Q. And you knew from that conversation that the reason he wanted to wait was so that he could get funds in order to pay the premium; isn't that correct? A. Correct.
>
> "Q. And you extended him credit to that extent, didn't you? A. Yes."

On the same day the policy was delivered, April 9, 1952, the Alstons gave Mrs. Marian Corbin permission to drive one of their automobiles, to try it for a day or two, to see if she wanted to buy it. While she was driving the car her husband asked one of the Alstons, in her presence, if they had insurance on their cars. Mr. Astor Alston said, "'Yes. * * * I have a blanket insurance. * * * It is PL & PD.' * * * Anyone that was driving them was automatically insured."

On the next day, April 10, 1952, while driving this car, Marian collided with a car driven by Rosemary Negvesky, plaintiff in this case.

April 15, 1952, the Alstons paid the first installment on the insurance premium by their check, but the check was returned from the bank marked "insufficient funds." After that the Alstons disappeared, and haven't been seen or heard of since.

May 5, 1952, the insurance company mailed the Alstons a notice cancelling the policy. At the same time the insurance company's bill against the Alstons for the unpaid premium was turned over to a collection agency. This was what is termed in the insurance business a pro rata cancellation.

The fact that it was a pro rata cancellation is revealing evidence that the insurance company at the time treated this policy as an existing valid contract of insurance. For there are two methods of cancellation, flat and pro rata. With a flat cancellation no claim for a premium is made. With a pro rata cancellation the insurance company demands payment by the insured of the pro rata portion of the premium for the time during which the policy was in force and effect.

Also the insurance company's agent testified that barring some collateral circumstance the policy should be deemed to effect coverage from its delivery until May 10, 1952.

January 14, 1953, Rosemary sued Mrs. Corbin and the Alstons for damages caused by Mrs. Corbin's alleged negligence. The following day the insurance company gave notice of rescission of the policy.

The insurance company was notified of its obligation under the policy to defend the lawsuit, but refused to defend. The case was prosecuted to judgment against Mrs. Corbin for $8,500, and the insurance company refused to pay the judgment.

This case is brought by Rosemary against the insurance company under the provisions of section 11580, subdivision (b) (2) of the Insurance Code. After trial in the Superior Court, it was found that the policy was in full force and effect on April 10, 1952, and judgment against the insurance company for $8,674.70 followed.

The insurance company appeals from the judgment upon three grounds:

1. That the policy was obtained by fraud and misrepresentation of material facts, and was void *ab initio*.

2. That there was no evidence to support the court's findings XIV and XV. These findings are as follows: XIV. That is not true (a) that the policy was delivered conditionally, or (b) that there was any condition precedent to said policy going into force or effect, or (c) that as a condition of the policy the premium was to be paid; and XV. That it is not true that the policy was void *ab initio* or that it was not in full force and effect.

3. And that the trial court erred in refusing to admit evidence concerning previous bad checks issued by the Alstons.

[1-3] The insurance company does not dispute the legal rules that when a policy of insurance is issued and delivered under an arrangement whereby credit is extended to the insured for payment of the premium the insurer is liable for a loss occurring during the credit period. Hooker v. American Indemnity Co., 12 Cal.App.2d 116, 119, 54 P.2d 1128. Or that whether or not a policy has been issued on credit is a question of fact. Hill v. Industrial Acc. Comm., 10 Cal.App.2d 178, 51 P.2d 1126. Or that, the policy being in effect, it is immaterial whether or not the insured failed to make payment of the premium. Maxfield Wilton & Associates v. Industrial Acc. Comm., 19 Cal.App.2d 606, 609, 65 P.2d 1354.

The insurance company bases its appeal in this case primarily upon the contention that the evidence shows conclusively that the policy was secured through fraud and misrepresentation of the Alstons.

[4] But this was a question of fact for the trial court to determine. It needs no citation of authority to support the fundamental rule of California law that if there is any substantial evidence in the record to support the trial court's finding contrary to the insurance company's contention, it is not within the power of this reviewing court to disturb it.

[5] Without repeating the controlling facts in this case already stated, it is plain from the record that the policy was issued and delivered by the insurance company and was in effect on the day of the accident, that credit was given the insured for payment of the premium, and that the evidence substantially supports the finding against the insurance company's contention of fraud and misrepresentation that they say made the policy void *ab initio*.

[6] While it is of course true that contrary deductions could have been made from the evidence, such deductions under our law are for the determination of the trier of facts. This court's power and function ends when it finds any substantial evidence in the record that will support a finding by the trial court. Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231.

[7] This being the situation in this case, the insurance company's second objection falls, because the findings complained of do no more than re-state in negative form the basic finding that the policy was in full force and effect on the date of the accident.

[8, 9] So far as the claim of error in refusing to admit evidence of previous bad checks of the Alstons is concerned, it is sufficient to say that the exclusion of this evidence does not in any event constitute prejudicial error that would compel this court to reverse the judgment. Moreover, the offer of evidence was to show by the testimony of a police officer of the City of Hawthorne that at the time in question there were several charges against the Alstons for issuing checks without sufficient funds in the bank. At best the offer was of charges only. And it was not shown who kept the records, or what authenticity they had.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

152 Cal.App.2d 29

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henderson TAYLOR, Defendant and Appellant.

Cr. 1320.

District Court of Appeal, Fourth District, California.

June 20, 1957.

Defendant was convicted of driving vehicle while under influence of intoxicating liquor resulting in injury to a person. The Superior Court, San Diego County, John H. Hewicker, J., rendered judgment and denied new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that hypothetical question propounded of criminalist as to whether person who drove through stop sign at 25 miles per hour, collided with another automobile, lacked coordination after accident, stated he got drunk easily, and had "a blood alcohol of .083" one hour after collision, was under influence of intoxicating liquor at time of collision was not prejudicial, where there was substantial evidence produced independently of opinion that defendant was intoxicated, and instruction was given that weight and sufficiency of opinion was for jury.

Affirmed.

1. Criminal Law 🔑1169(9)

In prosecution for drunken driving resulting in personal injury, hypothetical question, propounded of criminalist, as to whether person who drove through stop sign at 25 miles an hour, collided with another automobile, lacked coordination after accident, stated he got drunk easily, and had "a blood alcohol of .083" one hour after collision, was under influence of intoxicating liquor at time of collision, was not prejudicial as allowing expert to give opinion which was on a matter of common knowledge and which was not based on personal observation, where there was substantial independent evidence of intoxication, and instruction was given that weight and sufficiency of opinion was for jury. West's Ann.Vehicle Code, § 501.

2. Criminal Law 🔑469

In prosecution for drunken driving resulting in personal injury, expert criminalist may testify as to subjects other than blood alcohol percentages as they affect coordination and judgment of humans, and question whether actions of person are prompted by use of alcohol is scientific factor having important bearing on question of defendant's being under influence of intoxicating liquor and degree of intoxication as defined by law. West's Ann.Vehicle Code, § 501.

3. Criminal Law 🔑470

An expert may be asked question that is coincident with ultimate issue.

4. Criminal Law 🔑741(4)

The weight and effect of opinion evidence of an expert witness is matter for jury to determine.

Augustine, Bryans & Ragen, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was convicted by a jury of the crime of driving a vehicle while under the influence of intoxicating liquor on August 25, 1956, resulting in injury to a person, in violation of Vehicle Code Section 501. He was granted probation after serving 90 days in jail and paying a fine of $250. No complaint is made as to the sufficiency of the evidence to support the verdict.

The argument on appeal is that the trial court erred in overruling defendant's objection to certain hypothetical questions asked by the prosecution of the criminalist for the San Diego Police Department relating to his opinion as to whether defendant was under the influence of intoxicating liquor at the time of the injury, when the expert witness was not present at the time.

The witness stated he was a *criminalist* for the city in the Police Department crime laboratory, and had made tests to study the effects of known percentages of blood and alcohol on the coordination and judgment of human subjects. Counsel for defendant interrupted the witness and stipulated that "he is an expert in his line" and stipulated his qualifications as a *criminalist.* Without further questioning the stipulation was accepted. He proceeded to testify that he made an examination of the *intoximeter* used on defendant to determine the percentage of blood alcohol shown by it and found the subject's blood alcohol was ".083 per cent"; that according to the standards set up by the American Medical Association, National Safety Council and American Bar Association, an average person with from .0 to .05 would not be affected by alcohol and would not be termed under its influence; that a person with from ".05 to .10 per cent" blood alcohol is possibly under its influence, that is, a minority of such group will be, and a majority will not be; that with from ".10 to .15 per cent" they very probably would be, and all persons with .15 and above, regardless of their tolerance, would be; that within the zone of .083, an intoximeter test, without other evidence, would not show whether the person was or was not under the influence of it; that other facts must be known; that some people are more easily influenced by the alcohol they consume than others; that the average person will "void about .02 per cent" per hour of pure alcohol, and accordingly a reading of .083, taken one hour after the accident, would indicate a reading of .103 at the time; that to insure a test under ".27 per cent", other objective symptoms of sobriety or lack of it should be considered.

[1] The hypothetical question was then propounded of the witness: "Mr. Burgess, assuming a person who, driving a vehicle on a public highway, drives his car through a stop sign at about twenty-five miles an hour, continues on into the approximate center of the intersection where he collides with another car; that the driver of the car in question that has run the stop sign does not put on the brakes or slow his car noticeably up until the time of the collision; that that person is then given a Romberg test of coordination in which he falls off balance and is caught by an officer when he tries to stand on one foot, he falls off balance and is caught by an officer when he stands with his head back and his eyes shut, he has difficulty in getting his heels and toes together; he, when walking down the sidewalk, walks in an unsteady fashion; and assume further that this man made a statement that he gets drunk easily and that he had a blood alcohol of .083, * * * based on a test one hour after the collision, would you think that man was under the influence of intoxicating liquor * * *?" Defendant testified that while in Tijuana that afternoon he had two glasses of beer; that he became sick on a chicken taco which he purchased; that after they crossed the border they went into Sam's Cafe and he there had a bottle of beer, left there a little after 7 p. m. and soon thereafter the acci-

dent occurred. He denied being under the influence of alcohol and claimed he had complete control of his car. A passenger in defendant's car testified that defendant was unable to stand correctly or walk steadily as a normal person would during the administration of the sobriety tests by the officer. He observed that defendant "didn't do good" while taking these tests and he believed that the liquor consumed by the defendant affected him more than it would the average person so that defendant got drunk easily, and that it didn't take too much to get him drunk. Other witnesses testified concerning the facts related in the propounded question. Upon this given set of facts and over objections the expert was allowed to answer the question. He said that in his opinion, under such circumstances a normal person would be under the influence of liquor.

Defendant argues that although he stipulated the witness was an expert in his field, the witness went beyond that and gave an opinion on matters of common knowledge; that an expert is only allowed to give an opinion concerning facts not of common knowledge, and that as to intoxication it must be based on personal observation. It is argued further that the expert was giving an opinion as to the ultimate question in issue to be determined by the jury, citing 19 Cal.Jur.2d p. 14, sec. 289; p. 17, sec. 290; p. 20, sec. 293; and page 77, sec. 347; also, 10 Cal.Jur. p. 1003, sec. 262; and Stuart v. Dotts, 89 Cal.App.2d 683, 686, 201 P.2d 820.

It is further argued in this connection that the error was emphasized because the prosecutor, in his argument to the jury, laid great stress on the opinion of this expert and stated that defendant was intoxicated because it was *scientifically* proved to be true.

In People v. Ravey, 122 Cal.App.2d 699, 265 P.2d 154, under similar circumstances, a qualified expert was permitted to express his opinion as to the intoxication of a person, based on his finding of .29 of one per cent by weight of alcohol in the blood. In Manney v. Housing Authority, 79 Cal.App.2d 453, 180 P.2d 69, 73, although factually dissimilar, it was held with certain exceptions, that a non-expert may not testify as to his opinion, based on facts he did not personally observe, but said:

> "* * * but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions. * * * The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. If the case is one for expert testimony this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the facts while the ordinary juror is not. It is a confusion of the two exceptions to the rule excluding opinion evidence to make the reception of expert testimony dependent upon the fact that the expert has been a personal witness to the facts."

See also Stuart v. Dotts, supra, 89 Cal.App.2d at page 687, 201 P.2d at page 822, where an officer, not shown to be a qualified expert, testified as to his opinion whether a person was in a cross-walk at the time of the accident, his opinion being based partially on his own observation of certain facts and facts related by other parties. It was there said:

> "The officer did not qualify as an expert witness, nor was a hypothetical question propounded based upon facts presented by other witnesses. As a non-expert, he could only testify to matters which he had observed and were deemed too complex to present to the jury in any manner except as

opinion evidence." It was held that the admission of the opinion testimony of the officer was error, and when considered with all of the other facts, was prejudicial to the rights of plaintiff.

The rule stated in Manney v. Housing Authority, supra, 79 Cal.App.2d at page 461, 180 P.2d at page 74, is as follows:

> "Is the matter involved one which is not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may 'enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt.'" Citing Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 P. 238.

[2] 19 Cal.Jur.2d p. 77, sec. 347, relied upon by defendant, does recite that expert testimony is not necessary to prove intoxication, but it is also stated that such testimony is competent. Inferentially, the court held in the cited cases that if the witness is qualified as an expert on the subject and the proposed hypothetical questions were proper, within the rule above set forth, based on facts testified to by the expert witness as well as other witnesses, he could give his opinion as such expert provided the subject matter of the hypothetical question clearly ties the other established facts in evidence to the factor respecting the intoximeter reading, particularly where the purpose of the entire question was to give significance to the otherwise inconclusive reading which the expert made, and where it was stipulated he was qualified in this field. In just what field a criminalist operates is not clearly shown by the record. Webster's New International Dictionary, Second Edition, Unabridged [1954] defines it as "One versed in criminal law; one addicted to criminality; also, a psychiatrist dealing with criminality." Criminality is defined as "an act or practice which constitutes a crime." The field or limitations of the expert criminalist to testify on a subject may well cover subjects or factors other than those of an expert versed in the study of blood alcohol percentages as they affect the coordination and judgment of human subjects. In a general sense, it may well appear that the question of a person's intoxication by observation may be in a field that may be considered as common knowledge. However, the question whether the actions of a person are prompted by the use of alcohol becomes important. It is a scientific factor and would have an important bearing on the question of his being under the influence of intoxicating liquor and the degree of the intoxication as defined by law. The question of his intoxication was not the only or ultimate question for the jury to decide under the charge made.

[3] There is no hard or fast rule that an expert may not be asked a question that is coincident with the ultimate issue. 19 Cal.Jur.2d p. 18, sec. 291. Qualified medical experts are allowed to testify as to their opinions regarding the sanity or insanity of a person at a particular time, or as to a patient's condition, based upon their own examination and competent testimony of other facts related by other witnesses in the case where the main issue for the jury is the question of his sanity or insanity or the condition of the patient at a particular time. People v. Wilson, 25 Cal.App.2d 332, 77 P.2d 238; 8 Cal.Jur. p. 162, sec. 243; People v. Plyler, 126 Cal. 379, 58 P. 904.

[4] Of course the weight and effect of opinion evidence of an expert is clearly a matter for the jury to determine, and the jury was so instructed. There was substantial evidence produced, independent of the opinion expressed, that defendant was intoxicated. We conclude that no prejudicial error resulted.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

152 Cal.App.2d 206

Eugene LOCATELLI, Plaintiff and Respondent,
v.
Paul Robert HASKELL and Robert Phillips, Defendants,
Robert Phillips, Appellant.

District Court of Appeal, Third District, California.
July 1, 1957.

Action for property damages to truck involved in an accident. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for plaintiff and a defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that trial court did not abuse discretion in permitting truck owner, who had been in trucking business for ten years and had hired trucks with drivers on a contract basis, to testify as to the reasonable rental value of his truck even though he had never rented trucks without drivers.

Judgment affirmed.

Evidence ⚿474(19)

In action for property damage to truck, trial court did not abuse discretion in permitting truck owner, who had been in trucking business ten years and had hired trucks with drivers, to give opinion evidence as to the rental value of truck by reason of his ownership and operation of the damaged equipment, plus knowledge he had gained generally in the trucking business, even though owner had never rented trucks without drivers.

◆

Kasch & Cook, Ukiah, for respondent.

Spurr & Brunner, Ukiah, for appellant.

VAN DYKE, Presiding Justice.

This is an appeal from the judgment rendered by the trial court sitting without a jury in a property damage action.

Respondent's truck, which he used in his trucking business, was damaged in an accident. The judgment awards him damages not only for the cost of repair of the truck, but also the sum of $3,600 for loss of use. The only assignment of error is the ruling of the trial court in permitting respondent, on the issue of loss of use, to testify as to the reasonable rental value of his truck over appellant's objection that respondent did not qualify as an expert and that a proper foundation had not been laid. Respondent contends he qualified to give opinion evidence as to rental value by reason of his ownership and operation of the damaged equipment, plus knowledge he had gained generally in the trucking business. Respondent testified that he had been in the trucking business for ten years and that, although he had never rented trucks without drivers, he had hired trucks with drivers on a contract basis to subhaul. He testified that in his own business he had analyzed costs and in so doing had considered rental values of trucks such as he used. He testified that the hourly rental rate of trucks such as his, in the locality in which he operated was $12 and that in his opinion the reasonable rental value of his truck was $100 a day. This amount the trial court, in the absence of any other testimony on the subject, allowed for a period of 36 days. We find no error in the court's ruling. The showing was sufficient to place the admissibility of the testimony within the trial court's discretion and there appears no abuse thereof.

A somewhat similar situation was presented in Pfingsten v. Westenhaver, 39 Cal.2d 12, 20–21, 244 P.2d 395, wherein the owner of a trailer was allowed to testify as to its rental value, although he had never rented a trailer without a tractor and driver. The court pointed out that the plaintiff there had been in the oil trucking business for eight years and that his experience with trucks and trailers during that time showed some knowledge of the reasonable rental value of such equipment. The court stated, 39 Cal.2d at page 20, 244 P.2d at page 400:

> "The qualification of a witness to testify as an expert is a matter within

the sound discretion of the trial court, and where there is no showing of a manifest abuse of such discretion the ruling of that court will not be disturbed upon appeal."

In our view this case comes within that statement of the rule.

The judgment appealed from is affirmed.

SCHOTTKY, J., concurs.

* * *

152 Cal.App.2d 49

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jerry Robert LEON, Defendant and Appellant.

Cr. 2743.

District Court of Appeal, Third District, California.

June 21, 1957.

Defendant was convicted of issuing fictitious check. The Superior Court, Sacramento County, Raymond T. Coughlin, J., rendered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that contentions of defendant concerning matters which did not appear in record on appeal could not be considered.

Affirmed.

1. Criminal Law ⚷1114(1)

Accused's contentions concerning matters which did not appear in record on appeal could not be considered by reviewing court.

2. Criminal Law ⚷1044

Where no motion was made to dismiss information, contention that evidence introduced at preliminary examination was insufficient to support information could not be raised or considered on appeal. West's Ann.Pen.Code, § 996.

Jerry Robert Leon, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment following conviction of the crime of issuing a fictitious check. Appellant, who was represented by counsel of his own choosing, initially entered a plea of not guilty to the substantive charge, but admitted a prior conviction of a felony. Later, by leave of court, he withdrew his plea of not guilty and pleaded guilty. Application for probation was denied and appellant was sentenced.

In support of his appeal appellant contends that he was coerced by the district attorney and the Sacramento police into pleading guilty; that he was tricked into pleading guilty since he believed he was pleading only to the charge of prior conviction; that he was inadequately represented by his attorney; that the evidence introduced against him at the preliminary examination was insufficient to support the information and that the prosecution withheld evidence favorable to him during the preliminary hearing before the magistrate.

[1] All of appellant's contentions concern matters which do not appear in the record on appeal. They, therefore, cannot here be considered. People v. Levine, 114 Cal.App.2d 616, 617, 250 P.2d 645; People v. Graff, 104 Cal.App.2d 32, 34, 230 P.2d 654.

[2] Appellant also asserts that the evidence introduced at the preliminary examination was insufficient to support the information. No motion was made to dismiss the information and, therefore, these contentions cannot be raised or considered on appeal. Penal Code, Sec. 996; In re Berry, 43 Cal.2d 838, 844, 279 P.2d 18.

The judgment appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

152 Cal.App.2d 131

Marcus I. RUSSEK, T. C. Kegerreis, Kalman Muller and Jack Kegerreis, Plaintiffs and Appellants,

v.

TOMARK JET COMPONENTS, Inc., a corporation, Charles E. Cook, Jr., Defendants,

Charles E. Cook, Jr., Respondent.

Civ. 22135.

District Court of Appeal, Second District, Division 1, California.

June 26, 1957.

Rehearing Denied July 19, 1957.

Hearing Denied Aug. 20, 1957.

Action against the president of a bankrupt corporation for money had and received and money paid him by plaintiffs for stock in corporation. From judgments of the Superior Court of Los Angeles County, A. E. Paonessa, J., granting non-suits on counts of complaint for money had and received, a judgment thereof for defendant on remaining count, and an order denying plaintiff's motion to strike from defendant's cost bill a sum paid for perpetuation of testimony of a plaintiff who died before trial, plaintiffs appealed. The District Court of Appeal, Drapeau, J. pro tem., held that defendant was not bound in equity or good conscience to return money, which he did not receive for his own use or benefit and deposited in corporation's bank account.

Judgments and order affirmed.

1. Licenses 🔑39.17

Where all parties to action against president of bankrupt corporation for money had and received and amount paid him by plaintiffs for stock in corporation were engaged in joint enterprise and promoters of corporation's business and knew at all times what was going on and that corporation had no permit to sell stock, but paid money to defendant for corporation, courts will leave parties where they were when action was begun.

2. Money Received 🔑14

Where president of bankrupt corporation did not receive money paid to him by other incorporators for stock in corporation, for his own use or benefit, and deposited it in corporation's bank account, he was not bound in equity or good conscience to return money and hence was properly granted non-suits in such other incorporators' action for money had and received and recovery of money paid defendant.

3. Appeal and Error 🔑174

In action against bankrupt corporation's president for money had and received and amount paid him by plaintiffs for stock in corporation, which had no permit to issue stock, technical objection that one of plaintiffs was dead and that another plaintiff had assigned his cause of action established no prejudicial error requiring reversal of non-suits granted by superior court.

4. Appeal and Error 🔑984(1)
Costs 🔑154

In action against bankrupt corporation's president for money had and received and amount paid him by plaintiffs for stock in corporation, which had no permit to issue stock, denial of plaintiff's motion to strike from defendant's cost bill cost of one plaintiff's deposition, taken in proceeding to perpetuate his testimony and offered in evidence by plaintiffs on trial of case after deponent's death, was not prejudicial error; allowance of such cost being within trial court's discretion. West's Ann.Code Civ.Proc. § 1032.

◆

MacBeth & Ford, by Patrick H. Ford, Los Angeles, for appellants.

H. J. Gross, Van Nuys, Harris K. Lyle, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Three of the plaintiffs in this case, Marcus I. Russek, T. C. Kegerreis, and Kalman Muller, and the defendant, Charles E. Cook, Jr., started a machine shop.

They hoped to establish a paying business; also to secure a lucrative contract to manufacture machine products for the United States government. They all put money into the enterprise.

The remaining plaintiff, Jack Kegerreis, was a son of T. C. Kegerreis. When the shop was first started and while Jack was in Arabia, he sent his father $500 to put into the business. After he came home he put in $2,500 more.

These men held frequent meetings to direct the policy and details of the shop; to run it. They decided to form a corporation "to have a front" for the business. T. C. Kegerreis suggested the corporate name, "Tomark". It was a combination of his first name and Russek's first name.

Defendant Cook was president, and plaintiffs Russek and T. C. Kegerreis were vice presidents of the corporation. All three were directers. Russek was in charge of sales, and T. C. Kegerreis was in charge of production, and these two men were paid salaries and allowances by the corporation.

Plaintiffs Muller and Jack Kegerreis were not officers of the corporation, but Jack testified, "We were all in on the thing."

No corporate stock was issued to anybody, and no permit to issue stock was procured from the State Corporation Commissioner. The books of the corporation denominated payments by the parties as "stock subscriptions".

Unfortunately, the government contract did not materialize, the business was not a success, and the corporation went into bankruptcy.

Then plaintiffs picked out Cook as a defendant, and sued him for their contributions to the enterprise. Their complaint alleged four common counts for money had and received, and another count on the theory that Cook was liable to them because they paid their money to him for stock in the corporation when no permit from the Corporation Commissioner had been obtained. Concededly, Cook kept none of this money for himself, but put it into the corporation's bank account as it was paid to him. He also put his own money into the business. He said he considered that a total loss.

The trial court granted defendant's motion for nonsuits on the common counts; and, after trying the case on the other count, found for defendant on that count also.

Plaintiffs appeal from the nonsuits, from the judgment, and from the order of the trial court refusing to strike from defendant's cost bill an item paid for the perpetuation of the testimony of T. C. Kegerreis. Mr. Kegerreis died before the case was tried, and his testimony so perpetuated was read into the record.

Plaintiffs argue:

(a) That it was error to grant the judgment and the nonsuits because Cook was president of the corporation and is personally liable for the return of the money they paid to him, there being no permit by the Corporation Commissioner to sell stock. They also argue that it was error to grant two of the nonsuits because one plaintiff was dead, and the other had assigned his cause of action.

(b) That their motion to strike part of the cost bill should have been granted, because no statutory basis exists to tax as costs money paid by a party in a separate proceeding to perpetuate testimony.

These matters will be discussed in the order stated.

[1] (a) The trial court found that plaintiffs and defendant were engaged in a joint enterprise; that they all were promoters of the business, and that each of them at all times knew what was going on; that they all knew that they had no permit from the Corporation Commissioner to sell stock, but that they paid their money into the corporation anyway. In such circumstances courts will leave the parties where they were when the action was begun. Wells v. Comstock, 46 Cal.2d 528, 532, 297 P.2d 961.

[2, 3] Plaintiffs' objections to granting the nonsuits may be answered as follows: Cook did not receive the money for his use or benefit, and in the facts in this case in equity and good conscience he is not bound to return it. Pollak v. Staunton, 210 Cal. 656, 665, 293 P. 26. The technical objection that one plaintiff was dead, and that another had assigned his cause of action, does not establish prejudicial error that requires reversal of the nonsuits.

[4] (b) It was not prejudicial error to deny plaintiffs' motion to strike the cost of the deposition of the deceased plaintiff, taken in proceedings to perpetuate his testimony. Plaintiffs themselves offered this deposition in evidence in the trial of this case, and the allowance of its cost was within the discretion of the trial court. Code Civ.Proc. § 1032.

The judgments of nonsuit, the final judgment, and the order denying plaintiffs' motion to strike defendant's costs, are, and each of them is, affirmed.

WHITE, P. J., and Doran, J., concur.

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152 Cal.App.2d 80

Judy Ann HALL, Plaintiff and Appellant,

v.

The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Benjamin E. Butzon, and James K. Hamlin, Defendants and Respondents.

Civ. 5448.

District Court of Appeal, Fourth District, California.

June 24, 1957.

Rehearing Denied July 22, 1957.

Hearing Denied Aug. 20, 1957.

Action for damages arising out of collision of plaintiff's automobile with defendants' freight train. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Griffin, J., held that under evidence plaintiff was not entitled to requested instruction on last clear chance doctrine based on calculations of speed of both automobile and freight train.

Judgment affirmed.

1. Railroads 🔑351(2)

In action by automobile driver against railroad and its employees for personal injuries sustained as a result of a collision between automobile and freight train, automobile driver was not, under evidence, entitled to requested instruction on last clear chance doctrine based on calculations of speed of both automobile and freight train.

2. Railroads 🔑338.4

In determining whether last clear chance doctrine is applicable in collision case involving automobile and train, the natural reflex time in communicating an emergency stop and the time for effective brake action must be considered, together with speed and ability to stop train in a given distance.

3. Negligence 🔑135(6)

In determining whether last clear chance doctrine is applicable, there must be substantial evidence to show defendant had a last clear chance to avoid accident.

4. Negligence 🔑83.7

Under last clear chance doctrine, the time for defendant's exercise of any last clear chance commences only at such time as he has both actual knowledge of injured person's position of danger and actual or constructive knowledge that such person could not escape from such situation.

5. Railroads 🔑351(22)

In collision case involving automobile and freight train, requested instruction on last clear chance doctrine, which was in language of instruction previously criticized by Supreme Court, was properly denied.

6. Appeal and Error ⚷1064(1)
Trial ⚷296(10)

In action for damages arising out of collision of plaintiff's automobile with defendants' freight train, instruction to effect that jury should apply same test to testimony given by railroad employees as it would to any other witness was not prejudicial where other witnesses, not employees, testified for defendants, and plaintiff relied heavily on testimony of defendants' employees to establish her case and there was general instruction concerning credibility of witnesses.

◆

David S. Casey, and Mahedy & Schall, San Diego, for appellant.

Robert W. Walker, Richard K. Knowlton, Los Angeles, and Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant brought this action against defendants and respondents to recover damages as a result of a collision between her car and defendants' freight train. The accident occurred about one-half hour after sunset on December 23, 1954. A single track of defendant company runs east and west, and about 45 feet north of the intersection of 28th Street and Harbor Drive, which drive also runs east and west. Twenty-eighth Street is approximately 42 feet wide, and runs north and south. A railroad switch standard was located 40 feet west of 28th Street near the track. Situated at distances of 5 feet east and west of this switch standard were imbedded railroad ties protecting the standard. Railroad crossing signs were in evidence. The point of actual impact was unknown, although plaintiff, who was traveling north on 28th Street, swerved to her left toward the center lane just prior to the impact. The train and the automobile came to a stop at the west post or about 65 feet from the center of 28th Street. A train of 15 freight cars, with the engine about 600 to 800 feet to the rear, was being pushed westerly around a slight curve up to the crossing at about 4 to 6 miles per hour. A street light standard was located about 65 feet southwest of the crossing. Visibility was clear.

Plaintiff, an office worker at an industry located at the southwest corner of Harbor Drive and 28th Street, attended a Christmas party for a short period of time after leaving work that evening, procured her automobile from a parking lot on the southeast corner of Harbor Drive and 28th Street and stopped northbound on 28th Street at its intersection with Harbor Drive, at a red traffic signal. Upon change of the signal she proceeded northward, looked to her right for trains, and then observed defendant Hamlin, the switchman, in front of her waving a red fusee and lantern. Although she utilized this crossing every night and had frequently seen trains occupying it, plaintiff was unaware that defendant Hamlin was signaling for her to stop for a train. Swerving to her left she came to a stop on the tracks, remained there "maybe a couple of seconds", and then, becoming alerted as to a train's approach, she looked through her right front window or windshield and saw the train approaching. It was her opinion at that instant that it had not quite reached 28th Street. Plaintiff was unwilling to give an estimate of her distance from the track at the time she first saw the flare, but said she was traveling about 10 to 15 miles per hour. She testified in her deposition that she turned to her left when she was 20 feet from the track.

The evidence indicates, and she said she saw no lights on the approaching box car, heard no horn or bell of the train; and that she thought the switchman was signaling her to go around him until he shined a flashlight in her eyes; that someone hollered "train", so she stopped on the track and remained there a matter of "a couple of seconds" and "within the time it would take to look for one" she saw the freight car; that the switchman was standing just north of the track, waving the burning red fusee; that the freight car struck her car on its east side and carried it west down the track and pushed it into the switchstand, at which time she was thrown from the car and injured.

The testimony of the switchman, defendant Hamlin, is that he was standing on the track crossing carrying a lighted fusee and lantern; that he observed plaintiff approaching from a distance of between 20–35–40 feet; that at that time the freight car was about 50 to 70 feet from the crossing; that plaintiff was traveling 6 to 10 miles per hour and that she slowed down as if she was going to stop before reaching the track; that instead she swerved to go around him; that when he saw she was going onto the tracks he gave the emergency stop signal to another switchman located on the top of the ninth car back, who relayed it to another switchman on top of the box car near the locomotive, who relayed it to the engineer seated in the engine; that he then ran northerly to avoid the collision, and at that instant the freight car was entering 28th Street; that immediately after the sound of the impact he heard the escaping of air from the application of the emergency air brakes. Some of these facts were corroborated by the other switchmen. The engineer testified he could not see the intersection from his position while rounding the curve but depended on the switchmen's signals and when he received the signal from the last one he applied the brakes; that he believed with this number of cars it would take two or three seconds to stop, and "it is as likely to stop within 60 feet as it would 40 or 80 feet"; that in his opinion the time required for the effective brake operation through this cut of 15 cars, would be two or three seconds. Other "outside" witnesses testified they observed that the leading box car was at the edge of or about 15 feet from 28th Street at a time when plaintiff's vehicle was at a similar distance from the tracks, and also said plaintiff's car did not stop before the impact. Based upon certain isolated facts and disregarding others, plaintiff has made calculations which she claims indicates that she was entitled to her proffered instruction on the last clear chance doctrine, which the court refused to give. Her claim is that this evidence shows that when plaintiff was approximately 20 feet from the track, moving at 10 to 15 miles per hour, the nearest freight car was then about 60 to 70 feet away, moving at four to six miles per hour; that mathematically, plaintiff was traveling 15 to 20 feet per second at a point about 20 feet from the point of collision and the train was moving approximately six to nine feet per second at a point 60 to 70 feet from the point of collision; that accordingly, the jury could find that the train could have been stopped within 40 to 60 feet; that since the brakes on the train were not applied until after the first impact and the train carried plaintiff, unharmed, for 85 feet thereafter before it crashed her car against the switchstand and injured her, the trainman was able to stop well within that distance, and could have avoided her injury. She relies principally upon Daniels v. City and County of San Francisco, 40 Cal.2d 614, 255 P.2d 785; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 255 P.2d 795; and Brooks v. E. J. Willig Truck Transp. Co., 40 Cal.2d 669, 678, 255 P.2d 802.

[1, 2] We are in accord with the trial court's ruling in reference to the proffered instruction and in denying a new trial based on this ground. Chambers v. Southern Pac. Co., 148 Cal.App.2d 873, 307 P.2d 662. The Brooks decision was predicated upon the theory that it was known by the driver of a truck that Brooks was in a perilous and helpless position, after the initial collision, and defendant, after carrying him unharmed for some distance, had a last clear chance to have stopped the truck in time to prevent the wheels from later running over him. We do not believe the calculations made by plaintiff furnish substantial evidence for the operation of the last clear chance doctrine. Here we are dealing with a long train of freight cars operating on its own track, which is properly posted and with a switchman signaling with a red flare fusee indicating the presence of the approaching train, being pushed by an engine operated and controlled by an engineer 600 to 800 feet from the scene of the collision and being guided by means of signals communicated to him from three different switchmen. After plaintiff disregarded the fusee signal and

notice by voice that a train was approaching, she nevertheless left a place of safety and went upon the tracks somewhere near the center of 28th Street. When her perilous condition was noticed by the switchman, timely notice was communicated, through the other switchmen, that an emergency stop was necessary. The engineer had no way of realizing plaintiff's perilous condition at any time. The natural reflex time in communicating the emergency stop and the time for effective brake operation must be considered, together with the speed and ability to stop such a train in a given distance. Choquette v. Key System Transit Co., 118 Cal.App. 643, 5 P.2d 921; Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932; Berton v. Cochran, 81 Cal.App.2d 776, 185 P.2d 349. This is not a case where the engineer saw the predicament in which plaintiff had by her own negligence placed herself and seeing such predicament failed to stop after having a last clear chance to do so, as held in the Brooks case. It was said in Rodabaugh v. Tekus, 39 Cal.2d 290, 296, 246 P.2d 663, 666:

> "'* * * it is not enough to relieve a plaintiff of his own negligence that the defendant may have had *a chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care.'"
>
> And at page 295 of 39 Cal.2d, at page 666 of 246 P.2d, that "'Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent.'"

See also Berton v. Cochran, 81 Cal.App.2d 776, 185 P.2d 349; Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595; Schouten v. Crawford, 118 Cal.App.2d 59, 257 P.2d 88; Story v. Cox, 130 Cal.App.2d 231, 278 P.2d 720; Wilson v. Knudsen Creamery Co., 137 Cal.App.2d 552, 290 P.2d 677; and Hazelett v. Miller, 115 Cal.App.2d 801, 252 P.2d 997.

In Johnson v. Sacramento Northern Railway, 54 Cal.App.2d 528, 542, 129 P.2d 503, 511 (Hearing denied in the Supreme Court), in reference to a railway accident, the court said:

> "'Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance.'" And further held that the doctrine of last clear chance is not applicable where the negligence of the injured person is contemporaneous and concurrent with the negligence, if any, of defendant.

[3, 4] The rule is that there must be "substantial evidence to show that defendant had a last clear chance to avoid the accident." Hazelett v. Miller, 115 Cal.App.2d 801, 252 P.2d 997, 1000; Fleharty v. Boltzen, 137 Cal.App.2d 187, 290 P.2d 311; Dalley v. Williams, supra. To the same effect is also the case of Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 306 P.2d 432, holding that before the last clear chance doctrine may be applied the necessary elements, as there indicated, must be supported by substantial evidence. Time is such an element and an all-important factor. The time for defendant's exercise of any last clear chance commences only at such time as he has both actual knowledge of the injured person's "position of danger" and actual or constructive knowledge that such person "cannot escape from such situation." It affirmatively appears to us that in considering the evidence as a whole, there was no substantial evidence that all of these elements had been affirmatively established.

[5] In addition, the instruction offered and refused was in the language of BAJI No. 205, criticized in Moreno v. Los Angeles Transit Lines, Cal.App., 286 P.2d 923, later dismissed; and Brandelius v. City & County of San Francisco, Cal.App., 296 P.2d 415 (Hearing granted 47 Cal.2d 729, 306

P.2d 432). The Brandelius case, decided by the Supreme Court, supra, in effect held that this instruction which was there given was erroneous and the trial court might properly grant a new trial on this ground if it believed that the instruction could have misled or confused the jury. See also Lamoreux v. San Diego & Arizona Eastern Ry. Co., 48 Cal.2d 617, 311 P.2d 1.

[6] The final argument is that the court erred in giving an instruction requested by defendants, to the effect that the jury should apply the same tests to testimony given by employees of the railroad company as it would to any other witness in the case. Complaint is made that the instruction, in effect, told the jury it was not to consider any prejudice these witnesses might have in favor of the railroad company even though they were interested witnesses, citing Murray v. Llewellyn Iron Works Co., 4 Cal.App. 41, 87 P. 202; and Gray v. Southern Pacific Co., 23 Cal.2d 632, 145 P.2d 561.

It was held in the Murray case that a somewhat similar instruction, if given, would be erroneous. However, here there was testimony of other witnesses, not employees, testifying for defendants. Plaintiff relied upon much of the testimony of defendants' employees in her endeavor to establish defendants' negligence and to bring the case within the last clear chance rule. This instruction was followed by the general instruction that the jury was the sole judge of the credibility of all witnesses; that the witnesses were presumed to speak the truth and such presumption may be overcome by contradictory evidence, by the manner in which the witnesses testified, or by evidence that pertains to their motives. The challenged instruction does not, in any manner, set up tests of credibility with respect to an employee witness, but merely instructs the jury that they shall judge such witnesses by the same tests as set out in the instruction relating to the credibility of witnesses in general. In People v. Washburn, 54 Cal.App. 124, 201 P. 335, the trial court refused a somewhat similar instruction. The court, on appeal, held it might well have been given. It recites, 54 Cal.App. at page 127, 201 P. at page 336:

> " 'This defendant, under the laws of California, has a right to take the witness stand in his own behalf. It is your duty to carefully weigh and consider his testimony as you would the testimony of any other witness. You should not reject and disregard his testimony merely because he is the defendant in this case, but you should apply to his testimony the same rules in determining the credence to which the same is entitled that you would apply to any other witness in the case.' "

Although it was held in the Murray case that the refusal to give an instruction in a somewhat similar case was proper, it does not appear to us that prejudicial error resulted. People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

152 Cal.App.2d 35

Julius GOREN, Nettie Goren, Oslas G. Goren and Dorothy Goren, Plaintiffs and Respondents,

v.

T. L. GRIFFIN, Jean F. Griffin, William R. Greiner, et al., Defendants,

T. L. Griffin and Jean F. Griffin, Appellants.

Civ. 21631.

District Court of Appeal, Second District, Division 3, California.

June 21, 1957.

Rehearing Denied July 22, 1957.

Hearing Denied Aug. 13, 1957.

Action for fraud in exchange of plaintiffs' orange grove for defendants' motel. The Superior Court of Los Angeles County, LeRoy Dawson, J., rendered judgment for plaintiffs, and defendants appealed. The

District Court of Appeal, Parker Wood, J., held that the "out-of-pocket loss rule" had been applicable and that it had been prejudicial error to reject defendants' offer of proof relative to third party's purchase of orange grove from them two months later.

Reversed.

1. Appeal and Error ⚷1056(1)
Fraud ⚷57, 59(3)

The "out-of-pocket loss rule" was applicable, to action for fraud in exchange of plaintiffs' orange grove for defendants' motel, and it was prejudicial error to reject defendants' offer of proof relative to third party's purchase of orange grove from them two months later. West's Ann.Civ. Code, § 3343.

2. Pleading ⚷237(8)

Where plaintiffs, seeking to recover for fraud in exchange of their orange grove for defendants' motel, knew, prior to seeking equitable relief by way of reformation, that defendants did not own strip of land involved and could not specifically perform reformed agreement, it was error to grant motion to amend complaint to conform to proof by alleging cause of action for reformation of escrow instructions on account of mutual mistake of fact.

◆

Bailie, Turner, Lake & Sprague, and Richard W. Sprague, Los Angeles, for appellants.

Samuel B. Steinbach, Los Angeles, and Robert R. Schaefer, Hollywood, for respondents.

PARKER WOOD, Justice.

Plaintiffs sought damages by reason of alleged fraud in the exchange of real property. The complaint also contained a cause of action for declaratory relief. In a nonjury trial, judgment was for plaintiffs for $30,000. Defendants Griffin appeal.

Appellants contend that the court erred: (1) in excluding certain testimony offered by them on the subject of damages; (2) in permitting plaintiffs to amend the complaint to conform to proof—by alleging a cause of action for reformation of escrow instructions; and (3) in denying defendants an opportunity, after such amendment, to present further evidence on the issues presented by the amendment.

Plaintiffs (Julius Goren and Nettie Goren, husband and wife; and Osias Goren and Dorothy Goren, husband and wife) were owners of an orange grove near Lindsay, California. Defendants T. L. Griffin and Jean F. Griffin (husband and wife) were owners of a motel in Riverside. On April 28, 1949, plaintiffs Julius Goren and Osias Goren (father and son) and defendant Mr. Griffin signed escrow instructions for the exchange of said properties and certain personal property. The escrow instructions provided, in part, that the ranch would be conveyed to defendant Mrs. Griffin free of encumbrances, and that the property referred to as the motel would be conveyed to plaintiffs subject to an existing encumbrance of $16,200 and a second trust deed of $30,000 to be executed in favor of Mrs. Griffin. The instructions provided that plaintiffs would deliver into escrow a bill of sale for certain personal property which was at the ranch; and that defendant Mr. Griffin would deliver into escrow a bill of sale for certain personal property which was at the motel. The escrow was closed in May, 1949, and plaintiffs took possession of the motel, and Mrs. Griffin took possession of the ranch.

The motel, known as the Wagon Wheel Motel and consisting of 71 units, was on a rectangular parcel of land which according to a statement at the bottom of the escrow instructions was approximately 500 feet in length and 396 feet in width.

The south boundary of the land, about 512 feet in length, was Magnolia Boulevard. The east boundary was a hedge fence. When plaintiffs acquired the property they believed that the west boundary was a wooden fence, which extended about 396 feet along Tyler Avenue. The fact was that the west boundary was about 21 feet east of the fence. In other words, a strip of land about 21 feet wide and 396 feet long, which plaintiffs believed at the time of the transaction was a part of the motel property, was not a part of the property. The strip of land was owned by the city of Riverside. A substantial part of the main building of the motel was on the strip. (That part of the building was approximately 7 feet by 200 feet.)

The legal description of the motel property, as written in the escrow instructions, was a correct description of the property owned by defendants Griffin, that is, the description did not include the strip of land owned by the city. Defendants Griffin had obtained the motel, under a trust deed foreclosure, about five months before the time the Griffins exchanged the motel for plaintiffs' ranch. When the Griffins entered into the escrow with plaintiffs they described the motel property in the escrow instructions in the same manner as the property was described in the trustee's deed under which they acquired the property.

In June, 1951 (about two years after the exchange), the city of Riverside installed light poles on the strip of land above referred to. In July, 1951, plaintiffs caused a survey to be made of the motel property. The survey showed that the strip of land was not a part of the motel property, as legally described in the escrow instructions. Plaintiffs thereupon informed Mr. Griffin regarding the survey and gave him a copy of the survey record.

This action was commenced October 28, 1952. There were four alleged causes of action in the complaint. In the first cause of action it was alleged, among other things, that defendants orally represented to plaintiffs that the southern boundary of the motel property was 542 feet in length, the western boundary was 400 feet in width, and that all the motel buildings were within the rectangular area of those dimensions; plaintiffs relied upon the representations; the representations were false and unwarranted, or should have been known by defendants to be false and unwarranted, in that, the southern boundary was only 511.67 feet in length and the westerly portion of the land, 21 feet along the southern boundary line and 400 feet in depth which purportedly had been conveyed to plaintiffs, was not owned by defendants but was owned by the city of Riverside; plaintiffs did not know the true facts pertaining to the dimensions of the motel property until 1951 when employees of the city erected power lines; thereafter plaintiffs caused a survey to be made and the survey showed that the westerly strip of land, 21 feet wide, belonged to the city and that the motel buildings encroached upon the strip; that plaintiffs must vacate the strip of land and remove the buildings therefrom; plaintiffs have been damaged in the amount of $50,000; by reason of the substantial investment of money, time and labor in said property by plaintiffs, a rescission of the transaction would not adequately compensate plaintiffs for the damage sustained and therefore the action is for damages and not for rescission.

The second cause of action alleged that defendants were negligent in inducing plaintiffs to believe the said representations.

The third cause of action alleged that about April 28, 1949, it was orally agreed "between defendants" that the property to be conveyed by defendants to plaintiffs included all the land and the buildings which were within the said rectangular area, the southern boundary of which was 542 feet in length and western boundary of which was 400 feet in length; and the consideration paid by plaintiffs was based upon the inclusion of said westerly strip of land and the buildings in "defendants' conveyance" to plaintiffs; defendants breached their agreement in that their conveyance did not include said property; by reason thereof plaintiffs have sustained damage in the amount of $50,000, being the value of the property not conveyed to plaintiffs.

The fourth cause of action alleged that a controversy exists between plaintiffs and defendants Griffin with respect to the rights and liabilities of the parties in connection with the exchange agreement and the deed of conveyance, in that, defendants assert that plaintiffs are not entitled to be compensated or entitled to any relief by reason of the exclusion of said property from said deed, upon the ground that the property was not owned by defendants Griffin but was owned by the city of Riverside.

Defendants Griffin filed two answers. One was a general denial of all allegations of the complaint. The other answer admitted the allegations that there had been an exchange of properties, but denied there was any fraud or damage, and alleged that at the time of the transaction plaintiffs knew the dimensions of the motel. It was also alleged therein that the complaint did not state facts sufficient to constitute a cause of action, and that the alleged causes of action were barred by the statute of limitations. It was also alleged that the first and second causes of action were barred by laches, in that, the alleged representations were made prior to May 28, 1948, and the complaint was filed October 28, 1952, and no reasons were alleged for failure to discover the falsity of the representations before 1951.

At the time of filing the second answer, the defendants Griffin filed a cross-complaint wherein George and Margaret Rose were cross-defendants. It was alleged therein that on December 14, 1946, Mr. and Mrs. Rose sold the motel to third parties and took from the third parties a note for $43,000, secured by a trust deed on the motel; on April 28, 1948, the Griffins entered into negotiations with the Roses for the purchase of the note and trust deed, and that the Roses then orally represented to the Griffins that the motel comprised a rectangular area, the southerly boundary of which was 542 feet in length, and the westerly boundary was 400 feet in length and all the buildings were within that area of those dimensions; that the Griffins relied upon the representations and were induced thereby to purchase the note and trust deed; on November 9, 1948, at the trustee's sale which was held pursuant to provisions of the trust deed, the Griffins purchased the motel for $42,682.26; on May 28, 1949, the Griffins conveyed the motel to plaintiffs Goren. It was also alleged therein that the representations of cross-defendants Rose were false and known by them, or should have been known by them, to be false, in that, the southerly boundary was not 542 feet in length but was only 511.67 feet in length, and the westerly portion of the property comprising a strip of land approximately 21 feet in width was not on December 14, 1946, or at any time, owned by the Roses but was owned by the city of Riverside; the Griffins did not know or discover the true facts pertaining to the property until 1951; on October 28, 1952, plaintiffs Goren filed an action (the present action) against the Griffins for damages arising out of the sale of the motel and out of the encroachment of the motel buildings onto the property of the city; by reason of the fraudulent representations of the Roses, the Griffins are required to defend said action and spend large sums of money in defense thereof to the damage of the Griffins in the amount of $10,000, and if the Gorens prevail in their action the Griffins will be required to pay damages to them. The second, third and fourth causes of action of the cross-complaint were in substance the same, with reference to the Griffins' purchase of the trust deed, as the second, third and fourth causes of action of the complaint were with reference to the Gorens' purchase of the motel.

In January, 1954 (about 11 months before the trial), plaintiffs Goren amended their fourth cause of action to read that it was the intention and agreement of the parties (the Griffins and Gorens), as mutually expressed by them, that the real property and the deed were to include said westerly 21-foot strip of land, together with the buildings thereon; the deed did not include said strip, and the strip was the property of the city of Riverside; plaintiffs must vacate the strip and remove the buildings from it at a cost of $40,000; a controversy exists as to the rights and liabilities of the parties arising in connection with the exchange, in that, defendants assert that plaintiffs are not entitled to be compensated or entitled to any relief by reason of the exclusion of said property from said deed, upon the ground that said property was not owned by the defendants Griffin but was owned by the city. By said amendment, the prayer of the complaint was amended to include a prayer for reformation of the contract.

Near the beginning of the trial, the second cause of action (alleging negligent representation) and the cross-complaint were dismissed upon stipulation.

Upon stipulation, the issue of liability was tried first.

Mr. Drannon, a real estate broker, testified that plaintiffs listed their orange grove with him for sale or exchange; prior to negotiations with Mr. Griffin, the witness (Drannon) and plaintiffs Julius and Osias Goren stopped in front of the motel, and Drannon entered the motel and talked with the manager; during that time the two Gorens remained in the automobile; the manager said that Mr. Griffin owned the motel, and that he (manager) was not authorized to give any information regarding the property; a few days thereafter, Drannon went to Griffin's real estate office in Los Angeles and talked to him regarding an exchange of the orange grove for the motel; Griffin said he was not interested; on the way out of the office, Drannon talked with Mr. Greiner, a real estate salesman, who told him that there might be a chance to make the exchange; at that time Greiner gave him a sketch of the motel property; the sketch, received in evidence as Exhibit 5, looks like the sketch that Greiner gave to him; thereafter Drannon took Julius and Osias Goren to the motel and showed the motel to them, and they used the sketch as a guide in determining the boundary of the property; the manager went with them when they looked through several of the motel units; after that visit to the motel, Drannon gave the sketch to Greiner; the next time Drannon saw the sketch it was at the office of plaintiffs' counsel; thereafter the exchange was made; Drannon, Julius Goren, and Griffin were present when the escrow instructions were being prepared; Drannon did not see the sketch at the escrow.

Julius Goren testified that during the negotiations he did not have any dealings directly with Griffin or Greiner; he (Goren) made an offer of exchange through Drannon; Drannon showed him a sketch of the property, which sketch is Exhibit 5; thereafter when he (Julius), his son Osias, and Drannon went to the motel they had the sketch with them; they saw the manager of the motel, who said he was working for a management company (which managed the motel); he (witness) inspected the motel; he did not pay attention to anything on the sketch; he was interested in the location of the buildings and the physical layout and condition of the property; he, Drannon, and the manager went into several units of the motel and they walked from "corner to corner on the property"; he (witness) saw a fence along Tyler Avenue, which fence was about 18 to 20 feet from the cabins; he saw a hedge fence at the easterly side of the property; he was at the motel about two hours; Drannon took the sketch with him when they left the motel; at another date, before the exchange agreement was made, the four plaintiffs went to the motel and looked it over; the manager showed the motel again; at the closing of the escrow he (witness) saw the sketch, Exhibit 5, among the papers which Mr. Griffin brought to the escrow, and he (witness) asked if he would be permitted to keep the paper; one of the three men there let him have the sketch, and he kept it.

Osias Goren testified that Drannon showed the sketch to him and his father; when they were inspecting the property they used the sketch to determine the positions of the buildings; the property lines on the sketch were pretty much as they were represented by the apparent property lines on the land itself; he, his father, the manager, and Drannon walked along the boundaries of the property; the boundaries seemed pretty well outlined by landmarks—Magnolia Boulevard, the fence along Tyler Avenue on the west, a fence along the north part of the land, and a hedge fence on the east side; these enclosed an area which was landscaped and tended to by the management; he saw the sketch at the escrow, where it was in Mr. Griffin's files; Julius Goren asked if he could have Mr. Griffin's papers which related to the property, and Mr. Griffin gave him papers which included the sketch.

Mr. Griffin testified that at the time he was negotiating for the purchase of the trust deed from the Roses he assumed that the westerly boundary was the fence; he was first informed of the encroachement in 1951 when Julius Goren gave a copy of the survey to him; when he sold the motel to plaintiffs he intended to sell all the property he received on the foreclosure of the trust deed; he owned the property about eight months; he employed the Walters Company to manage the motel; that company had no authority to show the property for sale; he never saw the sketch (Exhibit 5) before this action was filed; he did not meet Julius or Osias Goren before he went to the escrow; he did not hand any map of the property to Julius Goren, or see any one hand a map to him, at the escrow; he had only one map and that was drawn by his insurance company, showing the locations of the buildings but it did not show the boundaries; it was a pencil sketch; he had the map during the time the Gorens were negotiating, through Drannon, for the exchange; but he could not find the map thereafter.

Mr. Greiner testified that in 1949 he was a real estate salesman, working under Mr. Griffin's broker's license; in April, 1949, Julius Goren came to his office and talked with him about the exchange; he gave Julius Goren a "set-up" of the motel, but it did not show the dimensions of the property; he did not give the sketch (Exhibit 5) to Goren; to the best of his recollection he never saw the sketch before his deposition was taken; he did not talk with Julius or Osias Goren before the escrow was started; he did not see the sketch at the escrow.

After the attorneys had argued the question of liability, plaintiffs asked for permission to amend the fourth cause of action (declaratory relief) to conform to proof. Defendants' objection to the amendment was overruled. The judge said that plaintiffs are "permitted to file an amendment to the complaint setting out a cause of action asking for a reformation of the contract based on the mutual mistake of fact." Defendants asked for permission to file an answer setting up defenses to the amendment. The motion was denied. Then defendants made a motion that they "be permitted to later open the proof in order to establish additional defenses that they would have available to the fourth cause of action as amended." The motion was denied. The judge said they would proceed with "the question of damages, the court having ruled that there is liability." Defendants asked if the amendment would be filed. The judge said it was not necessary to file the amendment—that plaintiffs could proceed on the theory that the other cause of action was pending. (That statement was made on December 28, 1954.) Defendants asked for a continuance. The judge replied that that might be a proper motion after plaintiffs concluded their presentation (referring to damages), and then if defendants needed additional time for evidence the motion might be made. Defendants' counsel then said: "For the purpose of giving evidence bearing on damages." The judge said that it "may appear that that is the proper thing to do. He may fall down flat on his face on the other part [damages]." The judge said that it was not necessary at that time to rule on the motion (for a continuance), that he would let it go, and that defendants might renew the motion.

The trial proceeded on the issue as to damages and was concluded January 31, 1955. The amendment to conform to proof was filed January 28, 1956.

In that amendment it was alleged that the legal description stated in the escrow agreement was erroneous in that it did not accurately describe the premises intended to be conveyed, and contrary to the mutual intention of the parties the description omitted an area of land approximately 21 feet by 396 feet upon which certain improvements of the motel were located; that in order to make the agreement conform to the actual intention of the parties, it is necessary that the description in the agreement be reformed so as to encompass said area; plaintiffs have paid the agreed compensation for the premises as correctly described; upon information and belief plaintiffs allege that defendants do not have, and have not had, title to the omitted area; a controversy exists between the parties as to the rights of plaintiff under the escrow agreement, in that, defendants assert that plaintiffs are not entitled to any relief on account of the erroneous description. The prayer of the amendment was that the escrow agreement be reformed and corrected.

After plaintiffs ascertained from the survey that a portion of the main building, approximately 7 feet by 200 feet, was on the 21-foot strip owned by the city, they purchased the 7-foot strip (extending the full 396 feet) from the city for $3,500.

Julius Goren testified that the value of the orange grove in April, 1949, was $120,000, which amount he itemized as follows: land, $70,000; equipment, $35,000; two houses, $15,000.

Osias Goren testified that the value of the orange grove in May, 1949, was as follows: 100 acres of orange trees, $1,000 an acre; 18 acres, between $500 and $600 an acre; house and barn, $10,000; equipment, $35,000. (A total of approximately $155,000.)

James J. Crilly, called as a witness by plaintiffs, testified that he had been a real estate broker since 1933; his place of business was Los Angeles; he did not know any particulars regarding the orange grove involved here. He testified further, over the objection of defendants, that in his opinion the value of orange groves in the Lindsay area was from "$1,000 to $2,000," and the value of land in that area in 1949 was around $500 an acre.

Mr. Griffin testified that the reasonable value of the orange grove in April, 1949, including the 120 acres, the trees, houses and equipment was $35,000; and that he sold the property to Mr. Page a month or two after he acquired it.

Mr. Page, called as a witness by defendants, testified that he had been engaged in the real estate business in Lindsay for 42 years; he was acquainted with the values of orange groves in that area; he bought the orange grove from Mr. Griffin; he was acquainted with the reasonable value of the orange grove in April, 1949; the reasonable value of the orange grove was $300 an acre at that time; the reasonable value of the equipment was "somewhat less than $2000." Defendants asked him when he purchased the grove and how much he paid for it. Objections by plaintiffs to those questions were sustained. Defendants made an offer to prove that Mr. Page purchased the property for $35,000 within two months after the sale to Mr. Griffin. An objection by plaintiffs to the offer of proof was sustained.

Mr. Kroells, called as a witness by plaintiffs, testified that he had been a citrus grower in Lindsay for 44 years; he was familiar with the orange grove involved here; in April, 1949, the property had no value as an orange grove, but its value at that time as land, including the houses and equipment, was $300 an acre. (A total of $36,000.)

Julius Goren testified that the value of the motel in April, 1949, including the 21-foot strip, was $170,000; the value of the property without the 14-foot strip (width after buying 7 feet from city) was approximately $135,000; the value of the property without the 21-foot strip was approximately $80,000.

Osias Goren testified that the value of the motel property in April, 1949, including the 21-foot strip was $150,000; the value of the property without the 14-foot strip was approximately $110,000.

Mr. Wagner, called as a witness by plaintiffs, testified that he had been a realtor and appraiser in Riverside since 1926. He testified further, in effect, that the value of the motel property in April, 1949, including the 21-foot strip, was $152,500; the value of the property without the 21-foot strip was $124,300. He also testified that the difference between those two valuations was based on the following estimates: value of the 21-foot strip, $10,500; moving trees, fences, building, etc., $6,700; consequential damages, such as easement retained by the city and loss of rentals during remodeling, $10,000.

T. E. Bower, called as a witness by defendants, testified that he had been a real estate broker in Riverside since 1948; the value in 1949 of the property conveyed by defendants to plaintiffs (with the property line 21 feet east of the fence and 7 feet under the buildings) was $133,000; if the property line was 14 feet east of the fence (that is including the 7 feet purchased by plaintiffs from the city of Riverside) the value was $136,000; if the property line was the fence, the value was $137,000.

Harry Iverson, called as a witness by defendants, testified that he had been a real estate broker in Riverside since 1930; the value in 1949 of the property conveyed by defendants to plaintiffs was $133,000; if the property line was the fence, the value of the property was $136,000.

The court found that defendants Griffin represented to plaintiffs that the property comprised a rectangular area, the westerly boundary of which was a board fence which fronted on Tyler Avenue a distance of approximately 396 feet, and that all the land and improvements belonging to the motel property were within said rectangular area; plaintiffs relied upon said representations and would not have entered into the agreement had it not been for their reliance upon the representations; it was the mutual intention of the plaintiffs and defendants Griffin that the escrow agreement would have to include all the property referred to in the representations; that due to mutual mistake of said parties the description in the agreement did not describe all the property referred to in the representations, in that, the agreement did not include said area of land which was approximately 21 feet by 396 feet along Tyler Avenue, and upon which there were improvements which were a part of the motel; defendants Griffin did not own, and had not owned, said area of land; the area was owned by the city of Riverside; the said representations of defendants in respect to the area were false and unwarranted, and should have been known by defendants Griffin to be false and unwarranted at the time they were made; plaintiffs performed everything on their part to be performed under the agreement; defendants Griffin conveyed to plaintiffs the property described in the agreement; plaintiffs entered into possession of all the motel property referred to in defendants representations, including the area of land approximately 21 feet by 396 feet; thereafter until 1951 plaintiffs invested approximately $50,000 in improving the motel property; plaintiffs did not own or discover that defendants had never owned the omitted area until 1951, nor could they by the exercise of reasonable diligence have discovered that fact at any time prior thereto; at said time plaintiffs promptly notified defendants of said discovery and the fact that the improvements encroached and trespassed upon land owned by the city; by reason of the substantial investment of money, time and labor in improving the property, a rescission of the purchase would not be practicably feasible, nor would plaintiffs be adequately compensated thereby; by reason of the foregoing findings, plaintiffs have sustained damages in the amount of $30,000; plaintiffs are entitled to reformation of the escrow agreement, reforming it to conform to the intention of the parties.

At the close of the trial, the judge said that judgment would be in favor of defendant Greiner. (Apparently no judgment was entered as to him.) The judgment provided that plaintiffs have judgment against defendants Griffin for reformation of the escrow agreement by reforming the description in the agreement to include said area of land which was approximately 21 feet by 396 feet, lying to the west of land described in the agreement, that said reformation was for the purpose of correctly delineating the agreement of the parties, that plaintiffs have judgment against defendants Griffin for $30,000, and for costs.

[1] Appellants (the Griffins) contend that the court erred in sustaining plaintiffs' objections to their questions (1) as to when Mr. Page bought the orange grove from the Griffins, and (2) as to the amount he paid for it. They also contend that the court erred in sustaining plaintiffs' objection to their offer to prove that Mr. Page bought the grove within two months after the Griffins acquired it, and that he paid $35,000 for it. As above shown, the first cause of action was for damages for fraud in exchange of property. Section 3343 of the Civil Code provides, in part: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." The measure of damages set forth in that section is referred to as the "out-of-pocket loss rule." Eatwell v. Beck, 41 Cal.2d 128, 135, 257 P.2d 643, 645. The questions referred to were asked, and the offer of proof was made, while Mr. Page was testifying regarding the value of the orange grove which he had purchased from the Griffins. The objections to the questions and the offer of proof should not have been sustained. In Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935, wherein there was a cross-complaint for damages for fraud in the sale of real and personal property, there was evidence as to the price obtained at a sale of the identical property in question, and it was held therein that the evidence was admissible. It was said therein at page 758 of 31 Cal.2d, at page 943 of 192 P.2d: "[A]uthorities elsewhere [outside this state] are practically unanimous in holding that evidence of other sales of the identical real property is admissible. [Citations.] There is no reason for extending the much-criticized exclusionary rule to evidence of sales of the *identical* property in question, whether realty or personalty * * *." In Eatwell v. Beck, 41 Cal.2d 128, at page 134, 257 P.2d 643, at page 647, it was said: "Evidence of 'sales of the *identical* property in question, whether realty or personalty' is also a proper indicium of value." In the present case, the court erred prejudicially in sustaining the objections to the questions and the offer of proof.

[2] Appellants also contend that the court erred in permitting plaintiffs to amend the complaint to conform to proof by alleging a cause of action for reformation of the escrow instructions on the ground of mutual mistake of fact. The issue as to liability for damages was tried first, and apparently that issue was tried on the theory of fraud as alleged in the first cause of action. After the judge had ruled that there was liability and had granted the motion to amend to conform to proof, counsel for defendants asked if the ruling as to liability was made with reference to any particular cause of action. The judge replied, "No, I am talking about the first cause of action. That is the only one that we have been discussing." The first cause of action, alleging fraud, was of course a proceeding at law. The amendment to conform to proof, alleging a cause of action for reformation of escrow instructions, was a proceeding in equity. Prior to granting the motion to amend to conform to proof, it was stipulated that the city of Riverside owned the 21-foot strip at the time of the exchange and for some time prior thereto. Also, the amendment to conform to proof, which was filed later, alleged that the Griffins did not own the strip. Under such circumstances it is clear there could not be specific performance of such a reformed agreement. In Carpenter v. Froloff, 30 Cal.App.2d 400, 86 P.2d 691, there was a cross-complaint by one White against the Froloffs for damages for breach of agree-

ment, wherein it was alleged that through a mistake known to the Froloffs a written agreement, and a deed deposited in escrow, did not accurately describe the real property which the Froloffs (as sellers) exhibited to White and represented that they owned. (Apparently the legal description in the agreement and deed did not include certain mining property which was exhibited, but the description did include other land.) With permission of the court, White amended the cross-complaint to conform to proof, and prayed for reformation of the agreement so that it would include a description of the mining property. The court found that the Froloffs had breached the agreement and that White was entitled to damages; and that White was entitled to have the agreement reformed to include a description of the mining property. The appeal therein was on the judgment roll. The Froloffs contended that the trial court erred in reforming the agreement. On appeal, the court said (30 Cal.App.2d at pages 407–408, 86 P.2d at page 695) that since there was nothing in the pleadings or the findings to the effect that the Froloffs owned or were able to sell or intended to sell the property as described in the findings, there was an omission of a finding necessary and material to sustain the judgment. The court also said (30 Cal.App.2d at page 408, 86 P.2d at page 696): "Unless appellants [the Froloffs] owned, or had acquired the right to own, the lands they represented they were selling, how could they specifically perform the contract as reformed? And if appellants could not specifically perform the contract, reformation of necessity would be futile. The findings therefore wholly fail in material particulars to make out a case for the application of the remedy of reformation of the contract." The judgment therein was reversed. In the present case, as above shown, it was established by stipulation and the amendment itself that the Griffins did not own the 21-foot strip. The plaintiffs (Gorens) knew, prior to seeking equitable relief by way of reformation, that defendants Griffin did not own the strip and could not specifically perform such reformed agreement. The court erred in granting the motion to amend the complaint to conform to proof.

By reason of the above conclusions, it is not necessary to decide other contentions on appeal.

The judgment is reversed.

VALLÉE, J., concurs.

SHINN, P. J., did not participate.

152 Cal.App.2d 16

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Vincent STANLEY, Defendant and Appellant.
Cr. 5869.

District Court of Appeal, Second District, Division 2, California.
June 20, 1957.

Defendant was convicted of bookmaking, and from a judgment and an order denying a new trial in the Superior Court, Los Angeles County, Allen T. Lynch, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held that the evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1023(12)

An order granting probation falls within the term "the judgment" for purposes of an appeal. West's Ann.Pen.Code, § 1237, subd. 1.

2. Criminal Law 🔑1144(13)

On appeal from judgment of conviction, the evidence must be viewed most favorably to the People.

3. Gaming ⚷98(3)

In prosecution for bookmaking, evidence that horse races involved were run on the days mentioned and that defendant took bets on them and paid off the winners sustained conviction. West's Ann.Pen. Code, § 337a, subd. 3.

4. Gaming ⚷73, 96

The statute penalizing bookmaking is violated when money is received as a wager on a race and proof of the actual running of the race is unnecessary. West's Ann.Pen.Code, § 337a, subd. 3.

Walter L. Gordon, Jr., and James L. Garcia, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

[1] Defendant was convicted of violation of subdivision 3, § 337a, Penal Code, bookmaking.[1] Motion for new trial was denied, further proceedings suspended and probation granted. Defendant appealed from "the judgment." For purposes of appeal the order granting probation falls within that term. Pen.Code, § 1237, subd. 1. Defendant also appealed from the order denying a new trial.

The sole contention made by appellant's counsel is that the evidence is insufficient to establish a corpus delicti, in that there was no proof that horse races upon which defendant took bets were actually run. Counsel say in their brief: "There is no evidence that any other horse was in the eighth (8th) race at Tropical Park, competing against 'Topside'. There is no evidence in the record that 'Wolf Junior' was a horse. There is no evidence that 'Wolf Junior' was competing against anything. Therefore, the evidence is insufficient in this respect. * * * Again, there is no evidence in the record that 'Aces Count' was competing against any other beasts or horses."

Defendant testified that he was engaged as a bookmaker prior to 1954, that he was then convicted of that offense and was on probation when the instant crime was committed. He admitted that he was then engaged in taking "layoff bets" from small bookmakers. "The Court: What difference does it make? He has already admitted that during that period he was operating as a bookmaker."

[2] The evidence, viewed most favorably to respondents (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778), shows the following. Police Officer James A. Branch, on January 16, 1956, visited a "cash room," a place for taking and relaying bets, located at 5750 Crenshaw Boulevard in the city of Los Angeles. It was the back room of a pretended television shop. As he stepped on a rubber mat at the front door a bell rang, a face appeared in a peep hole in a partition and he was admitted to the back room. There he saw the usual accouterments of a bookmaking activity, table, numerous chairs, telephone, scratch sheets, magic pad for recording bets, betting markers, and the like. On a prior occasion there had also been a radio giving results of races. Betters were identified by initials or numbers. Races were then being run at Santa Anita and Tropical Park race tracks. Defendant Stanley was present when Branch entered the cash room on that day. One

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[1] Penal Code, § 337a: "3. Every person, * * * Who * * * receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, * * * staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, * * * upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, * * *

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

Jesse Sanford, with whom Branch previously had bet, was not in sight, so he asked defendant whether he could place a bet with him. Receiving an affirmative answer he handed defendant $6 and bet $2 to win on a horse named "Topside" which was running in the eighth race at Tropical Park, $2 to win on "Wolf Junior", running in the ninth race at the same track; also a $2 parlay from Topside to Wolf Junior. Defendant took the bets and placed the money in his pocket. On the preceding Friday, the 13th, Branch had bet $2 with Sanford on "Aces Count" in the first race at Santa Anita. On this occasion, the 16th, he asked defendant to call his Vermont location and get an o.k. for payoff on that horse which had won. Defendant did so and then paid Branch $6.10 on that winner. Someone asked defendant where his radio was and he said the cops had taken it and "I am lucky to even be in business." Topside won on the 16th and defendant later collected from Sanford $3.70 on that bet. The collection was made at defendant's cash room at 5103 South Vermont Street. After his arrest defendant told Officer Gough that he had two cash rooms operating, one "supposedly a swap shop; the one on Crenshaw was a television front." He later admitted having three such places and said "that he would close them all if we would allow him to stay at the one at Vermont as a home base." After his arrest he told Officer Gough, who had arrested one of his patrons and then had him in custody, "I'd rather you take one of my bookmakers than one of my betters because once you start booking the betters, they don't come back." Gough further testified: "I asked him how long he had been making book or taking action, and he stated that he had been on and off for three years, that prior to that time and during the time that he wasn't taking action on the horses that he was a golf player. * * * He asked if he could get the radio back from the arrest we made at 4519 Southwestern, * * * that he would like to get it back. He stated that he intended to make book as long as he could, that there was more money in it, and his bills were running pretty high." Prior thereto, on the 14th of January, when Gough had arrested one of defendant's bookmakers at the Crenshaw location, Stanley said: "Do you have to book the money? If you do, I can't pay my betters off."

[3] The evidence leaves no room for doubt that the horse races in question were run on the days mentioned, that defendant took bets on them and paid off on the winners.

[4] In support of the baseless claim that there was no evidence that the races actually were run, counsel rely upon the single case of People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818, which makes no such holding and which has been repeatedly criticized by this court, also disapproved by the Supreme Court. In People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981, 984, it is said: "The offense charged in count one, the violation of subdivision 3 of section 337a, is committed when money is received as a wager on a race. People v. Hoffman, 94 Cal.App.2d 379, 210 P.2d 885. The testimony of Officer O'Keefe concerning the transaction between defendant and the newsboy, the piece of paper on which defendant recorded the bet, and defendant's admissions with respect to the business in which he was engaged, are clearly sufficient to support the verdict of the jury that defendant was guilty of taking a wager on the outcome of a horse race. Defendant relies on People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818, in which it was held that evidence somewhat similar to that in the present case was insufficient to support a conviction under subdivision 3. However, it apears, as stated in the case of People v. Hoffman, supra, 94 Cal.App.2d [at page] 382, 210 P.2d at page 887, that in the Banks case 'the appellate court weighed the evidence and decided in accordance with the testimony of witnesses who were not believed by the trial court and contrary to the evidence that the court had accepted as true.' People

v. Banks, supra, is disapproved insofar as it is in conflict with our holding that the evidence is sufficient to support the judgment as to count one." With reference to the Banks case, see also, People v. Hoffman, 94 Cal.App.2d 379, 382, 210 P.2d 885; People v. Oliverio, 99 Cal.App.2d 743, 745, 222 P.2d 245; People v. Lopez, 103 Cal. App.2d 291, 293, 229 P.2d 404; People v. Pollack, 105 Cal.App.2d 581, 586, 234 P.2d 176. Further to the effect that proof of the actual running of the race is unnecessary see People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1; People v. Carroll, 54 Cal.App. 684, 686, 202 P. 885; People v. Sutherland, 59 Cal.App. 462, 463, 210 P. 965; People v. Larum, 111 Cal.App.2d 732, 245 P.2d 323. The reason is thus stated in People v. Carroll, supra, 54 Cal.App. at page 686, 202 P. at page 885: "Defendant first contends that it was essential that the prosecution make proof that a race upon which the defendant sold pools and accepted bets had been actually run, and that the evidence was insufficient to show that fact, and that the various documents introduced were incompetent for that purpose. The statute, in our opinion, does not require that the prosecution shall make proof that a race or contest upon which bets are taken or pools made shall be an actual one. The statute has been subjected to several amendments which have changed its original form and make inapplicable decisions rendered prior to the amendments. The words 'purported bet or bets' and 'purported trial or contest' have been carefully placed within each subdivision of the section. Those terms must be given the meaning which the words ordinarily imply, and it seems quite plain that the Legislature intended that the offense as defined in the section should be complete whenever it was shown that a person engaged in any of the acts described, having reference to a race or contest, actual or pretended."

This appeal is patently frivolous. Rule 13 of the Rules of Professional Conduct of the State Bar of California commands that an attorney shall not take or prosecute an appeal merely for delay, or for any other reason, except in good faith. 33 Cal.2d 30. The conclusion is inescapable that the instant appeal could have been taken for no purpose other than that of delay.

The judgment (order granting probation) is affirmed. Order denying new trial is also affirmed.

MOORE, P. J., and FOX, J., concur.

152 Cal.App.2d 51

Morris J. BERNSTEIN, Plaintiff, Cross-Defendant and Respondent,

v.

Abraham RUBIN, Administrator with the Will Annexed of the Last Will and Testament of Alexander Rubin, deceased, et al., Defendants, Cross-Complainants and Appellants.

Civ. 17165.

District Court of Appeal, First District, Division 2, California.

June 24, 1957.

Action for money had and received. Defendant filed a cross-complaint and, after his death, the administrator with the will annexed of his estate was substituted as party defendant and cross-complainant. From a judgment of the Superior Court, City and County of San Francisco, H. A. Van Der Zee, J., for plaintiff, defendant appealed, and from a portion of the judgment denying plaintiff interest, he appealed. The District Court of Appeal, Draper, J., held that plaintiff having filed a request, as a creditor of decedent, for special notice in estate proceedings, and administrator having been formally substituted, pursuant to parties' stipulation, by order filed before expiration of statutory time for filing claims against estate, amended claim for amount sued for was properly filed by plaintiff after such time, though no formal claim was filed within statutory period.

Judgment affirmed.

1. Courts ⇨92

Where an appellate court bases its decision on two grounds, each of them is a ruling on questions involved and neither is mere dictum.

2. Executors and Administrators ⇨232

Where plaintiff in action for money had and received, pending at time of defendant's death, filed a request, as creditor of decedent, for special notice in proceedings in matter of decedent's estate, within statutory time for filing claims against estate, and administrator with will annexed of estate was formally substituted as defendant in action, pursuant to parties' stipulation, by order filed before expiration of such time, amended claim for amount sued for was properly filed thereafter, though no formal claim was filed within such period. West's Ann.Prob.Code, §§ 700–709.

3. Appeal and Error ⇨1041(2)

Where judgment for plaintiff in action for money had and received was based solely on two common counts of original complaint, stating causes of action at law, and there was no suggestion that any evidence received was admissible only under third count, stating cause of action in equity, addition of third count by amended complaint was not prejudicial to defendant.

4. Interest ⇨19(1), 44

Generally, liquidated claims bear interest from their due date, and existence of unliquidated offset does not destroy right to interest.

5. Interest ⇨39(1)

Where amount of claim is not ascertainable by computation from contract or established market rates, interest is not allowable until amount due is determined by judicial process.

6. Interest ⇨18(2)

In action for money had and received by defendant under parties' joint venture agreement to share costs of goods purchased by plaintiff and profits of their resale, where substantially every item was disputed, period covered by agreement was in issue, many transactions involved were conducted wholly by plaintiff, who thus was only party who knew monetary results thereof, and evidence warranted inference that many figures were withheld by plaintiff until present litigation, trial court properly denied plaintiff interest.

Eugene H. O'Donnell, Leo H. Shapiro, V. G. Skinner, San Francisco, for appellants.

G. D. Schilling, Samuel Reisman, Los Angeles, for respondent.

DRAPER, Justice.

Defendant appeals from judgment for plaintiff in an action tried without jury. Plaintiff appeals from the portion of the judgment denying him interest. The action arises out of a joint venture agreement by which the parties agreed to share the costs of goods purchased by plaintiff, and to share the profits of their resale. Not the least confusing feature of the case is the fact that the goods, although purchased from "Northwest Tractor and Machinery Corp.," consisted of face creams and lotions.

The original complaint, for money had and received, was filed June 13, 1950. It named Alexander Rubin as defendant. During his lifetime, this defendant moved to dissolve an attachment and apparently answered and cross-complained. Alexander Rubin died December 28, 1951. On January 4, 1952, Abraham Rubin petitioned for letters of administration with the will annexed, and was appointed such January 18. Notice to creditors was first published January 21, 1952. One of the attorneys for Alexander Rubin in this action was attorney for the administrator, and the notice to creditors designated that attorney's office as the place for filing of claims against the estate. This attorney had a copy of the original verified complaint and of the bill of particulars in this case. Plaintiff, on May 21, 1952, served and filed request for special notice in the estate proceeding. By written stipulation dated May 20, 1952, it was agreed by counsel for both parties that Abraham Rubin, as administrator, should be substituted for Alexander Rubin, deceased, as "party defendant and cross-complainant" in the present action. Pursuant to this stipulation, order effecting this substitution was signed and filed June 9, 1952. No formal claim was filed in the probate proceeding before expiration of the time to file claims in July, 1952.

October 26, 1953, plaintiff filed in the probate proceeding his "Notice of Motion for Leave to File Amended Creditor's Claim." Accompanying the motion was a verified "amended claim" stating the substance of the complaint in this action, and the affidavit of one of plaintiff's attorneys. Both claim and affidavit alleged that copies of both the verified complaint and bill of particulars herein were in the possession of both the administrator and his attorney from the time of the administrator's appointment. The claim alleged that negotiations for settlement were carried on by counsel for plaintiff and for the administrator, and that the claim was rejected before May 20, 1952. After hearing, plaintiff's motion was granted by the probate court, and the amended claim was filed.

The principal issue is whether, on these facts, recovery by plaintiff is barred by the claims statute. Probate Code, Sections 700–708 provide for publication of notice to creditors and filing of claims. Section 709 provides: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim * * * or present it * * *; and no recovery shall be had in the action unless proof is made of such filing or presentation."

The trial court found that plaintiff presented his creditor's claim to the administrator, who rejected it on or before May 20, 1952, and that thereafter, and after expiration of the time for filing claims, the amended claim was filed with leave of the probate court and was rejected by the administrator.

The facts of this case support these findings (United States Gypsum Co. v. Shaffer, 7 Cal.2d 454, 60 P.2d 998, 999). In that case, plaintiff obtained a judgment during the lifetime of defendant, who appealed. Defendant died before determination of the appeal. The attorney who had represented her was appointed one of three executors of her will. Within the period for filing creditors' claims, plaintiff, without knowledge of decedent's death, moved to require a new undertaking on appeal. Notice of this motion was served upon the attorney-executor, who appeared in opposition to the motion, but without disclosing the fact that his client had died. After expiration of the time for filing claims, plaintiff moved in the probate court for leave to file an amended claim (no formal claim having been theretofore filed). The probate court granted leave to file an "amended claim" with the same effect as though it had been filed on the same date as service on the attorney-executor of the motion to require a new undertaking. The trial court, however, held that the motion in the civil action was not equivalent to the filing of a claim in the probate court or its service upon the executors, and upon that ground entered judgment for defendant. The Supreme Court reversed this judgment.

The court noted defendant's contention that the notice of motion presented to the executor was not intended as notice of a claim against the estate, "because it was entitled and filed in the action then pending, and not in the matter of the estate." But it rejected this contention, saying, 7 Cal.2d at page 458, 60 P.2d at page 999:

> "* * * The notice otherwise informed the executor of the identical judgment upon which the plaintiff based its claim and disclosed the plain-

tiff's intention to prosecute its rights thereunder. * * * A particular purpose of the requirement to file claims and of the limitation of time thereon is to inform the personal representatives and the court of the valid claims against the estate to the end that the estate be administered expeditiously. [Citation] The Code does not state what precise form such a claim shall take, and any notice presented to the executor or administrator which informs him of the outstanding claim is sufficient at least upon which to base an order permitting an amendment to supply the missing formalities or any deficiencies. [Citations]

"The effect of the order permitting the amendment to be filed was not to extend the statutory period within which claims may be filed. Such a contention is founded on the hypothesis that no claim or notice sufficient to support an order permitting an amendment was filed within the statutory period."

[1] It is true that the Supreme Court also pointed out that a claim is not required to be filed against an estate where judgment precedes death of the defendant. However, where an appellate court bases its decision on two grounds, each is a ruling on the questions involved, and neither is "mere dictum." King v. Pauly, 159 Cal. 549, 555, 115 P. 210.

[2] The case at bar is a stronger one than that before the court in United States Gypsum Co. v. Shaffer, supra. There, nothing was filed by plaintiff in the probate proceeding until after expiration of the time for filing claims. Here, request for special notice, reciting that plaintiff was a creditor, was filed within such period. Here, too, there was a formal substitution of the administrator as defendant, pursuant to stipulation and order made before expiration of the claims period. It seems clear that, under the rule of the United States Gypsum case, the trial court was fully justified in accepting the view of the probate court that an amended claim was properly filed.

[3] Defendant next contends that the third cause of action, added by an amended complaint, is in equity and not, as the original two causes of action, at law. Thus, he says, the amendment adding this count should not have been allowed. It is clear, however, that the judgment rendered is based solely upon the two common counts. It is not suggested that any evidence received was admissible only under the third count. Thus the addition of the third cause of action has not in any way prejudiced defendant.

Defendant also argues that the evidence is insufficient to support the judgment. It would serve no purpose to review the evidence of the numerous and involved transactions forming the basis of the many claims and counterclaims in this case. We have reviewed the transcript. It reveals direct conflict upon almost every issue, large or small. The evidence amply supports the judgment.

[4–6] Plaintiff seeks reversal of that portion of the judgment denying him interest before date of judgment. The general rule is that liquidated claims bear interest from the due date, and that the existence of an unliquidated offset does not destroy the right to interest. Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670. But where the claim is not subject to ascertainment by computation from the contract or from established market rates, interest is not allowable until the amount due has been determined by judicial process. Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408; Axell v. Axell, 114 Cal.App.2d 248, 250 P.2d 182; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100. In the case at bar, there was bitter dispute over substantially every item, large or small. There was an issue as to the period covered by the agreement. Many of the transactions here in issue were conducted wholly by plaintiff, who thus was the only party who knew the monetary results thereof.

The record contains basis for the inference that many of these figures were withheld by plaintiff until the present litigation. On all the facts, we conclude that the trial court properly denied interest. Axell v. Axell, supra.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
William C. HODGES, Defendant and Appellant. *
Cr. 5697.

District Court of Appeal, Second District, Division 2, California.
June 21, 1957.
Rehearing Granted July 10, 1957.
For Opinion on Rehearing see 315 P.2d 38.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Judgment and order affirmed, and appeal from verdict dismissed.

1. Criminal Law 🔑1023(10)

Appeal would not lie from verdict of guilty in prosecution for grand theft.

2. Criminal Law 🔑1144(13)

Upon appeal from judgment of conviction and order denying motion for new trial, the District Court of Appeal would assume, in favor of the verdict, every fact which the jury could reasonably have deduced from the evidence and would refrain from drawing contrary inferences of its own.

3. False Pretenses 🔑49(1)

Evidence sustained conviction of grand theft on theory of false pretense or of trick and device. West's Ann.Pen.Code, §§ 484, 487, subd. 1.

4. False Pretenses 🔑7(5)

Promise made with existing intent not to perform may constitute a false pretense within the grand theft statute. West's Ann. Pen.Code, §§ 484, 487, subd. 1.

5. Criminal Law 🔑1122(5)

Upon appeal from judgment of conviction and order denying motion for new trial, complaint concerning given instruction could not be considered even though Attorney General agreed that the instruction had been given, in view of facts that the instructions were not contained in clerk's transcript or in reporter's transcript on file in the District Court of Appeal and that no request was shown to have been made for inclusion of the instructions in the record. West's Ann.Rules on Appeal, rule 33(b).

6. Criminal Law 🔑1122(1)

In absence of showing that instruction of which defendant complained had not been requested by defendant and in absence of showing of context of the instruction, no reversible error could be predicated thereon even if the District Court of Appeal were to take cognizance of the instruction despite failure to include it in the clerk's transcript or in the reporter's transcript on file. West's Ann.Rules on Appeal, rule 33(b).

7. Criminal Law 🔑1177

Where defendant was convicted on first three counts of information and acquitted on fourth count, defendant would not be heard to contend that there was error in excluding certain evidence going to merits of fourth count only.

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* Opinion vacated 315 P.2d 38.

Joseph R. Laird, Jr., Garden Grove, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Los Angeles, for respondent.

ASHBURN, Justice.

[1] Defendant appeals from judgment of conviction of three charges of grand theft[1] and from order denying motion for new trial. He also attempts to appeal from the verdict which plainly is not appealable. People v. Tompkins, 109 Cal.App.2d 215, 217, 240 P.2d 356.

Appellant's principal argument is that the evidence is insufficient to sustain the verdict with respect to each of the first three counts.

Defendant was business manager of Gardena Valley News, a concern engaged in publishing a newspaper in the city of Gardena. He had been contacted by Mr. Medric Spenard, an importer and exporter, who handled Canadian newsprint and offered him 600 tons of the same. His company was desirous of buying 200 tons, but was unable to handle a 600-ton transaction. Defendant took Mr. Spenard to the Times-Mirror Company and there made a deal for it to buy the entire lot and then re-sell 200 tons to the Gardena concern. The delivered price to Times-Mirror Company was $190 a ton and Spenard had agreed to pay defendant a commission of $5 a ton. The Times-Mirror Company arranged a letter of credit for $114,000 to finance the deal. This was on August 9, 1955. On the 23rd of that month defendant told Mr. Lewis W. Daniels, the operator of a restaurant in Gardena, of the deal and said he needed $500 to give to the broker (Spenard) to insure shipment of the paper; he termed it "marginal" money required to get the paper shipped, meaning a part payment on the purchase price; defendant further told Daniels that if the thing did not materialize he would get his money back but if it went through he would receive $1,000 upon an investment of $500; he further said he would turn the money over to the broker, Spenard, so he could send it to Canada. Defendant did not mention a loan or say he wanted the money for himself; he did say he wanted it to turn over to Spenard to be used as partial payment on the newsprint. Relying upon these representations Mr. Daniels turned over to defendant $500 on that same day.

In the latter part of August defendant also told Mr. Dudley Gray, a Gardena attorney, of the newsprint deal; said he would make a profit of $10 a ton but needed $1,000 to $1,500 to pay down on margin and insure delivery of the paper; that he had to give the money to the Los Angeles representative of the Canadian seller; that $5 a ton was to go to Canada as "margin." He offered to give Gray half his profit for an advance of the necessary money. A week later he showed Gray the letter of credit and said the money for payment of the purchase price was guaranteed. On these representations Gray gave him $500 on September 15 and another $500 on October 3. This he did "for the purposes of paying the Canadian newsprint representative for sending it to Canada;" "[f]or the sole purpose of sending that money to Canada to guarantee shipment of this newsprint down here." There never was any mention of a loan between defendant and Gray.

Delays in delivery of the newsprint brought inquiries from Daniels and Gray as to the reasons. Defendant gave various explanations and finally told Gray he had given his money to Spenard; Gray telephoned Spenard and found that the statement was untrue. In fact, Spenard had never told defendant that money was necessary to guarantee delivery, had not asked defendant for any money or been promised any, and did not receive one dollar from him. On one occasion in answer to Daniels' inquiry defendant said that the deal was closed, the paper was in Los Angeles and he was going to Newport over the weekend to pick up the check and get the signature. Defendant himself testified, "I always needed money." Asked whether he intended to use Daniels' money for personal expenses he said: "Whatever came up first and needed it the worst." With reference to the Gray money: "What did you intend to do with the money which you got from Mr. Gray? A. Use it the same way; whatever needed first." He also admitted that he never gave any of the money received from Daniels or Gray to Spenard. When questioned by Deputy Sheriff Knowles defendant said that he had turned Gray's $500 over to Spenard, followed immediately by the statement that he could not recall, "that there might have been part of it." With respect to the Daniels money he told Knowles "that he had spent it in various ways * * * that he had spent it on his own personal expenses and debts."

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[1] Defendant was also charged with petty theft of $200 from one Bruce Jenkins, but he was acquitted on this, the fourth count, of the information, and it is not involved in the instant appeal.

The paper deal was never consummated. In early December Spenard received a telegram from the seller saying that the price had gone up $5 a ton. He then asked defendant whether he would split the increase with him. Defendant declined and apparently this impasse caused the failure of the deal. Defendant received no money from it and the demands made upon him by Daniels and Gray for the return of their money proved fruitless.

Other portions of the state's evidence had a tendency to offset some of the foregoing but it is not necessary to discuss it. Defendant himself was the only witness for the defense. His version of the transactions with Daniels and Gray varied substantially from their testimony, but he was impeached by proof of conviction of three prior felonies, viz., larceny as bailee in Colorado in 1931, issuing checks without sufficient funds in California in 1943, and grand theft in California in 1950. The jury and trial judge rejected his story and adopted that of the complaining witnesses.

[2, 3] The foregoing résumé of the facts is built upon testimony and inferences favorable to respondent pursuant to the established rule of review, which requires us to assume in favor of the verdict every fact which the jury could reasonably have deduced from the evidence, and to refrain from drawing contrary inferences of our own. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Those facts are sufficient to support a finding of grand theft (Pen.Code, §§ 484, 487, subd. 1), upon the theory of false pretenses or that of trick and device.

[4] The language of People v. Gilliam, 141 Cal.App.2d 749, 754, 297 P.2d 468, 471, is pertinent: "It is settled however, that a promise made with an existing intent not to perform may constitute a false pretense within the grand theft statute. People v. Ashley, 42 Cal.2d 246, 262–265, 267 P.2d 271; People v. Weitz, 42 Cal.2d 338, 343, 267 P.2d 295. The jurors in this case were justified in inferring that defendant at the time of making them intended not to perform his promises."

Likewise that of People v. Bartges, 126 Cal.App.2d 763, 770, 273 P.2d 49, 52: "Without again setting forth the evidence in detail, suffice it to say that it clearly shows that appellant with a preconceived design to appropriate the money to his own use, obtained possession of it by means of fraud or trickery. The fraud vitiated the transaction and the owner is deemed still to retain a constructive possession of the property. The owner does not part with title to the alleged thief where as here, he delivered it to appellant to be applied by the latter to a particular purpose and the recipient, having obtained possession with the preconceived intention to appropriate the money to his own use, subsequently did convert it to his own use instead of applying it to the purpose contemplated by the owner. Under the facts here present there was in contemplation of the law of larceny a 'taking'. * * * Since the money belonged to Mr. Simmons and appellant acquired possession of it by fraud and chicanery, his holding was without right, and title thereto did not pass to him." See, also, People v. Hennessey, 201 Cal. 568, 581–582, 258 P. 49; People v. Kirsch, 204 Cal. 599, 602, 269 P. 447; People v. Gilliam, supra, 141 Cal.App. 2d at page 758, 297 P.2d at page 473.

[5, 6] Appellant complains of an instruction which he asserts the court gave concerning embezzlement, namely, No. 224 of California Jury Instructions, Criminal (Caljic), but the point cannot be considered for the instructions are not contained in the clerk's transcript or the reporter's transcript on file herein. Nor does it appear that any request was made for inclusion of same in the record, as required by Rule 33(b). The fact that the Attorney General agrees that the instruction was given does not alter the situation. If we were to sanction this indirect method of augmentation of the record it nevertheless would not appear that the instruction was not requested by appellant, nor would the context be apparent. No reversible error could be predicated thereon if we were to take cognizance of the particular instruction. 4 Cal.Jur.2d § 441, p. 267.

There is also an assertion, but no competent showing, that Caljic instruction No. 231 was given in connection with 224. This instruction explains the three forms of theft,—embezzlement, obtaining property by false pretense, and larceny by trick and device. It concludes with this paragraph: "[If you should find that the defendant committed theft in any one of the three ways hereinabove defined, you should return a verdict of 'guilty', and it will not be necessary or proper for you to state in your verdict which form of theft the defendant committed.]" Appellant complains that it was error, a denial of his constitutional rights, to omit the bracketed language. Again we are unable to entertain the argument because the record is insufficient. If we assume that the instruction was given, it nevertheless does not appear whether defendant did or did not request it. Moreover, the note to instruction 231, found at page 78 of the 1953 pocket part, says: "It now is definitely established that the final and bracketed paragraph of this instruction, p. 183, Main Volume, is not a correct statement of law and ought not to be given."

[7] Lastly it is contended that there was error in excluding certain evidence going to the merits of the Jenkins transaction which was the subject of the fourth count of the information, the count upon which defendant was acquitted. This evidence had no bearing upon the first three counts, those upon which defendant was convicted. Obviously the point is frivolous.

The judgment and order denying new trial are affirmed. The appeal from the verdict is dismissed.

MOORE, P. J., and FOX, J., concur.

152 Cal.App.2d 87

Charlotte Jane ARTHUR, Plaintiff, Cross-Defendant and Respondent,

v.

Junior W. ARTHUR, Defendant, Cross-Complainant and Appellant.

Civ. 5450.

District Court of Appeal, Fourth District, California.

June 24, 1957.

Action by wife for divorce. Husband filed cross-complaint for annulment. The Superior Court, San Diego County, C. M. Monroe, J., annulled the marriage, and the father appealed from the child custody and support provisions of the judgment. The District Court of Appeals, Barnard, P. J., held that under the circumstances there was no abuse of discretion in denying the father child visitation privileges and in requiring him to contribute $176 monthly for support of the three children.

Affirmed.

1. Marriage ⚷64

The Superior Court has wide discretion with regard to child visitation rights of father whose marriage is annulled.

2. Marriage ⚷64

In annulment action, evidence was insufficient to show that Superior Court abused discretion in depriving father of rights of child visitation.

3. Marriage ⚷64

If circumstances appear to warrant a change in child visitation provisions of annulment decree, father may apply for restoration of his visitation rights.

4. Marriage ⚷64

Evidence supported finding that after annulment of marriage the father, a first class petty Naval officer, should contribute for the support of his three children the $176 monthly allotment theretofore made for the wife and the three children. West's Ann.Civ.Code, § 84.

5. Marriage ⚷62

The fact that a wife is not entitled to attorney's fees for her own benefit does not affect the power of the Superior Court to allow such fees as part of the support of children of the annulled marriage. West's Ann.Civ.Code §§ 84, 87.

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F. W. Powell, La Mesa, for appellant.

Harold D. Cornell, San Diego, for respondent.

BARNARD, Presiding Justice.

This appeal involves provisions for the custody of and support for the minor children of the parties to the action. These parties went through a marriage ceremony in June, 1945, and lived together until January, 1955, during which period three children were born to them. The plaintiff wife brought this action for divorce, for custody and support of the minor children, and for attorney's fees and costs. The defendant husband answered and filed a cross-complaint for an annulment, alleging that the marriage of the parties was bigamous. At the trial in February, 1956, the plaintiff's motion to strike from her complaint the allegation that the parties were and are husband and wife was granted. It was agreed and documentary evidence was received showing those facts, that the plaintiff was in fact married to one Schaefer at the time of her purported marriage to the defendant, and that the marriage to Schaefer was not dissolved until some time in 1947. It was then stipulated that the trial was to proceed on the cross-complaint and the answer thereto, on the question of the parties' knowledge of the bigamy, and on the matters of custody and support of the minor children.

The court found that on June 27, 1945, these parties participated in a marriage ceremony; that subsequent thereto these three children were born; that at the time this ceremony was performed the plaintiff and cross-defendant was the legal wife of one Schaefer; that both parties to this action then knew that fact; that after the plaintiff was divorced from said Schaefer she requested the defendant to enter into a valid marriage with her; that he continued to live with her and have children by her, but refused to enter into such a valid marriage; that during the cohabitation of these parties they have become possessed of certain household furnishings and equipment which "are needed for the care and maintenance of the minor children"; that the plaintiff is a fit and proper person to have the care, custody and control of the minor children; that it is necessary for the welfare and best interest of said children that the defendant be denied the right of visitation with said children at this time; that the defendant is an enlisted man in the U. S. Navy with a rating as First Class; that it is proper that he make a Navy allotment for the support of the three children in the sum of $176 per month; that the plaintiff is without funds or credits to pay the expenses of this hearing; and that by reason of the facts and circumstances the expense of this hearing should properly be assessed to the defendant. In accordance with these findings, and with the conclusions of law, a judgment was entered declaring that the marriage between these parties was null and void from the beginning, and further ordering that the plaintiff have the exclusive care, custody and control of these children; that the defendant be restrained "from visiting with said minor children until further order of this court made upon recommendation of the Probation office of the county of San Diego"; that the defendant shall pay to the plaintiff by U. S. Navy allotment or otherwise for the care, maintenance and support of the children the sum of $176 per month; that the defendant pay to plaintiff's attorney for attorney's fees and costs incident to this hearing the sum of $200; and that the plaintiff "shall have exclusive use and possession" of the household furnishings and equipment acquired by the parties. The defendant has appealed from all of said judgment except that portion which decrees that the marriage between these parties was and is null and void.

[1–3] It is first contended that the court abused its discretion, in connection with the custody order, in depriving the defendant of the right of visitation. He concedes that the children were properly placed in the custody of the mother, since he was subject to being transferred from place to place, and presently had no home to which he could take them. It is contended, however that there was no evidence which would justify the order depriving him of the right of visitation. It appears that there had been an order *pendente lite* permitting him to visit the children every other Sunday, and that he had thus visited them at times when he was in San Diego. There was a great deal of evidence of friction between the parties in connection with such visitation, and some evidence of its adverse effect upon some of the children. The situation was such that the defendant brought policemen or friends with him whenever he came to see the children or to take the eldest child out. Two months before the trial, pursuant to a stipulation of the parties, the court had ordered that the county probation department make an investigation as to both plaintiff and defendant and make a written report to the court for the purpose of helping the court to "determine said parties' fitness to have the care, custody and control of the minor children." This report was made and it was stipulated that the facts stated therein could be considered by the court in deciding the case. The court, in deciding the case, stated that he had gone over this report very carefully and that "I am inclined to shape this decree in accordance with the things that are expressed in this report." The portion of the evidence which was thus received was not made a part of the record before us, and it must be assumed in support of the judgment that this evidence, together with the other evidence, was sufficient to support the court's conclusion in that regard and the order made. The court necessarily has a wide discretion with regard to such a matter and there is nothing in the record to show an abuse of that discretion. The court did not, as the defendant seems to contend, substitute a decision of the probation department for a decision of the court with respect to when his rights of visitation should be restored. The defendant may apply for a modification of the order in that respect if and when circumstances appear to warrant such a change.

[4] It is next contended that the court allowed too much for the support of the three minor children. It is argued that a Navy allotment of $176 per month was theretofore being paid for the support of the mother and the children, the defendant being a first class petty officer; that it was neither just nor proper to award the plaintiff the same amount for the support of the three children as she had previously been receiving for the support of herself and the three children; that there was no evidence showing the amount needed by the children; and that the proper allotment for three children where there is no wife, under a standard formula used by the Navy, would be $115.30 a month. This court is asked to reduce the amount allowed for

support of the children from $176 per month to $115.30 per month. In this connection it is also argued that the court should not have awarded the household furniture and equipment to the wife as her separate property, although it is conceded that it was proper to allow her the use of this property so long as it is needed to care for such children during their minority.

The furniture was of small value and the court did not award it to the wife as her separate property, but merely allowed her to use it in caring for the children. The amount to be allowed for the support of the children was a matter within the sound discretion of the court. Sec. 84, Civ.Code. There was evidence that a Navy allotment of $176 had been and was still being paid, and there was no evidence at the trial that this would be reduced, or if so when this would be done. Counsel for the defendant agreed with the court's suggestion that the award for support of the children should be the amount of an allotment made by the Navy. After findings were submitted, but before they were signed, counsel for the defendant sent the court a letter signed by a legal officer of a Navy group at San Diego, addressed to "Whom It May Concern", and stating that a "guide for support" contained in a certain Navy instruction would give $115.30 as support for three minor children. This letter was not sworn to, and was never admitted in evidence. These small children needed some one to care for them, as well as a place to live, food, clothing, etc., and as a practical matter the amount needed would be the same as before. The previous allotment furnished some indication of the amount needed, especially in view of the concession made. The findings in this regard are sufficiently supported by the evidence, and in the event of changed circumstances an application for a modification of these orders may be made.

[5] Finally, it is contended that since this was changed into an annulment action the court was not authorized to allow attorney's fees. In Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 1047, 115 A.L.R. 163, a paternity case, it is said: "Also, as section 196a of the Civil Code requires a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation." Section 196a requires the father of an illegitimate child to support it and authorizes the mother to maintain "a civil suit" to enforce that obligation, and further provides that in such an action the court shall have power to enforce performance, the same as under sections 137, 137.5, 138, 139 and 140 of that code. Section 84 of the Civil Code provides that a judgment annuling a marriage does not affect the legitimacy of children born before the judgment, and authorizes the court in an annulment action to make such order for support of the children "as may seem necessary or proper". The present action was brought, among other things, to enforce the obligation for support and at the beginning of the trial the facts justifying an annulment were conceded and the entire contest concerned the custody of and support for the children. It clearly appears that the court was authorized to make an order for the support of the children. As said in Kyne v. Kyne, 74 Cal.App.2d 563, 169 P.2d 272, 275: "There is no material legal difference between the right of a child to an attorney's fee as part of his statutory right of support, and the right of a wife to such a fee granted to her by § 137 of the Civil Code." The fact that this wife would not be entitled to attorney's fees for her own benefit, under section 87 of the Civil Code, would not affect the power of the court to allow such fees as a part of the relief authorized by section 84.

No abuse of discretion appears, with respect to the order made, and the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Paul FERGUSON, Lowell Lyons and James Pope, Defendants,
Lowell Lyons, Defendant and Appellant.
Cr. 5640.

District Court of Appeal, Second District, Division 1, California.
June 24, 1957.
Rehearing Denied July 23, 1957.
Hearing Granted Aug. 20, 1957.

Defendant was convicted of receiving stolen property. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that testimony of arresting officer that at time of defendant's arrest he had stated that stolen watch found in his pocket had been in his possession for some time, although watch had been stolen on the day before, was insufficient corroboration of accomplice's testimony against defendant, where defendant denied making statement and it was not otherwise proved.

Reversed and remanded for new trial.

1. Criminal law 🔑633(1)

Every defendant must be accorded a full and fair trial, regularly conducted in time honored manner, and laws of evidence and procedure may not be relaxed at whim of either judge or prosecutor.

2. Criminal law 🔑560

Mere suspicion is no substitute in a criminal case for the doctrine of reasonable doubt, and this is particularly true in cases where much of testimony emanates from mouth of defendant's accomplices. West's Ann.Pen.Code § 1111.

3. Receiving stolen goods 🔑6

That a person is guilty of being a party to original burglary does not necessarily make him guilty of receiving stolen property.

4. Criminal law 🔑511(4)

In prosecution for receiving stolen property, testimony of arresting officers that at time of defendant's arrest he had stated that watch found in his pocket had been in his possession for some time, although watch had been stolen the day before, was insufficient corroboration of accomplice's testimony against defendant, where defendant denied making statement and it was not otherwise proved. West's Ann.Pen.Code, § 1111.

5. Criminal law 🔑510

Courts cannot countenance any relaxation of provisions of statute requiring that testimony of an accomplice must be corroborated. West's Ann.Pen.Code, § 1111.

6. Criminal law 🔑1170½(1)
Witnesses 🔑372(2)

In prosecution for receiving stolen property, where police officer's statement that defendant claimed to have had the stolen watch for some time was heavily relied upon by prosecution as furnishing corroboration of the accomplice's testimony, defendant should have been permitted by cross-examination to show any bias, interest or prejudice affecting such officer's credibility, and error in excluding such evidence was prejudicial. West's Ann.Pen.Code, § 1111.

7. Criminal law 🔑778(1), 1173(2)

In prosecution for receiving stolen goods, refusal to give defendant's requested instruction that private transactions are presumed to be fair and regular, and failure to instruct jury that defendant is presumed to speak the truth, constituted prejudicial error where conviction depended largely upon accomplice's testimony and statement allegedly made by defendant was relied upon as furnishing necessary corroboration. West's Ann.Pen.Code, § 1111.

8. Receiving stolen goods 🔑7(6)

There was a fatal variance between charge of receiving stolen property and proof that defendant was active member of conspiracy which contemplated a stealing by one conspirator, a disposition of stolen property by defendant and another conspirator and a division of the proceeds and that such enterprise had not yet been completed.

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Cantillon & Cantillon, Richard H. Cantillon, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was convicted of two counts of receiving stolen property. This is an appeal from the judgment.

The argument on appeal is extensive. Appellant was charged, together with Paul Ferguson and James Pope with receiving stolen property. The case against Pope was dismissed on motion of the People, and Pope became a witness for the prosecution. Six counts were alleged. Count IV was dismissed. The jury returned a not guilty verdict as to Counts I, II and III, and guilty of receiving stolen property as charged in Counts V and VI. Ferguson pleaded guilty to Count II. Incidentally, Pope was charged with four prior convictions.

The offense involved an alleged theft of a watch and a fur coat. It was charged that the defendants conspired to commit burglary and receive stolen property. Count V referred to the watch and Count VI to the fur coat.

The case against codefendant Pope was dismissed with the obvious understanding that he would testify for the prosecution. The indictment against appellant, Ferguson and Pope, charged Pope with four prior convictions of burglary and a prior conviction of grand theft against Ferguson. Ferguson pleaded guilty to Count II.

Appellant contends, as recited in respondent's brief:

"1. That the testimony of the accomplices was not corroborated as required by Penal Code Section 1111.

"2. That the verdict of not guilty of conspiracy to commit burglary and to receive stolen property was inconsistent with the verdicts of guilty of receiving stolen property, inasmuch as two of the overt acts of the conspiracy charged were possession of stolen articles, the receiving of which was charged, and of which the appellant was found guilty.

"3. That the Court erred in excluding evidence of the bias and prejudice of Officer Hooper.

"4. That the District Attorney committed prejudicial error in his arguments to the jury, and in his questioning of the appellant.

"5. That the testimony of coerced witnesses was used, and the appellant was thereby denied the due process of law.

"6. That the Court erred in admitting into evidence the testimony of a witness concerning his service of subpoenas upon Gallo, and his subsequent failure to find Gallo.

"7. That the Court erred in receiving evidence obtained by the police by means of a secret microphone and recorder in rebuttal.

"8. That the prosecutor suppressed evidence and thereby denied the appellant a fair trial.

"9. That the Court erred in allowing the district attorney to read an altered transcript of a tape recording to refresh the appellant's recollection of a conversation after the appellant stated that his recollection needed no refreshing.

"10. That the Court erred in refusing to instruct the jury that private transactions are presumed to be fair and regular; and that a defendant is presumed to speak the truth, and unless the presumption is destroyed by the evidence, the jury must find that he has spoken the truth; that the testimony of a witness who has been granted immunity should be examined with great care; and that guilt cannot be established by the admissions of the appellant alone.

"11. That the appellant was denied a fair trial by the actions of armed guards in carrying exhibits to the jury room.

"12. That the Court erred in denying the appellant's motion for severance.

"13. That there was a fatal variance between the pleading and proof in Count VI inasmuch as the evidence showed no more than a burglary.

"14. That the Court erred in its instruction concerning the method to be used in determining the sufficiency of the corroboration of the accomplices.

"15. That the Court erred in denying the appellant's motion for a new trial because of newly discovered evidence."

Several of appellant's contentions, hereinafter to be discussed, find support in both law and evidence, and deal with material matters vitally affecting the integrity of the trial. A careful survey of the record leaves no room for doubt the cumulative effect of the errors is highly prejudicial and has resulted in a situation which can only be cured by reversal and a new trial.

[1, 2] Whether appellant be guilty or innocent of the crime charged, it is fundamental that every defendant must be accorded a full and fair trial, regularly conducted in the time honored manner. The laws of evidence and procedure may not be relaxed at the whim of either judge or prosecutor. Mere suspicion is no substitute for the doctrine of reasonable doubt. This is particularly true in cases such as the present, where much of the testimony emanates from the mouth of the defendant's accomplices.

[3] There is no claim on appellant's part that the articles in question were not stolen, or that such articles were not found in the immediate presence of appellant and other defendants. However, excluding the accomplice testimony, nothing save alleged suspicious circumstances, has been offered to supply the corroboration required by Section 1111 of the Penal Code. The appellant cannot be legally convicted unless this statute is satisfied with respect to the elements of the crime charged, receiving stolen property with knowledge of its character. And, even if appellant can be deemed guilty of being a party to the original burglary, this, as pointed out in the briefs, does not necessarily make appellant guilty of the crime now under discussion.

[4] At the time of the arrest, according to officers' testimony, the stolen watch was found in appellant's pocket; appellant is said to have then claimed that the watch had been in his possession for "some time", although, actually, it had only been stolen the day before. This is strongly relied upon by the prosecution, as furnishing adequate corroboration of the accomplices' testimony. The appellant denied making such a statement and it was not otherwise proven. This is a striking example of the alleged corroboration, the sum total of which cannot be deemed to satisfy the requirements of the law.

[5] Neither in this nor in any other case, can the courts countenance any relaxation of the salutary provisions of Section 1111 of the Penal Code, which reads: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[6] Interrelated with the matter of corroboration just discussed, is the appellant's Fifth Assignment of error that the "Trial Court caused prejudicial reversible error in excluding evidence of bias and prejudice on the part of Officer Hooper", who testified, "I asked him (appellant) where the watch had come from. He said that it was his watch,—he had had it for some time", and that appellant said nothing else about the watch. Appellant denied making this statement.

On cross-examination the officer stated that the interrogation of appellant was recorded but the witness did not know whether the portion about the watch was recorded. No record of appellant's alleged statement was ever produced. The question was then asked whether the officer had stated to appellant, "You don't like police officers, do you, Mr. Lyons?" As stated in appellant's brief, "the officer stated in reply that he didn't recall making the statement and said he believed appellant stated that. (Later in the trial this witness admitted accusing appellant of anti-police feeling (Rep.Tr. 461, 1 103). Then appellant referred to the People's witnesses * * * Mr. Pope being first, and asked: (Rep.Tr. 322, 1. 1–14). 'Now, how many times from the 8th of April, 1955, to this day, have you talked to Mr. Pope?'." This evidence was offered by appellant to show bias and prejudice, but was excluded.)

Since the officer's statement that appellant claimed to have had the stolen watch "for some time", was heavily relied upon by the prosecution as furnishing corroboration of the accomplice testimony, appellant should have been permitted to show any bias, interest or prejudice affecting the witness' credibility. As appellant says, "The police witness later admitted he had accused appellant of 'anti police' feeling, therefore there was a basis for appellant's belief that the witness was biased and prejudiced. That he had contacted the witness Pope an unusual number of times * * * would go to show that prejudice, and that is exactly what appellant attempted to show."

In this connection, appellant calls attention to the fact that, "Officer Roberts stated Hooper had contacted him after testifying and that he (Roberts) came back to court on the following day and changed his testimony; the court also censored Hooper for going out into the hall during the trial and, admittedly, contacting another witness * * * in defiance of a previous order of sequestration of witnesses." In view of the record, and of the importance of the testimony in question, the appellant should have been accorded ample latitude in testing the credibility of the witness Hooper. The error in excluding evidence bearing on such credibility cannot be deemed harmless.

[7] Standing alone, the trial court's refusal to give appellant's requested instruction that private transactions are presumed to be fair and regular, and in failing to instruct the jury that a defendant is presumed to speak the truth, might, perhaps, be deemed harmless error. However, in the instant case where, as hereinbefore indicated, a conviction depends largely upon accomplice testimony and an alleged statement of appellant is relied upon as furnishing necessary corroboration, it is felt that such an instruction, as requested by appellant, has material value, and upon a retrial of this case, should be given.

[8] It is further argued by appellant that "There was a fatal variance * * * in that Count 6 charged the defendant with receiving stolen property when all the proof thereon of necessity supported and established a charge of burglary by reason of the conspiracy element appearing therefrom." Count VI charged appellant with having, on April 7, 1955, feloniously received an ermine coat stolen from its owner, Donald Thomas Handy. James Pope, a defendant against whom the charge was dismissed, testified for the prosecution, to having burglarized the Handy home and stolen the ermine coat; that the coat was taken to defendant Dan Rio's apartment and turned over to defendant Ferguson while appellant Lyons was at Rio's apartment with Ferguson.

According to Pope's testimony, there had been an understanding with appellant Lyons and defendant Ferguson, about March 17, 1955, in connection with the handling of property to be stolen by Pope. On the evening of April 7, 1955, Lyons, Ferguson, Pope and Rio met at Rio's apartment and had a conversation concerning the amount of money to be realized from the fur pieces. Either Lyon or Ferguson is said to have taken the furs out of the house; eventually the brown ermine coat was placed in Ferguson's garage. On the morning of April 8, 1955, the coat was taken to one Gallo's place at the Crest Hotel, and Gallo agreed to try and get

$1,100 for defendants. Ferguson and Lyons were arrested while transacting this business with Gallo.

There is substantial merit in the appellant's argument that, assuming the truth of the prosecution witnesses, "the only logical interpretation * * * is that the defendant Lyons was an active member of a criminal conspiracy * * * which contemplated (1) a stealing by Pope, (2) a disposition of the ill-gotten gains by defendant Lyon and Ferguson, and (3) a division of the proceeds received * * * as among the three of them. This was the enterprise for which the combination had been effected. It had not been completed and was in the process of being diligently prosecuted, according to the testimony, at the time the defendant Lyons and Ferguson were arrested. We contend, therefore, that the verdict of guilty of receiving stolen property as to Count 6 is at fatal variance with the evidence adduced in support thereof."

Under the most favorable interpretation of the evidence, appellant could only have been guilty, as a conspirator, of the crime of burglary. The alleged conspiracy was still under way with the view of realizing something from the burglary, but at the time of appellant's arrest, had not been completed. The appellant had not, as yet, received the stolen property although the same may have been then in appellant's presence and hence could not be convicted of that crime. Evidence tending to show appellant's activity in the conspiracy to commit burglary and share in the proceeds, cannot be deemed adequate proof of receiving stolen property, a crime having distinct and different elements. And, as appellant states, a defendant can hardly be convicted of "receiving stolen property from himself".

The other assignments of error advanced by appellant are either without merit or must be considered harmless in respect to the defendant's substantial rights. The errors hereinbefore discussed, however, and the combination thereof, cannot, even under the most favorable interpretation, be deemed other than prejudicial in nature, and entitle the appellant to a new trial.

The judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

WHITE, P. J., and FOURT, J., concur.

152 Cal.App.2d 108

YASUKOCHI, Inc., a corporation, Plaintiff and Appellant,

v.

John S. McKIBBIN et al., Defendants and Respondents.

Civ. 5452.

District Court of Appeal, Fourth District, California.

June 25, 1957.

Action by crop grower against insecticide sprayer for injury to plants which resulted in an inhibition in growth, development and yield as a result of spraying. The Superior Court of San Diego County William A. Glen, J., entered judgment for insecticide sprayer and crop grower appealed. The District Court of Appeal, Griffin, J., held question whether crop grower's plants had been injured by sprayer's negligence, in failing to sufficiently flush harmful chemical out of spraying tank was for jury.

Judgment affirmed.

1. Negligence ⟹136(25)

In action by crop grower against insecticide sprayer for injury to plants allegedly caused by failure of sprayer to sufficiently flush harmful chemical out of spraying tank before applying spray to plants, question whether injury to plants was occasioned by sprayer's negligence, and not otherwise, was for jury.

2. **Judgment** ⚿199(3.15)
New Trial ⚿68

Where question whether plaintiff had proved defendant's negligence was for jury, trial court was justified in denying motion for new trial and motion to enter judgment notwithstanding verdict.

3. **Evidence** ⚿546

Usually question of an expert qualification is for determination of trial court.

4. **Evidence** ⚿536

Farm advisor who had merely read circulars issued by agricultural department of state to farm advisors to effect that it was dangerous to use any tank 2, 4–D, weed killer and later use other sprays because of likelihood of ineffective cleaning did not make farm advisor an expert on subject of spraying crops.

5. **Appeal and Error** ⚿1048(1)

Where trial court would have permitted alleged expert witness to testify concerning injury to crop owner's crop without bringing in contents of two agricultural department circulars which had been excluded on ground of improper foundation, but crop owner had failed to recall witness, no prejudicial error resulted to crop owner.

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Charles A. Thomasset, Los Angeles, for appellant.

Luce, Forward, Kunzel and Scripps, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiff, a corporation, a crop grower in San Luis Rey Valley, employed defendants to spray a crop of chili peppers (125 acres) by aircraft with an insecticide supplied by plaintiff, and composed of Malathion and DDT. Plaintiff alleged in its complaint that defendants mixed with this spray some foreign substance, known to defendants and not known to plaintiff, which had been carelessly mixed by defendants and incorporated with the Malathion and DDT, which injured the plants, resulting in an inhibition in growth, development and yield. Damages for $65,000 are sought. Defendants denied generally these allegations. A jury trial resulted in a verdict for defendants. A motion for new trial and judgment notwithstanding the verdict were denied.

At the trial plaintiff adduced certain testimony indicating that a foreign substance known as Esteron 1010 or 2, 4–D, a herbicide injurious to pepper plants, may have been previously used on another ranch from the plane's polished sheet aluminum tank and it had not thereafter been properly cleaned.

Plaintiff's manager testified defendants had dusted his crops before; that plaintiff decided it would be more economical to spray; that the spray, furnished by plaintiff, was applied on June 25th and 26th, and around July 25th he noticed abnormal symptoms in the crop; that he and defendants observed the condition and were unable to diagnose it; and that experts made an inspection. He said that defendants admitted the equipment used to spray plaintiff's crop had been previously used to spray 2, 4–D and that defendants said they probably had not cleaned out the tank well enough; that he compared the crop yield in 1953 with that in 1954, and calculated, from the difference in yield, cost of labor, etc., a loss of profit of $25,669.75.

Defendant John S. McKibbin testified the spray, furnished by plaintiff, was mixed with water at the airport; that the same plane was used on the two days indicated; that before using it on plaintiff's pepper plants and other plants on the 26th of June he used it in spraying tomatoes on another ranch; used it in spraying pepper plants before and after June 26th on other ranches, without known difficulties; that on

June 14th and June 23rd he sprayed a ranch with Esteron and Diesel oil, a weed killer spray; that before using plaintiff's spray on the 25th, he flushed all of the equipment, including the tank, at least three times with a 180-gallon mix of household ammonia, water and detergent soap; that this was a sufficient precaution, "a standard procedure for years", was according to the recommendations of the University of California; and that he had been a licensed pest control operator since 1951, and had a permit to do this kind of work since 1947.

Plaintiff's experts testified generally that they inspected the crop and the plants showed abnormalities which were not, in their opinion, pathological, but were due to "2, 4–D-like influence"; that it is "most impossible" to de-contaminate equipment used to spray 2, 4–D, and chili peppers are sensitive to this spray.

The evidence showed that plaintiff had a total of 350 acres of peppers planted; that only the 125 acres sprayed were seeded and used as nursery stock and the rest were transplanted from the 125-acre tract; that there had been transplanting in that extra acreage for at least ten days before the spraying; that no fields planted by plaintiff after June 25th were found that did not have some similar damage, although those transplanted before June 25th (about 100 acres) did not show the effects of the spray and did produce a marketable crop; and that these other fields were shown to plaintiff's experts when they examined the 125-acre tract. It also appears that these other fields were sprayed again about July 15th by defendants in the same manner, but plaintiff claims the real injury came from the spraying of the seed stock on the 125-acre tract on June 25th and 26th; and that by harvesting time all plants showed some signs of damage. Plaintiff's expert also testified that on all the fields of peppers he inspected on plaintiff's ranch that summer, the damage appeared to be uniform.

Defendants denied the admissions plaintiff claimed they made in reference to not properly cleaning the tank before using the spray furnished by plaintiff and claimed they took all necessary precautions before using it. There was at least considerable doubt in the evidence as to whether there was damage done to the bedding acreage by reason of the failure of defendants to properly flush the equipment prior to its use on June 25th and 26th, and whether the damage done was the result of this negligence as distinguished from some other cause which was not apparent. Even the experts, in expressing their opinions, were not certain in regard to it. One of them said, in answer to a hypothetical question, "It seems quite possible to draw" the inference that the airplane was a competent producing cause of 2, 4–D damage to the chili peppers, and he "would think it might have something to do with it"; that there was a risk of the plane not being adequately flushed out; that there was a possibility that enough 2, 4–D had been left absorbed in the surface of the metal after the flushing to show symptoms on sensitive plants; and that the plane, under the circumstances related "could have caused the injury".

[1, 2] Of course the burden of proving plaintiff's case and that the injury to the plants was occasioned by defendants' negligence and not otherwise, was upon plaintiff. Defendants denied any such negligence and claimed proper precautions were taken and concede they do not know whether plaintiff's crops were damaged by their acts or from other causes. At least the jury was permitted to hold that plaintiff had failed in this necessary proof. Under these circumstances the court was justified in denying the motion for new trial and motion to enter judgment in favor of plaintiff notwithstanding the verdict. Bushey v. Union Oil Co., 13 Cal.App.2d 350, 56 P.2d 1272; Huffines v. Standard Brands of California, 32 Cal.App.2d 634, 90 P.2d 599. It was a factual question and not one of law. Had a verdict been rendered in plaintiff's favor, a different question might here arise.

[3-5] Some complaint is made of a ruling of the court in not allowing a certain witness, a farm advisor, to testify as to whether the spray equipment used by defendants was, under the circumstances related, a producing cause of the 2, 4-D damage. An objection was sustained because of the lack of showing of qualifications. Usually, the question of an expert's qualifications if for the determination of the trial court. It may well appear to us, from the factual background related by the witness, that he was qualified to answer the question. Apparently, by his question, counsel for plaintiff was endeavoring to get before the jury the contents of two weed circulars, dated June, 1955, a year after this occurrence, numbers 41 and 46, issued by the Agricultural Department of the State, which were not intended for general circulation but more for instructions to the farm advisors in different communities, to the effect that it was dangerous to first use in a tank 2, 4-D weed killer and later use other sprays, because of the likelihood of ineffective cleaning. The court properly sustained the objection to the offer of the circulars in evidence as having no proper foundation. Merely because the witness had read these circulars would not make him an expert on the subject. Plaintiff, however, cannot be heard to complain in this respect because, subsequently, in chambers and during the trial, this ruling was discussed by the court and counsel. The court told plaintiff's counsel he would allow his claimed expert to again take the stand and answer the questions if he felt he had the ability to answer them without bringing in the contents of these circulars. Plaintiff failed to recall the witness. No prejudicial error appears.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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152 Cal.App.2d 99

Anne H. BIRD,
Plaintiff and Appellant,
v.
Thomas E. BIRD,
Defendant and Respondent.
Civ. 21896.

District Court of Appeal, Second District, Division 2, California.

June 25, 1957.

Rehearing Denied July 23, 1957.

Hearing Denied Aug. 20, 1957.

Divorce proceeding. The Superior Court, Los Angeles County, William E. Fox, J., awarded divorce, but denied wife any alimony, and wife appealed. The District Court of Appeal, Ashburn, J., held that trial court did not abuse its discretion in denying alimony to wife and failing to preserve, upon its own motion, its jurisdiction to act on subject in future by awarding nominal alimony, where wife said nothing about a token award at trial

Affirmed.

1. Divorce ⚷235

The question of making a nominal award of alimony for purpose of retaining jurisdiction to deal with future possibilities is committed to sound judicial discretion of trial judge.

2. Appeal and error ⚷901, 948

The burden rests upon an appellant who claims insufficiency of evidence or abuse of discretion or other type of error to make it affirmatively appear that error was committed by trial court.

3. Divorce ⚷239

Separation agreement providing that husband should pay wife $200 a month for support of each of their children and that she should have their custody, afforded evidence that no support for wife was necessary. West's Ann.Civ.Code, § 175.

4. Divorce ⚷235

In divorce proceeding, trial court did not abuse its discretion in denying alimony to wife and failing to preserve, upon its own motion, its jurisdiction to act on subject in future by awarding nominal alimony, where wife said nothing about a token award at trial. West's Ann.Civ. Code, § 175.

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Julius A. Leetham, Los Angeles, for appellant.

Walker, Wright, Tyler & Ward, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff wife, having been awarded a divorce from defendant on the ground of cruelty and having received what appears to be the major portion of the community property, appeals from a part of the judgment which denies her any alimony. Custody of the two children was awarded to defendant subject to plaintiff's having them during summer vacation and Christmas and Easter holidays; defendant was ordered to pay to plaintiff during such periods the sum of $400 a month for the maintenance of the children. The portion of the judgment from which plaintiff appeals is this: "That plaintiff's application for alimony, maintenance and support from the defendant is denied."

No contention is made that there was error in refusing to make an award of alimony in excess of a token amount of One Dollar per month or year, but appellant now claims that such token award should have been made as a means of preserving jurisdiction to allow a larger amount in the future should the need arise. Appellant's opening brief says: "No criticism could be levelled at the trial court if its adjudication as to the lack of need of alimony were made in the normal domestic relations situation. * * * The plaintiff-wife had a history of serious illnesses, which had occasioned considerable expense. The trial court had this fully in mind, as evidenced by its remarks. The writer of this brief is hopeful and even optimistic about Mrs. Bird's future. * * * Should the illness pattern of the past re-occur, it is a mathematical obviety [sic] that Mrs. Bird's substance and expectancies will be exhausted, and she may become a public charge." Also: "Presumably, the trial court must have determined that Mrs. Bird's separate estate was adequate for her future support, or that that [sic] she was capable of supporting herself."

[1] This question of making a nominal award for the purpose of retaining jurisdiction to deal with future possibilities is one which, like others pertaining to allowance of alimony, is committed to the sound judicial discretion of the trial judge. In Farnsworth v. Farnsworth, 81 Cal.App.2d 380, 383, 184 P.2d 7, 8, the court said: "With regard to alimony appellant argues, 'Appellant is not asking for alimony in any sum other than $1.00 per year in order that the trial court may retain jurisdiction to award her alimony in the future should the circumstances justify a more substantial amount to be paid.' The issue too was for the trial court's determination and there is nothing in the record to suggest that the court's judgment constituted an abuse of discretion."

[2] It is to be remembered that the burden rests upon an appellant who claims insufficiency of the evidence or abuse of discretion or other type of error "to make it affirmatively appear that error was committed by the trial court." Richard v. Richard, 123 Cal.App.2d 900, 902, 267 P.2d 867, 868. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552, says: "Such contention requires [appellant] to demonstrate that there is no substantial evidence to support the challenged findings." Sonkin v. Hershon, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157: "It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the wit-

nesses before it, the controversy is settled. Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607." In re Estate of Phelps, 132 Cal.App.2d 850, 853, 283 P.2d 293, 295: "Where an appellant has failed to show that the trial court was wrong it is not incumbent upon a reviewing court to engage in a dissertation upon the law for the purpose of demonstrating that the court was right."

The reporter's transcript in this case includes by reference voluminous depositions and other documents which the court apparently is expected to analyze and weigh for itself. Appellant's briefs aggregate 15 pages. Respondent however has directed our attention to evidence which is sufficient to sustain the trial judge's implied findings,—written findings and conclusions were waived.

Defendant's financial statement for December 31, 1954 (the last full year before the trial), shows gross assets of $85,322.82 and net worth of $45,322.82. His income tax return for the calender year 1954 showed adjusted gross income to be a loss of $2,011.16. When residing with his wife she paid a substantial part of the household expenses. Mrs. Bird is the beneficiary of a trust which has a book value of $160,804.89, the actual value of which is estimated by a competent witness as $104,744; but it consists of slow moving assets and the expenses exceed the income. Appellant is also entitled to a one-sixth interest in the estate of her deceased father valued at $1,807,380.58 after payment of taxes and expenses. Grace Healey Greenan claims one-half of it and if she succeeds will take one-half of a gross estate of $2,610,435.63, leaving $1,305,200 for distribution to others. Our computation indicates that that half, reduced proportionately, becomes $903,673, of which one-sixth, or $150,612, goes to Mrs. Bird the appellant. She also has oil royalties of about $500 a year and certain stocks of doubtful value. At the time her deposition was taken shortly before the trial she was working as a saleslady and making $34 a week take-home pay. She testified that she considered that work "good therapy."

[3] At the time of separation in 1952 the parties made an oral separation agreement which was later carried into a written one of November 24, 1954. It provides that they shall live separately, that the husband shall pay to the wife $200 a month for support of each child, as it was agreed that she should have their custody. (Upon this matter the trial judge disagreed. He gave custody to the husband "by reason of the alcoholic problem which Mrs. Bird, the plaintiff, has had here and by reason of the background, her background, being confined in an institution by reason of her mental illness.") The agreement makes no mention whatever of alimony or any type of support of the wife by the husband. It brings into operation Civil Code, § 175 which provides that a husband is not liable for the wife's support "when she is living separate from him, by agreement, unless such support is stipulated in the agreement." This instrument afforded evidence that no support from the husband was necessary. See Walsh v. Walsh, 108 Cal.App.2d 575, 581, 239 P.2d 472.

Counsel for appellant stresses the fact that Mrs. Bird was committed to the psychopathic department of the superior court in March, 1954, being discharged on November 1st of that year as "recovered from her psychotic symptoms." She was again committed and discharged in 1955 before the trial. In her deposition given shortly before that event she testified that she had no reason to believe that her emotional disturbance would recur. There appears to have been no evidence of a probability of recurrence of this problem, or of any other previous disability.

[4] There was ample basis for the court's denial of any present award of alimony. Counsel actually said nothing about a token award at the trial. If he had done so that would have presented to the judge a problem in weighing imponderables in

the nature of future possibilities or probabilities. That was peculiarly his task and we cannot say, in the light of all the circumstances, that there was any abuse of discretion in the denial of alimony or the failure to preserve upon his own motion jurisdiction to act on the subject in the future.

The portion of the judgment from which the appeal was taken is affirmed.

MOORE, P. J., and FOX, J., concur.

48 Cal.2d 696

Larry FRICKER et al., Plaintiffs and Respondents,

v.

UDDO & TAORMINA COMPANY (a Partnership), Defendant and Appellant.

L.A. 24479.

Supreme Court of California,
In Bank.

June 21, 1957.

Action for money had and received. The Superior Court, Orange County, John Shea, J., entered judgment for defendant and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that where contract for sale of farmer's tomato crop to defendant, a canner, permitted crop orders by farmer and advances by defendant to farmer for growing and harvesting the crop and defendant accepted crop order for soil fumigant furnished farmer by plaintiffs, the crop order operated as an assignment to plaintiffs from returns due to farmer from tomatoes to be delivered to defendant, and in absence of express or implied understanding as to whether crop orders or defendant's subsequent advances were to have priority, the assignment was subject to subsequent advances which were necessary to production of the crop.

Judgment affirmed.

Opinion, 305 P.2d 78, vacated.

1. Assignments 🔑84

Where contract for sale of farmer's tomato crop to defendant, a canner, permitted crop orders by farmer and advances by defendant to farmer for growing and harvesting the crop and defendant accepted crop order for soil fumigant furnished farmer by plaintiffs, the crop order operated as an assignment to plaintiffs from returns due to farmer from tomatoes to be delivered to defendant, and in absence of express or implied understanding as to whether crop orders or defendant's subsequent advances were to have priority, the assignment was subject to subsequent advances which were necessary to production of the crop.

2. Assignments 🔑93

Generally, rights of an assignee, including his rights in fund to become due to the assignor, cannot be destroyed by payments made by the debtor to the assignor after notice of assignment.

3. Assignments 🔑84

Assignment of moneys to become due under an executory contract is subject to advances which are necessary to enable the assignor to perform his contract.

4. Courts 🔑89

Cases are not authority for propositions not considered.

5. Assignments 🔑137

In action for money had and received, by supplier of soil fumigant to whom farmer, by crop order, assigned part of the returns due farmer from his tomato crop, which was to be delivered to defendant, a canner, pursuant to contract which permitted crop orders by farmer and advances by defendant to farmer for growing and harvesting the crop, evidence disclosed that only a portion of the canner's subsequent advances to farmer were so necessary to production of the crop as to have priority over the crop order.

Rimel & Johnston and Jack J. Rimel, Santa Ana, for appellant.

Mize, Larsh, Mize & Hubbard, Delbert L. Larsh and Royal E. Hubbard, Santa Ana, for respondents.

GIBSON, Chief Justice.

Plaintiffs, claiming that they are the assignees of part of the proceeds of a tomato crop which George Kikuchi had agreed to grow and sell to defendant canning company, seek to recover the amount of a crop order given to them by Kikuchi and accepted by defendant.[1] Defendant has appealed from an adverse judgment contending that it is not supported by the evidence.

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[1] As used by the parties, the words "crop order" apparently mean a direction by the grower that the buyer of the crop shall pay to a third party a certain sum from the moneys due to the grower from the buyer.

The case was submitted on stipulated facts which may be summarized as follows:

In March 1952 Kikuchi agreed to grow a tomato crop and to sell it to defendant. The contract provided that in the event defendant should advance moneys to Kikuchi for the growing and harvesting of the crop, Kikuchi should not permit any encumbrance to accrue against the crop except advances and crop orders. In April Kikuchi requested plaintiffs to supply soil fumigant for his farm on credit. Plaintiffs, knowing that Kikuchi had no assets except the proceeds which he could expect to receive from the crop, asked defendant if it would guarantee payment for the soil fumigant as it had done the previous year. Defendant refused to guarantee payment but stated that it "would accept a crop order against the 1952 crop returns which would become due from defendant to Kikuchi." Plaintiffs furnished the soil fumigant to Kikuchi and sent the bill to defendant for payment. Kikuchi approved the bill, and, on May 2, 1952, defendant wrote to plaintiffs: "This will confirm that we have accepted a crop order instructing us to pay to you $4,074.91 from the return due George Kikuchi from Tomatoes delivered by him to us during the 1952 season." Plaintiffs knew when they furnished the soil fumigant to Kikuchi that defendant had already charged the sum of $27,000 against Kikuchi's 1952 tomato crop account for moneys advanced.

After sending the letter to plaintiffs, defendant advanced to Kikuchi an additional $53,668. The major portion thereof was paid directly to third persons for purposes related to the growing of the crop. Certain of the advances, made both before and after the date of the letter, consisted of cash paid directly to Kikuchi, and "in the main" were used by him to pay necessary crop production expenses. Kikuchi, having no other income, used some of the cash advances to support himself and his family and some to make installment payments due upon farm machinery that he was purchasing and using full time in the production of the crop. On several occasions tomatoes were delivered to defendant, who credited Kikuchi's account with the amount of the gross proceeds. At no time did the credits for delivered tomatoes exceed the amount of previous advances. The venture proved to be unprofitable in that the total amount credited to Kikuchi was only $77,013, whereas the advances totaled $80,668. It is apparent from the stipulation that, while the gross proceeds were insufficient to cover all of the advances made by defendant to Kikuchi, the receipts were more than adequate to cover plaintiffs' crop order and the amount of the advances made prior thereto. Kikuchi has since been adjudged a bankrupt.

The complaint is in the form of a common count for money had and received, and the findings are to the effect that defendant became indebted to plaintiffs in the amount of $4,074.91 for money received for the use of plaintiffs, that the amount remains due, owing, and unpaid, and that plaintiffs requested and defendant refused payment thereof. The trial court in effect rejected defendant's contention that all of the advances made by defendant have priority over plaintiffs' crop order.

Defendant's letter of May 2 discloses that there was a crop order which instructed defendant to pay plaintiffs $4,074.91 from the return due to Kikuchi from tomatoes delivered by him to defendant during the 1952 season and that defendant accepted the order. It seems clear that, if the parties had expressly agreed at the time of the acceptance of the crop order that either the order or the advances by defendant should have priority, that agreement would be controlling. See, e.g., Garner v. Uddo & Taormina Co., 137 Cal.App.2d 819, 822, 290 P.2d 967.

[1] Both the crop order and the acceptance are silent with respect to whether the crop order or the advances subsequently made by defendant should have priority. The crop order is conditioned upon the production of a tomato crop and the existence of a return due to Kikuchi from

tomatoes delivered by him to defendant, and the record shows that tomatoes were delivered and that sums were credited to Kikuchi's account, but there is nothing to indicate that the order was conditioned upon the existence of a net balance due to Kikuchi from defendant at the end of the season, and the acceptance neither limits nor enlarges the scope of the crop order in this respect. The situation is not altered by the fact that in other transactions defendant had used a special form which provided that the acceptance of a crop order was subject to all advances made to the grower. Plaintiffs did not know that such a form had been used by defendant and were unaware of its provisions. Nor does the fact that defendant refused plaintiffs' request that defendant guarantee payment of the bill for the soil fumigant show an intention of the parties that advances made by defendant subsequent to the acceptance of the crop order were to have priority over plaintiffs' claims against the returns due from the tomato crop. A determination that plaintiffs' claim against the crop proceeds should have priority over defendant's advances made subsequent to the acceptance of the crop order obviously would not be the same thing as holding that defendant is liable, as a guarantor, beyond the amount of the proceeds which it derived from the crop.

[2-4] The crop order operated as an assignment to plaintiffs of $4,074.91 from the returns due to Kikuchi from the tomatoes to be delivered to defendant. As a general rule the rights of an assignee, including his rights in a fund to become due to the assignor, cannot be destroyed by payments made by the debtor to the assignor after notice of the assignment. See, e.g., Jones v. Martin, 41 Cal.2d 23, 27-28, 256 P.2d 905; A. Farnell Blair Co. v. Hollywood St. Bk., 102 Cal.App.2d 418, 431, 227 P.2d 529; 2 Williston on Contracts (Rev. Ed.) § 433, pp. 1251-1255. Defendant contends in effect that this rule is not applicable here because, it argues, the advances made by it after the date of the crop order were necessary to the production of the crop, without these advances there would be no crop and nothing for either plaintiffs or defendant, and, for this reason, the subsequent advances should have priority. Decisions in other jurisdictions have adopted the rule that an assignment of moneys to become due under an executory contract is subject to advances which are necessary to enable the assignor to perform his contract, and we have concluded that these cases should be followed here. Peden Iron & Steel Co. v. McKnight, 60 Tex.Civ.App. 45, 128 S.W. 156, 159; Stansbery v. Medo-Land Dairy, 5 Wash.2d 328, 105 P.2d 86, 91; see St. Mary's Bank v. Cianchette, D.C.N.D.Me., 99 F.Supp. 994, 999-1000; 6 C.J.S. Assignments § 96, p. 1152. The opinion in the Peden case shows that there, as in the present case, the consideration for the assignment was necessary to enable the assignor to perform his duties under the principal contract. The decision in A. Farnell Blair Co. v. Hollywood St. Bk., 102 Cal.App.2d 418, 427-431, 227 P.2d 529, appears to have taken a contrary position, holding that priority could be given only to advances which were required by contractual and statutory duty. The opinion, however, did not discuss the question whether advances should have priority on the ground of necessity to enable performance by the assignor, and, as pointed out in Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 730, 146 P.2d 673, 151 A.L.R. 1062, cases are not authority for propositions not considered.

[5] The rule that priority must be given to subsequent advances which are necessary to enable the assignor to perform his duties under the contract is obviously an exception to the general rule relating to assignments, and, for this reason, the burden was on defendant to put into evidence the facts required to bring the advances made by it within the exception. As we have seen, the gross returns of the tomato crop were $77,013, and plaintiffs' crop order was for $4,074.91. Accordingly, the judgment must be affirmed unless the stipulated facts establish as a matter of law that defendant was entitled to a priority for advances

amounting to more than $72,938.09, the difference between these two amounts. The record, including a detailed statement of account received in evidence pursuant to the stipulation of facts as defendant's exhibit, does not establish that the advances as to which defendant has priority reach such a figure.

The account shows that certain advances totaling $57,668 were made by defendant for purposes specified in the account. Most of these payments were made directly by defendant to third persons, and it is stipulated that all payments so made were necessary for production of the crop. Other payments listed in the account as having been made for specified purposes, for example, "hauling" paid to Kikuchi by defendant, appear reasonably germane to farm purposes, and plaintiffs do not question the correctness of the listing. Accordingly, we shall assume that these advances for specified purposes were necessary for production of the crop.

The remaining advances, totaling $23,000, were paid to Kikuchi by defendant, and their purpose was unspecified in the account, the items being designated merely as "advance" or "advance (not deposited)."[2] Of the $23,000 so advanced, $9,000 was paid prior to May 2, 1952, the date of the letter confirming acceptance by defendant of plaintiffs' crop order, and defendant is entitled to priority with respect to this portion of the money advanced for unspecified purposes. Further, it is stipulated that the charges shown in the account as "advances" paid to Kikuchi were "in the main" used by him for necessary crop production expenses, and this language is broad enough, as used here, to mean that at least half of such advances, i.e., $11,500, were necessary for crop production. Cf. Floeck v. Hoover, 52 N.M. 193, 195 P.2d 86, 89; McGill v. Baumgart, 233 Wis. 86, 288 N.W. 799, 802; In re Atran's Estate, Sur., 145 N.Y.S.2d 540, 542. Conversely, the term "in the main" clearly indicates that a substantial portion of such advances was not necessary to the crop. The fact that there are two separate reasons for giving defendant priority with respect to some of the $23,000 advanced for unspecified purposes does not mean that defendant has established priority to $20,500 ($9,000 plus $11,500) of these advances, because it is entirely possible that all of the $9,000 in such advances made prior to May 2 was necessary for production of the crop and thus was included in the $11,500 of such advances which, by stipulation, was necessary for production. If such were the case, defendant's priority in the unspecified advances of $23,000 would be limited to $11,500. There is no evidence that any larger portion of the advances made for unspecified purposes was actually used for purposes necessary to growing the crop, and, in view of the fact that defendant has the burden of proof on this issue, we cannot properly conclude that defendant has established that any more than $11,500 of such advances was entitled to priority.

It is true that on each occasion when Kikuchi requested advances to be paid directly to himself, defendant was advised by Kikuchi that the money was needed and was to be used to pay various items of crop production expense which defendant deemed essential to the production of the crop. This, however, does not show that the money listed in the account without specification of purpose was actually used by Kikuchi for growing the crop. Moreover, it discloses only the personal opinions of Kikuchi and defendant as to the existence of a necessity. Such opinions, of course, were not binding upon plaintiffs, and proof should have been made of what the expenditures were so that the court could determine the question of necessity.

It should be noted that some of the money advanced for unspecified purposes was used by Kikuchi for living expenses of his family and that some was used to make installment payments due upon farm machinery which he was purchasing. Use of the money for payments on the machinery was probably necessary for production of the crop, but the sums spent for Kikuchi's family cannot properly be treated as having been used for this purpose. There is no evidence or finding as to how much of the money was used for family support, and, for all that appears, use of advances for family purposes may explain defendant's failure to prove that all of the advances made by it were necessary for production of the crop.

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[2] The designation "advance (not deposited)" is not explained, but the items so termed were included to make up the stipulated total of $80,668 advanced by defendant.

It follows that, under the record, defendant has established a priority with respect to only $69,168 of the advances made by it (i.e., $57,668 in advances for specified purposes plus $11,500, being one-half of the advances made for purposes unspecified in the account). This sum, deducted from the gross returns of the tomato crop, leaves a balance of $7,845, which is more than ample to permit payment from the fund of plaintiffs' crop order for $4,074.91.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 778

Helen KNIGHT, Plaintiff and Appellant,

v.

KAISER COMPANY (a Corporation), Defendant and Respondent.

S.F. 19697.

Supreme Court of California, in Bank.

June 28, 1957.

Rehearing Denied July 24, 1957.

Action against contractor, for death of infant trespasser upon contractor's sand pile, resulting when the sand collapsed about and asphyxiated him. From judgment rendered for the defendant by the Superior Court, Alameda County, James R. Agee, J., the plaintiff appealed. The Supreme Court, McComb, J., held that a sand pile did not constitute an attractive nuisance.

Affirmed.

Traynor, J., Gibson, C. J., and Carter, J., dissented.

Opinion, 305 P.2d 248, vacated.

1. Negligence 🔑136(19)

Where facts are undisputed, it is question of law whether there is an attractive nuisance.

2. Negligence 🔑32(1)

Where person goes on premises of another without invitation, as bare licensee, and owner passively acquiesces in his presence, the owner is not liable for injuries sustained by licensee by reason of mere defect in premises but owner is liable only for wanton or willful injury, unless the attractive nuisance doctrine applies.

3. Negligence 🔑33(3)

In absence of circumstances creating an attractive nuisance, owner of land owes no duty, to a child trespassing on his property, greater than he owes to an adult trespasser.

4. Negligence 🔑39

If landowner maintains attractive nuisance, he is liable for injuries thereby resulting to a trespassing child.

5. Negligence 🔑39

A sand pile maintained on its premises by a contracting corporation did not constitute an "attractive nuisance", and the contractor was not liable for death of child who trespassed thereon and who was asphyxiated when sand, in which he was digging, collapsed upon him.

See publication Words and Phrases, for other judicial constructions and definitions of "Attractive Nuisance".

6. Negligence 🔑56(1.1)

Where child who had been digging in contractor's sand pile died from asphyxiation when the sand collapsed about him, even if conveyor belt on premises constituted an attractive nuisance, since the sand pile itself did not, there could be no recovery for the child's death from the contractor where there was no causal connection between conveyor and the child's death.

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Charles O. Morgan, Jr., San Francisco, for appellant.

Frederick M. Van Sicklen and James C. Calkins, Alameda, for respondent.

McCOMB, Justice.

From a judgment predicated upon the sustaining of defendant's demurrer to plaintiff's third amended complaint without leave to amend in an action to recover damages for the death of plaintiff's son, plaintiff appeals.

The amended complaint, in substance, alleged that plaintiff was the natural mother of decedent, Johnny William Bass, Jr., 10 years of age; that defendant owned and maintained premises in Stockton on which it had placed or caused to be placed large piles of sand and gravel and, adjacent thereto, a large conveyor belt; that no fences, guards or railings were placed around these sand and gravel piles or a portion of the conveyor belt; that a road or pathway was close to these objects and children were in the habit of playing upon the sand and gravel piles and the conveyor belt; that defendant knew or should have known the conditions existing involved an unreasonable risk of death or serious bodily harm to children playing on the sand and gravel piles; and that on August 20, 1953, plaintiff's son, while playing upon the premises and digging in one of the sand piles, was asphyxiated when it collapsed upon him.[1]

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[1] The material parts of the amended complaint are as follows: "IV. That at all times herein mentioned the defendants owned, maintained, operated and controlled those certain premises located in the City of Stockton, County of San Joaquin, State of California, and more commonly known and designated as the 1100 Block, North Union Street, Stockton, California.

"V. That prior to and on or about the 20th day of August, 1953 the defendants had placed or caused to be placed and had maintained or caused to be maintained large sand and gravel piles and a large conveyor belt on the said 1100 Block, North Union Street, all of which were adjacent to each other, and no fences, guards or railings were placed around said sand or gravel piles or around a portion of the said conveyor belt; that in addition thereto there was a road, or pathway, proceeding along side the said sand and gravel piles and the said conveyor. That children of tender age were in the habit of being upon and playing upon the said premises and the said sand and gravel piles and conveyor belt, and by the ordinary predelictions and impulses of normal children were attracted to and induced to come and to be upon and to play upon the said premises, said sand and gravel piles and conveyor belt; all of which was well known to the defendants, its servants, agents and employees, or by the exercise of reasonable care on their part would have been known to them. That the defendants knew and realized, or should have known and realized, that the said sand piles, gravel piles and conveyor involved an unreasonable risk of death or serious bodily harm to children playing on the same as aforesaid in that the children could be injured or killed from falling from the same, from the same falling upon them and in other manners and ways.

"That said children because of their youth were unable to and did not discover the condition or realize the risk involved in intermeddling in said condition or coming withn the area made dangerous by the same. That a fence, guard or railing would have prevented said children from coming upon and being upon said premises and condition and from intermeddling in same.

"VI. That on or about the 20th day of August, 1953, at or about 7:20 P.M. of said day, the said Johnny William Bass, Jr., having been attracted to and induced to come upon and be upon and to play upon the said premises, the said sand and gravel piles and the said conveyor belt as aforesaid, was playing upon the same, and being of the age of ten (10) years and being of tender and immature years and by reason of his age and immaturity, being unable to perceive or appreciate the danger confronting him and without fault on his part was situated and playing as aforesaid. That at said time and place the defendants, and each of them, did carelessly and negligently maintain, operate and control the said premises owned by the defendants and known and designated as the 1100 Block of North Union Street, in that the said defendants negligently

Plaintiff contends that the facts alleged in the complaint as amended state a cause of action within the "attractive nuisance" doctrine. This contention is untenable.

[1] Where the facts are undisputed, as in the instant case, it is a question of law whether or not the facts alleged fall within the scope of the "attractive nuisance" doctrine. (Nicolosi v. Clark, 169 Cal. 746, 747 et seq., 147 P. 971, L.R.A.1915F, 638; Hernandez v. Santiago Orange Growers' Ass'n, 110 Cal.App. 229, 236 [4], 293 P. 875; cf. Loftus v. Dehail, 133 Cal. 214, 218, 65 P. 379.)

Applying this rule to the admitted facts in the present case, it is conceded that defendant maintained upon its premises large sand and gravel piles and a large conveyor belt; that decedent while playing and digging in one of the sand piles was asphyxiated when it collapsed upon him.

[2] It is the general rule that where a person goes upon the premises of another without invitation, as a bare licensee, and the owner passively acquiesces in his presence, if any injury is sustained by the licensee by reason of a mere defect in the premises the owner is not liable for negligence, for the licensee has assumed the risk himself. The owner of property does not assume any duty to one who is on his premises by permission only and as a mere licensee, except for wanton or willful injury inflicted upon the licensee while on the premises. (Means v. Southern California Ry. Co., 144 Cal. 473, 479, 77 P. 1001; Ward v. Oakley Co., 125 Cal.App.2d 840, 844 [1], 271 P.2d 536; Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 777 [5], 267 P.2d 841; Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 540 [2], 96 P.2d 196; Herzog v. Hemphill, 7 Cal.App. 116, 118, 93 P. 899.)

[3] The law is also established that in the absence of circumstances which bring a case under the "attractive nuisance" doctrine, an owner of land owes no other duty to a child trespassing on his premises than he owes to an adult trespasser. (Peters v. Bowman, 115 Cal. 345, 349, 47 P. 113.)

[4] To the general rule there is this exception: If an owner of land maintains thereon what is commonly called an "attractive nuisance," the owner is liable for injuries resulting to a trespassing child. (See Prosser on Torts (2d ed. 1955), pp. 438 et seq.; Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 518 [2], 271 P. 1060.)

[5] In view of the foregoing rules and the facts alleged in the complaint, this question is presented: *Does a sand pile constitute an "attractive nuisance," i. e., a fact which places liability upon the owner of property for injuries to a trespassing child?* [2]

This question must be answered in the negative. It is settled that a body of water, natural or artificial, does not constitute an "attractive nuisance" that will subject the owner to liability for trespassing children who are attracted thereto and are drowned. (Peters v. Bowman, supra, 115 Cal. at pages 347 et seq., 47 P. 113; Ward v. Oakley Co., supra, 125 Cal.App.2d at page 845 [2], 271 P.2d at page 539; Demmer v. City of Eureka, 78 Cal.App.2d 708, 710 [1], 178 P.2d 472.)

As far as attractiveness to children is concerned, there is no significant difference between a body of water and a sand pile. Pools of water and sand piles duplicate the work of nature and are not uncommon. In fact, a pool of water is far more dangerous than a sand pile, which in and of itself is not dangerous. The dangers connected with and inherent in a sand pile are obvious to everyone, even to a child

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and carelessly failed to place any fences, guards or railings or other means of excluding small children from the area around said sand or gravel piles or around a portion of the said conveyor belt. That by reason of the negligence and carelessness of the defendants, and each of them, as aforesaid, and as a proximate result thereof, the said Johnny William Bass, Jr., while playing and digging on and in the same piles was asphyxiated, resulting in his death, when one of said sand piles collapsed upon him while he was playing and digging on or in the same."

[2] See Prosser on Torts (2d ed. 1955), supra.

old enough to be permitted by its parents to play unattended.

Sand piles may be attractive to children, but they are also of a common and ordinary nature and are found in numerous places, quite frequently in the child's own backyard. It is common for children to play in sand piles and to dig holes and make excavations in them. They are early instructed by their parents as to the danger of cave-ins. Hence, the owner of private property who maintains thereon a sand pile that merely duplicates the work of nature and to which no new dangers have been added should not be liable to a trespassing child for injuries under the "attractive nuisance" doctrine.

In Restatement of the Law on Torts, volume 2, section 339, page 922, it is said that the duty of the possessor of land "does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them. This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved therein, frees the possessor of land from the danger of liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults." (Cf. 28 A.L.R.2d (1953), § 4, p. 200.)

In Anderson v. Reith-Riley Const. Co., 112 Ind.App. 170, 44 N.E.2d 184, defendant removed a large amount of sand from its property, leaving a hole 100 feet long, 50 feet wide and 10 feet deep, with perpendicular walls. Plaintiff's son, nine years of age, was attracted to the hole, where he excavated below the surface and was killed in a cave-in which followed. The court held that defendant was not liable under the "attractive nuisance" doctrine, saying at page 185 of 44 N.E.2d: "Nature has created streams, lakes and pools which attract children. Lurking in their waters is always the danger of drowning. Against this danger children are early instructed so that they are sufficiently presumed to know the danger that if the owner of private property creates an artificial pool on his own property, merely duplicating the work of nature without adding any new danger, and a child, without invitation, ventures on the private property, enters the pool and is drowned, the owner is not liable because of having created an 'attractive nuisance.'

"Nature has created cliffs and embankments which attract children. And here again is always the danger of falling over the cliffs or down the embankments. Against these dangers children are early instructed so that they are sufficiently presumed to know the danger that if the owner of private property by excavating for a basement on his own property, thereby creates an artificial cliff, and a child, without invitation, ventures on the private property and falls into the excavation, the owner is not liable because of having created an 'attractive nuisance.'

"Another common danger in cliffs and embankments is that of cave-ins from excavation below the surface. And it is common for children in play to make such excavations in the sides of cliffs and embankments for the purpose of creating caves, tunnels, etc. So they are early instructed as to the danger of cave-ins and are sufficiently presumed to know the danger that if the owner of private property by excavating on his own property, creates an artificial cliff or embankment, merely duplicating the work of nature without adding any new dangers, and a child, without invitation, ventures on the private property, excavates below the surface and is injured or killed by a resultant cave-in, the owner is not liable because of having created an 'attractive nuisance.' Nor does the rule change with the varying texture of the earth. The danger is the same danger, real and obvious, with only the percentage of probability of the occurrence increased or decreased with the earth's fineness or firmness.

"The essence of the rule that the doctrine of attractive nuisance does not apply to cases where the danger is one which is obvious and common to nature, against which children are presumed to have received early instruction, was recognized by our Supreme Court in the case of City of Evansville v. Blue, 1937, 212 Ind. 130, 8 N.E.2d 224, 229. There a boy of eleven was drowned in a municipal swimming pool. Justice Fansler speaking for the court said:

"'Healthy boys of eleven years and younger must be deemed to know the perils of deep water, and it must be recognized that it is in the nature of boys to venture where it is dangerous. But it is none the less negligent for one who is not a good swimmer to venture into deep water, and, ordinarily, boys no more than adults may voluntarily and negligently put themselves in a position of known danger and charge others with responsibility for protecting them against their own voluntary acts.'"

In Puckett v. City of Louisville, 273 Ky. 349, 116 S.W.2d 627, plaintiff instituted an action against defendant city for injuries sustained by plaintiff's 11-year-old child, who had gone upon defendant's lot containing a hole about four feet deep. The child undermined the embankment with a spoon, causing it to cave in and injure her. The court held that defendant was not liable under the "attractive nuisance" doctrine.

In Zagar v. Union Pac. R. Co., 113 Kan. 240, 214 P. 107, it was held that defendant was not liable for injuries to a boy 13½ years of age who was injured as the result of earth falling upon him from a cave dug on defendant's land by other boys. The "attractive nuisance" doctrine was held not applicable to these facts. (See 214 P. at page 109.)

It is thus evident that the sand pile did not constitute an "attractive nuisance." This conclusion is in accord with the generally accepted rule,—to restrict and limit, rather than to extend, the doctrine of "attractive nuisance." It is a doctrine to be applied cautiously and only when the facts come strictly and fully within the rule. (See Lake v. Ferrer, 139 Cal.App.2d 114, 117 [3], 293 P.2d 104; 65 C.J.S. (1950), Negligence § 29(14), p. 479.)

[6] Finally, it is to be noted that if it is conceded that the conveyor belt mentioned in the pleading might constitute an "attractive nuisance," there is no allegation that it caused or contributed to decedent's death. There is a total absence of an allegation of a causal connection between the conveyor belt and his unfortunate death. Under these circumstances, the maintenance of the conveyor belt does not bring the case under the "attractive nuisance" doctrine. (Ward v. Oakley Co., supra, 125 Cal.App.2d at page 846[5], 271 P.2d at page 540.)

The judgment is affirmed.

SHENK, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

The Civil Code, section 1714, provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Nevertheless, the cases are replete with statements that an occupier of real property owes no such general duty of care to trespassers and bare licensees. With respect to adults we need not pause to determine how many of such statements constitute no more than a determination by the court that the defendant was not negligent at all or that the plaintiff assumed the risk or was guilty of contributory negligence as a matter of law. Clearly the fact that the plaintiff is a trespasser or a bare licensee is relevant to the question what precautions the reasonable man would take to protect him. In many cases there may be no reason to foresee trespassing, and a reasonable man ordinarily may be entitled to assume that those entering without right or by mere permission will not expect special precautions to be taken for their benefit and will accordingly exercise greater care for their own safety. Moreover, the rules dealing with the duty of land occupiers to the various classes of entrants on the land make clear that in this area courts have frequently exercised their power to establish specific standards of negligence instead of leaving the matter under more general instructions to the jury. It cannot be denied, however, that in the case of adult trespassers and licensees the operation of no-duty rules has in many instances resulted in immunity for conduct that unreasonably endangered the plaintiff and was therefore negligent toward him. The dilemma of choosing between such cases and the rule set forth in section 1714 is not now before us. In the case of trespassing children a review of the better considered cases convinces me that it does not exist.

In Barrett v. Southern Pacific Company, 91 Cal. 296, 27 P. 666, this court followed the Supreme Court of the United States in Sioux City and Pacific Railroad Company v. Stout, 17 Wall. 657, 21 L.Ed. 745, by solving the problem of the land occupier's liability to trespassing children for dangerous conditions maintained on the premises in terms of ordinary negligence principles. It pointed out that it could not recognize a rule that no duty was owed to trespassing children without departing from well-settled principles. "It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. [Frost v. Eastern R. R., 64 N.H. 220, 9 A. 790, invoked by defendant.] But this principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; 'for negligence in a legal sense is no more than this: the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.' Cooley, Torts, 630. And the question of defendant's negligence in this case was a matter to be decided by the jury in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that, leaving this turn-table unguarded and exposed, an injury, such as plaintiff suffered, was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children. In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and, in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased." 91 Cal. at pages 301–303, 27 P. at page 667.

To recognize such a duty of care toward trespassing children does not impose an unreasonable burden on the defendant, and "it must be kept in mind that it requires nothing of the owner that a man of ordinary care and prudence would not do of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions." Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880, 882, 59 L.R.A. 920. "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, *to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions.* As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character. But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist." Beatty, C. J., on denial of rehearing in Peters v. Bowman, 115 Cal. 345, 356, 47 P. 113, 598, 599. Italics added.

As Chief Justice Beatty stated such culpability turns on "the reasonableness and propriety of" the defendant's "conduct, in view of all surrounding circumstances and conditions," or, in other words, it is determined by applying familiar negligence standards. Accord: Gimmestad v. Rose Bros. Co., 194 Minn. 531, 261 N.W. 194, 196; Wolfe v. Rehbein, 126 Conn. 246, 193 A. 608, 609–610; Foster v. Lusk, 129 Ark. 1, 194 S.W. 855, 856; Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836, 841–842. Section 339 of the Restatement of Torts has defined these standards by stating four conditions that must be satisfied to impose liability on a possessor of land for injury to trespassing children caused by a structure or other artificial condition on the land. Liability exists if "(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." This section was cited with approval in Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, and has frequently been held to be in accord with the law of this state. Woods v. City and County of San Francisco, 148 Cal.App.2d 958, 307 P.2d 698; Edler v. Sepulveda Park Apts., 141 Cal.App.2d 675, 680, 297 P.2d 508; Lopez v. Capitol Co., 141 Cal.App.2d 60, 66, 296 P.2d 63; Marino v. Valenti, 118 Cal.App.2d 830, 842, 259 P.2d 84; Long v. Standard Oil Co., 92 Cal.App.2d 455, 464, 207 P.2d 837.

In the present case the allegations of plaintiff's complaint satisfy the foregoing requirements. It is alleged that defendant maintained large sand and gravel piles and a large conveyor belt on its property adjacent to a public street. "[C]hildren of tender age were in the habit of * * * playing upon * * * the said sand and gravel piles and conveyor belt," which was known or in the exercise of reasonable care should have been known to defendant. Defendant "knew and realized, or should have known or realized, that the said sand piles, gravel piles and conveyor involved an unreasonable risk of death or serious bodily harm to children playing on the same as aforesaid in that the children could be injured or killed from falling from the same, from the same falling upon them and in other manners and ways. * * * [S]aid children because of their youth were unable to and did not discover the condition or realize the risk involved in intermeddling in said condition or coming within the area made dangerous by the same." No fences, guards, or railings were "placed around said sand or gravel piles or around a portion of the said conveyor belt," but "a fence guard or railing would have prevented said children from coming upon and being upon said premises and condition and from intermeddling in same." Plaintiff's son, "having been attracted to and induced to come upon and be upon and to play upon the said premises, the said sand and gravel piles and the said conveyor belt as aforesaid, was playing upon the same, and being of the age of ten (10) years and being of tender and immature years and by reason of his age and immaturity, being unable to perceive or appreciate the danger confronting him and without fault on his part was situated and playing as aforesaid." As a proximate result of defendant's negligent failure to place any fences, guards, or railings or other means of excluding small children from the area, plaintiff's son "while playing and digging on and in the * * * piles was asphyxiated, resulting in his death, when one of said sand piles collapsed upon him while he was playing and digging on or in the same."

Despite the apparent sufficiency of these allegations, the majority opinion holds that the complaint does not state a cause of action on the ground that a sand pile does not constitute an attractive nuisance. This holding necessarily either departs from the general principles governing liability to trespassing children by adopting a special sand-pile rule, or is based on the tacit taking of judicial notice of facts with respect to children and sand piles contrary to those alleged in the complaint. It cannot be justified on either ground. There are no established precedents in this state dealing with sand piles, as there are with respect to bodies of water, that might, under the doctrine of stare decisis, justify adhering to a rigid rule without regard to the facts of the particular case. Precedent-wise we are free to follow the general principles governing liability to trespassing children. In purporting to do so, the majority opinion states that "sand piles duplicate the work of nature and are not uncommon," and that "The dangers connected with and inherent in a sand pile are obvious to everyone, even to a child old enough to be permitted by its parents to play unattended." There is no basis, however, for concluding that every sand pile necessarily duplicates the work of nature or holding as a matter of law that no defendant should reasonably foresee that the dangers connected with and inherent in its sand pile are not obvious to children old enough to be permitted to play unattended. Although Anderson v. Reith-Riley Const. Co., 112 Ind.App. 170, 44 N.E.2d 184, supports the majority's position, the other cases cited in the majority opinion may be explained on their particular facts. Moreover, authority contrary to the Anderson case is not lacking. Hawley v. City of Atlantic, 92 Iowa 172, 60 N.W. 519, 520; Baxter v. Park, 48 S.D. 506, 205 N.W. 75, 75–76; see, Holmberg v. City of Chicago, 244 Ill.App. 505, 510–512; 28 A.L.R.2d 195, 198.

Whether the maintenance of a sand pile can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case. Children accustomed to playing in sand piles in their own yards may be totally unfamiliar with the hazards of a large pile maintained for industrial purposes. The very harmlessness of the familiar small pile may lull them into a sense of security. Nor are all children reared in such proximity to natural bluffs, cliffs, caves, and large sand dunes that they may be presumed to be familiar with them or to have been warned of their characteristics by their parents. Thus even if it could be assumed that the sand piles in this case duplicated natural sand piles, we could not judicially notice that plaintiff's child should necessarily have been aware of their hazards. Dean Prosser has pointed out that many "courts have said that the doctrine does not apply to common conditions, or to natural conditions of the land, or that it is limited to latent dangers, or to highly dangerous conditions, or to special and unusual conditions of modern industry; but all such statements appear to be made with reference to the particular case, and to be directed at nothing more than the existence of a recognizable and unreasonable risk of harm to children." (Prosser on Torts, 2d ed., § 76, p. 443.) Professors Harper and James state: "In addition to the probability of trespass, the dangerous condition of the premises must be produced by man, and either created or maintained by the occupier. This requirement stems from the law's reluctance to impose purely affirmative obligations on a man. It is sometimes said that man-made conditions which merely reproduce natural ones stand on the same footing. But if there is to be exemption here it must obviously rest on a different basis. That basis may often be found in the fact that children are likely to appreciate the risks of natural dangers, such as water, fire, or high places, so that these conditions are not highly dangerous to them. But this is not always the case. Some natural conditions have more concealed danger than a turntable, and if a landowner reproduces such a 'natural trap,' liability should not be excluded. Given affirmative arrangement of the premises, the touchstone of liability should be unreasonable probability of harm. All other criteria should be used as guides only, and not erected into rigid rules." (2 Harper and James, Law of Torts, § 27.5, pp. 1452–1453.)

The evil of creating rigid rules is demonstrated by some of the California cases dealing with bodies of water. Since ordinarily it may be presumed that children are aware of the dangers of drowning and since frequently the burden of adequately protecting children from that risk is out of proportion to it, usually the maintenance of a body of water should not give rise to liability. See, Peters v. Bowman, 115 Cal. 345, 47 P. 113; Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; King v. Simons Brick Co., 52 Cal.App.2d 586, 126 P.2d 627; Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472; Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414; Betts v. City & County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456; Ward v. Oakley Co., 125 Cal.App.2d 840, 271 P.2d 536; Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406. Blindly, however, the rule appropriate for the usual case has been extended to the unusual case unless there was something abnormal about the body of water itself. See, Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060; Long v. Standard Oil Co., supra, 92 Cal. App.2d 455, 207 P.2d 837. Thus recovery has been denied on the pleadings for the death of very young children who could not be presumed to appreciate the danger despite allegations sufficient to justify recovery under general principles and where the facts alleged did not indicate that the burden of protecting such children outweighed the risk to them. Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104. In nonwater cases, on the other hand, the error of rigid categorization has been recognized and avoided. Woods v. City and County of San Francisco, supra, 148 Cal. App.2d 958, 307 P.2d 698; Morse v. Douglas, 107 Cal.App. 196, 200, 290 P. 465; Faylor v. Great Eastern Quicksilver Min. Co., 45 Cal.App. 194, 204, 187 P. 101. This conflict should be resolved by disapproving the former cases. In any event the error of those cases should not be extended. As stated in the Faylor case, "while matching cases is an interesting mental recreation, it is not by matching cases, but by the correct application of sound legal principles that a case such as this is best determined * * *." 45 Cal.App. at page 204, 187 P. at page 105. "The naming or labeling of a certain set of facts as being an 'attractive nuisance' case or a 'turntable' case has often led to undesirable conclusions. The inclination is then to find a *stare decisis* pigeonhole or category. The difficulty in such procedure is that too often the result of such a search is the reaching of irreconcilable conclusions. * * * [T]he only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases." Kahn v. James Burton Co., supra, 5 Ill.2d 614, 126 N.E.2d 836, 841.

I would reverse the judgment.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied.

GIBSON, Chief Judge, and CARTER and TRAYNOR, JJ., dissenting.

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48 Cal.2d 710

Clara L. BECKLEY, as Administratrix, etc., Plaintiff and Appellant,
v.
The RECLAMATION BOARD OF the STATE OF CALIFORNIA et al., Defendants and Respondents.

C. F. SEAVER and Emma F. Seaver, Plaintiffs and Appellants,
v.
The RECLAMATION BOARD OF the STATE OF CALIFORNIA et al., Defendants and Respondents.

D. W. GEORGE and Helen May Forry, Plaintiffs and Appellants,
v.
The RECLAMATION BOARD OF the STATE OF CALIFORNIA et al., Defendants and Respondents.

Katharine Frances ERISEY, Plaintiff and Appellant,
v.
The RECLAMATION BOARD OF the STATE OF CALIFORNIA et al., Defendants and Respondents.
Sac. 6768.

Supreme Court of California,
In Bank.
June 21, 1957.

Civil action. From an order of the Superior Court, Colusa County, Hugh H. Donovan, J., the plaintiffs appealed. The Supreme Court, Carter, J., held that where attorney for plaintiff was in attendance at regular session of the Legislature and through a mishap, the trial court did not receive notice of the legislator's request for a continuance because of his senatorial duties, trial court abused its discretion in refusing to vacate the default judgments entered.

Reversed.

Schauer and McComb, JJ., dissented.

Opinion, 301 P.2d 971, vacated.

1. Continuance 🔑20(2)

The purpose of the statutes was that attorney legislators should be relieved from concerning themselves with extraneous matter not pertaining to their legislative duties while in attendance at the Legislature and actually prosecuting their duties as such. West's Ann.Code Civ.Proc., § 1054.1.

2. Pleading 🔑229

Amendments to pleadings may be made at any stage of the proceedings in the furtherance of justice.

3. Judgment 🔑143(14)

Where attorney for plaintiff was in attendance at regular session of the Legislature and through a mishap, the trial court did not receive notice of the legislator's request for a continuance because of his senatorial duties, trial court abused its discretion in refusing to vacate the default judgment entered on the ground that the judgment was not taken through mistake, inadvertence, surprise or excusable neglect. West's Ann.Code Civ.Proc., §§ 473, 595, 1054.1.

4. Judgment 🔑272

Where attorney for plaintiff was in attendance at the regular session of the Legislature, the attorney was entitled to have entry of judgment delayed upon proper communication to the trial judge in event that he had timely shown that he was a member of the Legislature and that he desired such delay until after the Legislature had adjourned. West's Ann.Code Civ. Proc., §§ 595, 1054.1.

5. Judgment 🔑136

The statute respecting the setting aside of a default judgment for mistake, inadvertence, surprise or excusable neglect is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits. West's Ann.Code Civ.Proc., § 473.

6. Judgment 🔑92

The policy of the law is to allow a controversy to be tried and determined on its merits.

7. Judgment 🔑135

Any doubt that may exist should be resolved in favor of an application to vacate a default judgment to the end of securing a trial upon the merits.

◆

Earl D. Desmond, Edward Vayne Miller, Sacramento, Clarence O. Ward, Santa Barbara, Jack B. Tenney, Los Angeles, Edwin J. Regan, Weaverville, Richard J. Dolwig, So. San Francisco, James E. Cunningham, San Bernardino, Jess R. Dorsey, Bakersfield, Nathan F. Coombs, Napa, Ralph M. Brown, Modesto, Gordon A. Fluery, Sacramento, Gerald J. O'Gara, San Francisco, Randal F. Dickey, Alameda, S. C. Masterson, Richmond, and Allen Miller, San Fernando, for appellants.

Edmund G. Brown, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., Willard A. Shank and F. G. Girard, Deputy Attys. Gen., for respondents.

CARTER, Justice.

These are appeals in four consolidated cases from orders denying motions to set aside and vacate judgments entered after general demurrers to the complaints were sustained without leave to amend.

Plaintiffs, appellants here, filed the original complaints for damages against defendants, respondents, for the negligent construction of the Sacramento River Flood Control Project and negligent diversion of stream waters from the natural channel of the Sacramento River and onto lands belonging to plaintiffs on *May 1, 1947*. On *September 3, 1952* the first amended complaints were filed. On *December 1, 1952*, defendants filed demurrers and motions to strike portions of the first amended complaints. By stipulation entered into on *February 24, 1953* certain proposed amendments to the first amended complaints were filed with the county clerk to be submitted to the trial court for its aid in determination of the demurrers.

E. Vayne Miller and Earl D. Desmond were the sole attorneys of record for the plaintiffs in the four cases. Earl D. Desmond was then and still is a member of the Senate of the California Legislature from the 19th Senatorial District comprising Sacramento County. The California Legislature commenced the second portion of its regular 1953 session on *February 24, 1953* and continued in session until *June 10, 1953* when it took its final adjournment.

On *May 11, 1953*, Miller received from the Clerk of the Superior Court of Colusa County, a notice that the defendants' demurrer to the first amended complaints had been sustained without leave to amend. Subsequent to receiving the notice and during the same week, Miller visited Senator Desmond at his offices in Sacramento where a discussion was had concerning the ruling on the demurrer. It was agreed by and between them that a photostatic copy of the second amended complaint in Archer v. City of Los Angeles, 15 Cal.App.2d 520, 59 P.2d 605, would be obtained so that amendments could be proposed in the instant actions in accordance therewith to aid the trial court prior to entry of judgment in the four cases and that a motion would be made for a reconsideration of the ruling on the demurrers.

On *May 20, 1953,* Senator Desmond sent a Western Union telegram to Judge Hugh H. Donovan (the trial judge) as follows:

> "Judge Hugh M. Donovan
> Martinez, California
>
> "Request entry judgment George Beckley Erisey and Seaver against State be not executed by Court until June 10th. Legislative duties necessitate continuance so I can study proceedings.
>
> Senator Earl D. Desmond"

Judge Donovan stated to counsel in open court on the hearing of the motion to vacate that he did not receive the above telegram.

On *June 3 1953,* judgment was entered.

On *June 5, 1953,* Senator Desmond sent the following Western Union telegram to Judge Donovan:

> "Judge Hugh Donovan
> Martinez, California
>
> "Request judgment be not entered Colusa cases until June 19th. Still attending legislature.
>
> Senator Earl D. Desmond"

On *June 19, 1953,* Senator Desmond sent the following Western Union telegram to Judge Donovan:

> "Judge Donovan
> Martinez
>
> "Have just returned from Legislative duties. Am studying State cases. Request judgment not be entered until June 26.
>
> Earl D. Desmond"

The latter two telegrams were admittedly received by Judge Donovan.

On *September 10, 1953,* after learning on *August 4, 1953* that judgments had been entered, plaintiffs moved to vacate the judgments entered on June 3, 1953. The motion was made on the following grounds:

> "This motion will be made upon the grounds that the said Judgment was entered through the mistake and inadvertence, surprise, or excusable neglect of counsel for the Plaintiffs, and upon the grounds that said Judgment was entered contrary to the provisions of sections 595, 1054, and 1054.1 of the Code of Civil Procedure of California."

On *November 30, 1953,* the trial court rendered a memorandum of decision denying the plaintiffs' motions to vacate the judgments. In the memorandum of decision, the trial court stated that "Plaintiffs have not met the requirements of said section. The submission of the photostatic copy of the complaint in the Archer v. [City of] Los Angeles case cannot be considered as a pleading here and the Court did instruct counsel for defendants to submit a written order to be signed by the Court, in accordance with the memorandum of decision."

On *December 3, 1953,* counsel for plaintiffs filed with the County Clerk of Colusa County, a proposed amendment to the first amended complaints to be considered on plaintiffs' motion to vacate the judgments.

On *December 7, 1953,* counsel for plaintiffs filed notices of motions in the four actions on appeal for an order to set aside the memorandum of decision and opinion of the court entered December 1, 1953, refusing to vacate the judgments, and to move the court for an order permitting the filing of the proposed amendment to the first amended complaints.

On *December 14, 1953,* the trial court denied plaintiffs' motion to set aside the decision to vacate the judgments.

On *February 8, 1954,* plaintiffs filed notice of appeal from the order denying their motion to vacate the judgments.

Plaintiffs' primary contention is that under the provisions of section 595 of the Code of Civil Procedure a mandatory duty devolved upon the trial court not to sign and enter the judgment here involved.

Section 595 then read, in part, as follows: "The trial of any civil action, or proceeding * * * before a state board or commission or officer, irrespective of the date of the filing thereof or when it became at issue, or the hearing of any motion, demurrer, or other proceeding, shall be postponed when it appears to the court, board, commission, or officer before which such action or proceeding is pending that either a party thereto, or any attorney of record therein (whether he became an attorney of record before or after the commencement of a legislative session or before or after his appointment to a legislative committee) * * *. When the Legislature is in session or in recess such action or proceeding shall not, without the consent of the attorney of record therein, be brought on for trial or hearing before the expiration of thirty (30) days next following final adjournment of the Legislature or the commencement of a recess of more than thirty-five (35) days."

Section 1054.1 of the Code of Civil Procedure provides, in part, as follows: "When an act to be done, as provided by law or rule of court, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal and of intention to move for a new trial, the time allowed therefor, unless otherwise expressly provided, shall be extended by the judge of the court in which the action is pending, or by the judge who presided at the trial of said action, when it appears to the judge of any court to whom such application is made that an attorney of reocrd for the party applying for such extension is a Member of the Legislature of this State, and that the Legislature is in session or in recess not exceeding a recess of forty (40) days or that a legislative committee of which he is a duly appointed member is meeting or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel. When the Legislature is in session or in recess, extension shall be to a date not less than thirty (30) days next following the final adjournment of the Legislature or the commencement of a recess of more than forty (40) days * * *."

[1] The legislative purpose in enacting these two statutes was well stated in Bottoms v. Superior Court, 82 Cal.App. 764, 769, 770, 256 P. 422, 425, where it was said in discussing section 1054 (of which section 1054.1 was then a part) that attorney-legislators "should be relieved by the law from concerning themselves with extraneous matters or interests not pertaining to their legislative duties while they are in attendance on sessions of the Legislature and actually prosecuting their duties as such. On the other hand, the suggestion may be ventured, significant in the present connection, that a practicing lawyer deals with a science involving the most abstruse learning, in its remedial and procedural as well as its substantive branch, and in conserving or preserving, or protecting or defending the rights of his clients when such rights are questioned in the judicial tribunals, the demand for his undivided attention to those causes is as necessary or imperative as is the demand upon him for like attention while he is engaged in performing the duties of a member of the Legislature." The language used by the court in the Bottoms case is equally applicable to section 595 which was obviously enacted with the same purpose in mind.

Reviewing the factual situation here, the record shows that plaintiffs' attorney, desiring to present an amended pleading for the consideration of the court, made an honest and diligent effort to notify the court by telegram of his inability to appear because of his attendance at a session of the Legislature and requested that the entry of judgment be postponed until his legislative duties had been concluded and he could devote his time to a study of the matter. Through no fault of counsel, the telegram was not received by the addressee as a result of which the notification and request were not received by the trial court and judgments were thereafter entered. Two subsequent telegrams, addressed in the same manner as the first, were received by the court but after the judgments had been entered. Believing that his request for a postponement of entry of the judgments had been granted, plaintiffs' counsel did not learn of the entry thereof until the time for appeal had expired. Counsel's motion to vacate the judgment was denied by the trial court which, apparently, did not believe that it had the power to vacate the judgments because it stated in its memorandum of decision that "it [the court] would be helpless to set aside the judgments herein."

[2, 3] The foregoing statement of facts makes it obvious that the trial court did not receive notice of Senator Desmond's duties in the Legislature until after the judgments had been entered. Under the code sections (Code Civ.Proc. §§ 595, 1054.1) heretofore set forth, if the court had been advised that an attorney of record was a member of the California Legislature, Senator Desmond would have been entitled to a continuance until his legislative duties were concluded in order to prepare an amended complaint. In Davis v. Stroud, 52 Cal.App.2d 308, 315, 126 P.2d 409, 413, the trial court had sustained defendant's demurrer to the complaint without leave to amend. Plaintiff's motion for leave to file an amended or supplemental pleading was denied. On appeal it was held an abuse of discretion to deny plaintiff permission to file the additional pleading. The court there held that "The [trial] court had jurisdiction at any time prior to judgment to reconsider its ruling sustaining the demurrer without leave to amend (21 Cal.Jur. 124; 9 Cal.Jur. 10-Yr. Supp. 221)." The established policy in this state is that amendments to the pleadings may be made at any stage of the proceedings in the furtherance of justice (Berri v. Superior Court, 43 Cal.2d 856, 860, 279 P.2d 8; Bank of America Nat. Trust and Savings Ass'n v Superior Court, 20 Cal.2d 697, 702, 128 P.2d 357; Carter v. Shinsako, 42 Cal.App.2d 9, 108 P.2d 27; Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318; Wade v. Markwell & Co., 118 Cal.App.2d 410, 416, 258 P.2d 497, 37 A.L.R.2d 1313; 21 Cal.Jur. 183). In the case at bar, however, through a mishap, the trial court did not receive notice of Senator Desmond's request for a continuance because of his senatorial duties. It then becomes necessary to determine whether or not the trial court abused its discretion in refusing to vacate the judgments under section 473 of the Code of Civil Procedure. We have concluded that there was an abuse of discretion.

[4] Under section 473, a trial court may set aside its judgment when the judgment was taken against a party "through his mistake, inadvertence, surprise or excusable neglect." Regardless of which of these categories precisely describes the circumstances here involved, an examination of the cases involving section 473 clearly demonstrates that relief should have been granted. In Greenamyer v. Board of Lugo Elementary School Dist., 116 Cal.App. 319, 2 P.2d 848, relief was granted where plaintiff's attorney failed to amend the complaint after a demurrer thereto had been sustained without leave to amend because he relied upon a custom among attorneys to give one another actual notice before causing judgment to be entered upon a default or a demurrer sustained without leave to amend. In Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426, a default judgment was vacated because the defendant, relying upon a custom mistakenly believed that his demurrer had been sustained, failed to answer. The court there said that "Any doubt that may exist should be resolved in favor of the application [to vacate the judgment], to the end of securing a trial upon the merits." See, also, Nicholls v. Anders, 13 Cal.App.2d 440, 445, 56 P.2d 1289; W. J. Wallace & Co. v. Growers Security Bank, 13 Cal.App.2d 743, 746, 57 P.2d 998; Bonfilio v. Ganger, 60 Cal.App.2d 405, 410, 140 P.2d 861.

[5] In Hallett v. Slaughter, 22 Cal.2d 552, 557, 140 P.2d 3, 6, in an independent action in equity, the plaintiff sought to set aside a default judgment in an action where she, as the defendant, mailed an answer

and filing fee which failed to reach the clerk of the court due to a miscarriage of the mails. We there held that the default judgment was properly set aside on the grounds of extrinsic accident and mistake. We said there "Plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action. That such accident and mistake furnish a ground for equitable intervention under the circumstances of this case is clear." See, Winn v. Torr, 27 Cal.App.2d 623, 627, 81 P.2d 457; Wilson v. Wilson, 55 Cal.App.2d 421, 426, 130 P.2d 782. Judgments have also been held properly vacated under section 473 because of an attorney's neglect due to a mistake of law (Waite v. Southern Pac. Co., 192 Cal. 467, 221 P. 204; Fickeisen v. Peebler, 77 Cal.App.2d 148, 174 P.2d 883) and the pressure of business (Soda v. Marriott, 130 Cal.App. 589, 20 P.2d 758). In Nicol v. Davis, 90 Cal. App. 337, 265 P. 867, a judgment of dismissal was vacated where plaintiff's attorney failed to file an amended pleading because he mistakenly believed that a continuance had been granted. In Carter v. Shinsako, supra, 42 Cal.App.2d 9, 108 P.2d 27, the trial court verbally granted plaintiff permission to apply for a modification of his order sustaining a demurrer without leave to amend. Thereafter, the court inadvertently caused a judgment of dismissal to be entered. It was held that the judgment was properly vacated under section 473 of the Code of Civil Procedure. In Riskin v. Towers, 24 Cal.2d 274, 148 P.2d 611, 153 A.L.R. 442, the defendant failed to answer because he believed that he had not been legally served with summons. Even though it was judicially determined that the service was sufficient, a subsequent denial of his motion to vacate the default judgment was held to be an abuse of discretion. See, also, Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244; In re Estate of Strobeck, 111 Cal. App.2d 853, 245 P.2d 317; Melde v. Reynolds, 129 Cal. 308, 61 P. 932; Miller v. Carr, 116 Cal. 378, 48 P. 324. In Re Estate of Strobeck, supra, 111 Cal.App.2d at page 858, 245 P.2d at page 321, it was said, quoting from Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148: "'Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it.' And as was said in Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 667, 38 P.2d 451, 453:

[6, 7] "'Furthermore, it has been the fixed policy of the law always to allow a controversy to be tried and determined on its merits (Kalson v. Percival, supra [217 Cal. 568, 20 P.2d 330]); and to that end the appellate tribunals are disposed to affirm an order to that effect (Waybright v. Anderson, 200 Cal. 374, 253 P. 148), and in determining an appeal from such an order will resolve any doubts in favor of the application for such relief. Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923; Brill v. Fox, 211 Cal. 739, 297 P. 25). Moreover, it is well settled that independent of statutory provisions a trial court has inherent power on its own motion to correct mistakes in its proceedings and within a reasonable time to annul its orders and judgments inadvertently made. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 P. 238.'"

In view of the clearly expressed legislative policy in this state as set forth in sections 595 and 1054.1 of the Code of Civil Procedure, the settled policy that where possible there shall be a trial on the merits, and the fact that Senator Desmond was in no way to blame for the miscarriage or nondelivery of the Western Union telegram advising the court of his legislative duties and his request for a continuance, we have concluded that the trial court abused its discretion in refusing to vacate the judgments under section 473 of the Code of Civil Procedure.

Neither party has raised any question on this appeal as to the sufficiency of the complaint as amended and this matter has not been briefed. We have not, therefore, considered this question and when this case is reconsidered by the court below, it will have the power to determine the sufficiency of the complaint as amended or any other pleadings which either of the parties may see fit to present. All we are here deciding is that the trial court should have granted plaintiff's motion to set aside the judgment upon the ground that Senator Desmond was entitled to the time requested to give further consideration to the case.

The order denying plaintiffs' motion for relief is hereby reversed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SCHAUER and McCOMB, JJ., dissent.

SPENCE, Justice.

I concur in the judgment, as I believe that relief should have been granted under section 473 of the Code of Civil Procedure.

My disagreement with the majority opinion results from its implication that Senator Desmond would have had an absolute right to have had the entry of judgment delayed under the provisions of sections 595 and 1054.1 of the Code of Civil Procedure in the event that he had timely shown that he was a member of the Legislature, and that he desired such delay until after the Legislature had adjourned. It must be remembered that the hearing on the demurrer to the first amended complaint had been had without objection, and that counsel received notice on May 11, 1953, that the demurrer had been sustained without leave to amend. Nothing remained to be done but the mere act of entering a judgment of dismissal. I find no provision giving counsel the absolute right to delay that act.

Section 595 deals only with the postponement of the "trial of any civil action" or the "hearing of any motion, demurrer, or other proceeding"; and it provides that when the Legislature is in session, the "action or proceeding shall not, without the consent of the attorney of record therein, be brought on for trial or hearing" until after a specified time. Section 1054.1 deals only with the extension of time to do an act when "the time allowed therefor" is "provided by law or rule of court." Neither section provides for any absolute right of counsel to delay the entry of judgment after a hearing has been had without objection on a demurrer and the demurrer has been sustained without leave to amend. It would appear that the draftsman of these sections intentionally omitted any provision for delaying the entry of a judgment, as there are many instances involving emergency matters where the entry of a judgment should not be delayed after a cause is submitted following a trial or hearing held without objection.

On the other hand, it appears without dispute that Senator Desmond believed in good faith that he had such right, and that he attempted to communicate his request for a delay to the trial court by telegram. Under these circumstances, I am of the view that relief under section 473 of the Code of Civil Procedure should have been granted.

I therefore join in the reversal of the orders.

152 Cal.App.2d 266

STORE OF HAPPINESS, a California Corporation, Plaintiff and Respondent,

v.

CARMONA & ALLEN, Incorporated, a California Corporation, Defendant and Appellant.

Civ. 22136.

District Court of Appeal, Second District, Division 2, California.

July 3, 1957.

Retail store's action against advertising agency to recover frequency discounts granted by television station for continuous use of spot advertisements over station. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment for store and advertising agency appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained findings of principal and agent relationship existing between advertising agency and store, and that retention of discounts by agency amounted to a secret appropriation of profit.

Affirmed.

1. Trial 🔑395(3), 404(4)

It is permissible for findings of trial court to follow language of common count, and inherent therein are implied findings in accordance with evidence presented by the prevailing party.

2. Appeal and Error 🔑931(1)

In considering a claim of insufficiency of evidence, court of review must accept as established all testimony and all inferences favorable to the respondent.

3. Principal and Agent 🔑1

Distinguishing features of agency are its representative character and derivative authority, and it is a relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal.

4. Principal and Agent 🔑23(5)

In store's action against advertising agency to recover frequency discounts granted by television station for frequent use of spot advertisement over station, evidence sustained finding of a principal and agent relationship between store and advertising agency.

5. Customs and Usages 🔑10

Where custom of granting a 15 per cent commission to advertising agency was well established and known to principal when it employed agency as its advertising agent, and nothing was said between the parties at time about amount of commission, custom entered into the contract as one of its implied terms and agency's commission was fixed at 15 per cent and no more.

6. Principal and Agent 🔑69(2)

Where store retained advertising agency as its agent for placement of spot television advertisement over station and store was ignorant of station's practice of granting a frequency discount to advertisers as an incentive for continuous use of its facilities, advertising agency could not keep for itself such discounts without knowledge and consent of the store which was its principal.

7. Brokers 🔑35

Where real estate broker has been employed to represent a buyer who knows the commission is to be paid by the seller, this fact does not alter rule that broker cannot appropriate to himself money or property belonging to the buyer which comes into broker's possession as an incident to the agency.

8. Principal and Agent 🔑79(3)

Moneys secretly appropriated by agent may be recovered by principal in an action for money had and received, even though cause of action rests basically upon fraudulent conduct.

9. Account Stated 🔑8

The suppression of pertinent and material facts by fiduciary, such as an agent, is a fraud sufficient to impeach agent's showing of an account stated.

10. Account Stated 🔑19(3)

In action by retail store against advertising agency to recover frequency discounts granted by television station to advertiser as an incentive for continuous use of station's facilities, where evidence established that agency did not inform store of practice of granting such discounts but billed store for gross amount of advertising fee which store paid, evidence sustained finding that there was no account stated.

11. Customs and Usages 🔑19(2)

In action by retailer against advertising agency to recover frequency discounts granted by television station to advertiser, there was no error in admitting evidence of custom as to amount of agency's commission, where such custom was known to store and relied upon in employing agency.

12. Evidence ⚿219(3)

Evidence with reference to compromise is not admissible except to the extent that it contain admissions against interests or evidence otherwise admissible.

13. Appeal and Error ⚿1050(1)

In principal's action against agent to recover secret profits appropriated by agent, admission of testimony of efforts to compromise, if error, was not prejudicial.

14. Appeal and Error ⚿1060(2)

In store's action against advertising agency to recover frequency discounts granted by television station for frequent use of spot advertisements on station, where station's sales manager had testified that such discounts depended upon number of times an advertiser used the spot, question as to who was entitled to discount, while objectionable, was not prejudicial.

15. Evidence ⚿353(1)

In store's action against advertising agency to recover frequency discounts granted by television station based upon frequency with which spot advertisement was used, rate cards of television station explaining frequency discount and contract between agency and station containing admission that agency was an agent of store, were admissible as independent evidence of a pertinent fact in the nature of a verbal act rather than a narrative of a past event.

16. Evidence ⚿267

Where fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, statement is admissible as an independently relevant fact.

17. Customs and Usages ⚿3

A custom that would sanction a fraud cannot be recognized as binding upon anyone, and evidence thereof would be inadmissible to establish terms of a contract.

◆

Edward I. Gorman, Los Angeles, for appellant.

Abe Richman, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff Store of Happiness, a corporation, sued defendant Carmona & Allen, Inc., a corporation, for money had and received and recovered judgment in the sum of $4,592.07. From that judgment this appeal is taken. Defendant cross-complained, pleading common counts, and recovered from May Diamond Company, a corporation, the sum of $2,145. This judgment covers a period of time different from that embraced in plaintiff's judgment and no complaint is made by any party with respect to it. Store of Happiness and May Diamond Company are controlled by the same people, are treated by counsel for both sides as the alter ego of each other and are interchangeably referred to as plaintiff. We shall follow the same pattern.

Plaintiff's suit in assumpsit seeks recovery of secret profits reaped by defendant while acting as its agent in the placing for it of certain spot advertising upon television station KTTV in the city of Los Angeles.

[1, 2] Appellant challenges first the implied finding of agency.[1] In considering a claim of insufficiency of the evidence, which is the present contention, the court of review must accept as established all testimony and all inferences favorable to respondent. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. We proceed upon that basis.

[3] The business of defendant is that of operating an advertising agency; it so alleged in its cross-complaint. "The dis-

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[1] The findings follow the language of the common count, which is permissible; inherent therein are implied findings in accordance with the evidence presented by the prevailing party. Voss v. Friedgen, 141 Cal.App.2d 135, 136, 296 P.2d 424.

tinguishing features of agency are its representative character and its derivative authority" (2 C.J.S. Agency § 2a, p. 1026). Wallace v. Sinclair, 114 Cal.App.2d 220, 229, 250 P.2d 154, 160: "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. The heart of agency is expressed in the ancient maxim: *'Qui facit per alium facit per se.'*" Plaintiff is engaged in the retail jewelry business and advertises through television, newspaper and direct mailing. When its relationship began with defendant's predecessor (Carmona & Allen, a partnership), Mr. Allen told plaintiff's general manager Mr. Leo Westen, he "wanted to handle our account. * * * he would represent us and we would buy time through him," referring to television time for spot anouncements. Westen testified that he accepted "their offer to act as [our] advertising agency." Plaintiff thereupon wrote the Carmona-Allen agency as follows: "In accordance with our telephone conversation, we desire as of this date to employ you as our exclusive advertising agency to procure our television spots until such time as either of us desires to terminate this arrangement. We will send you a check on the 10th of the following month for all advertising procured for the proceeding [sic] month in accordance with the arrangement outlined by us." The corporate defendant herein was but a continuation of the partnership and no further distinction will be drawn between them.

Defendant's activity consisted of placing "leads" for plaintiff on television and buying for it the necessary spot time. A lead is advertising designed to produce telephonic or mail response which is then pursued through calls made upon the inquirers by a crew of salesmen. The dispute herein is confined to advertising done through television station KTTV. The practice pursued was that defendant would locate and buy from KTTV desirable spot time and would make a contract with it for same. The parties to that contract were defendant and KTTV, Inc. Defendant in each instance would quote a flat price to plaintiff, which was interested in obtaining leads at the lowest possible price; it would accept the offer when satisfactory. The television company would bill defendant for the time so used; it would pay the bill and in turn would invoice plaintiff for same and plaintiff would pay it the amount of that invoice.

[4] The contract between defendant and KTTV, Inc., described defendant as the "Agency." It recited that "the Agency desires to avail itself of the said broadcasting facilities on behalf of its client May Diamond Co." Paragraph (1) says: "KTTV agrees to furnish the necessary facilities of the aforesaid television station for broadcasting and on behalf of the Agency to broadcast the television programs hereinafter described in behalf of Agency's client for the advertising of its products and services acceptable to KTTV." It specifies a gross charge per week, an "Agency Commission" stated in dollars but computed at 15 per cent of the gross charge, and further says: "KTTV will bill Agency weekly and Agency shall pay the charges within 1 week after the end of the week in which they are incurred. Items of gross charges followed by an asterisk are subject to an agency commission of 15%, if this agreement is with a recognized agency." Defendant had no goods or other tangibles to sell, nor did it own television time other than that procured for plaintiff; it had only services to offer. The evidence abundantly establishes that defendant was plaintiff's agent and there seems to have been no question about it prior to the trial. It was then vigorously contended that defendant was an independent contractor, but that claim having been rejected by the trial judge and the evidence being sufficient to sustain his finding, the contention no longer can be entertained.

[5] The controversy revolves around the agency commission and certain "Fre·

quency Discounts." The 15 per cent commission specified in the contracts between the agency and the televiser is the one customarily paid for such services. The custom was well established, known to plaintiff and relied upon by it when employing defendant as its advertising agent. There was nothing said between the parties at any time about the amount of the commission, so the custom entered into the contract as one of its implied terms. "Unexpressed provisions of a contract may be inferred from the writing or external facts. Thus it is well settled that a contract need not specify price if it can be objectively determined. * * * In Buckner v. A. Leon & Co., 204 Cal. 225, at page 227, 267 P. 693, it was said: 'It is the general rule that, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract,' quoting from Hind v. Oriental Products Co., 195 Cal. 655, 667, 235 P. 438. See Civ.Code, §§ 1655, 1656; Code Civ.Proc. § 1870, subd. 12; 12 Cal.Jur.2d, Contracts, § 140." California Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474, 482, 289 P.2d 785, 790, 49 A.L.R.2d 496. To the same effect, see Guipre v. Kurt Hitke & Co., 109 Cal.App.2d 7, 14, 240 P.2d 312. Thus defendant's commission was fixed at 15 per cent and no more.

The term "frequency discount" embraces an allowance made to the advertiser by KTTV as an incentive and reward for continuous use of its facilities, the amount of such discount ranging from 15 per cent to 22½ per cent of the gross. The "more times the spot is on the larger the discount, up to what is known as end rate" of 22½ per cent. This discount is distinct from the agent's commission. It is given to the advertiser and goes to it so long as the station is used regardless of any change in its advertising agency.

Billing was done by KTTV to the agent only; its invoices showed the gross price, agent's commission, frequency discount and the net amount remaining after deducting both of the last named items. This amount the agent would pay to KTTV. In turn it would bill plaintiff for the gross amount, keeping for itself the 15 per cent commission and the frequency discount.

Plaintiff was ignorant of the practice of KTTV to make such allowances and was never told anything about them until the fact of their receipt by defendant was discovered by Mr. Westen in 1955 after a period of about two years of their secret appropriation by defendant. He then claimed same for plaintiff but without results. When his initial demand was made Mr. Allen said "that they needed that money to supplement what they were making from us." Mr. Carmona told Westen "that he told Bill [Allen] when it first started he should have advised me [Westen] and we should have talked about this." Later, "Mrs. Levitt asked Mr. Carmona why wasn't this brought up before, why didn't he say something about it, about getting the frequency discount and never telling us about it, and Mr. Carmona, to quote him, said it was an unanswerable question."

[6, 7] Plaintiff urges that this was a secret profit received by its agent which belongs to it in equity and in good conscience. Defendant's argument is that it quoted plaintiff a flat spot price in each instance, which plaintiff agreed to pay and did pay. The price so quoted was the gross charge of KTTV. From this circumstance of a flat figure defendant deduces the conclusion that it was an independent contractor and hence there could be no secret profit recoverable by plaintiff. It is shown above that the relationship was that of principal and agent and it follows therefrom that the agent could not keep for itself moneys belonging to the principal without the knowledge and consent of that employer. Defendant was in substantially the same position as a real estate broker who has been employed to represent a

buyer; the latter knows the commission is to be paid by the seller, but this fact does not alter the rule that his agent cannot appropriate to himself money or property belonging to the buyer which comes into the broker's possession as an incident to the agency. The basic duty of loyalty which pervades the entire field of agency forbids this. See Laurence v. Kilgore, 154 Cal. 310, 97 P. 760; Great Western Gold Co. v. Chambers, 155 Cal. 364, 101 P. 6; Blandy v. Bowden, 217 Cal. 61, 16 P.2d 993; Magnolia Park National Bank of Burbank v. Banks, Huntley & Co., 10 Cal. App.2d 22, 30, 50 P.2d 1064; 2 Cal.Jur.2d § 104, p. 771; 12 C.J.S. Brokers § 42, p. 102.

[8] In effect, defendant represented to plaintiff in each instance of fixing a price that it would be the gross figure named by KTTV; actually KTTV's price was that gross price less the frequency discount. Any profit thus made belongs to the principal. 9 Cal.Jur.2d § 54, p. 203. It may be recovered in an action for money had and received though the cause of action rests basically upon fraudulent conduct. "It must be borne in mind that defendant was plaintiff's advertising manager and represented plaintiff in its contractual dealings with the parties from whom he was receiving the rebates or payoffs. As plaintiff's agent he occupied a confidential status akin to that of a fiduciary. 2 Cal.Jur.2d Agency, sec. 104, p. 771. He was bound to a duty of good faith towards his principal and was precluded from making secret profits for his own benefit from the subject matter of the agency." Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 590, 294 P.2d 140, 146.

[9, 10] Appellant relied upon a defense of account stated and now urges error in the court's finding that there was no such accord between the parties. The finding is expressly based upon the fact that defendant failed to inform plaintiff of its receipt and retention of frequency discounts. Appellant's argument is that rendition and payment of invoices without objection creates an account stated and that this is true even though the parties are principal and agent. California Bean Growers' Ass'n v. Rindge L. & N. Co., 199 Cal. 168, 181, 248 P. 658, 47 A.L.R. 904. This may be conceded but it does not take account of the matter of impeachment of the prima facie showing of agreement upon the account. Suppression of pertinent and material facts by a fiduciary, such as an agent, is a fraud sufficient to impeach his showing of account stated. "While a debtor's misrepresentation to his creditor of the amount due is not ordinarily, in the absence of a relation of trust or confidence requiring a full disclosure of the facts, considered as a fraud on the creditor entitling him to re-examine an account stated, yet where any relation of trust or confidence exists between the parties that demands the communication of full and complete information as to their dealings, any concealment or misrepresentation amounts to such fraud as to entitle the party injured to re-examine an account stated." 1 Cal.Jur.2d § 61, p. 394. See, also, Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 114–115, 146 P.2d 8; White v. Thompson, 40 Cal.App. 447, 180 P. 953. The finding that there was no account stated in this case is correct.

Numerous claims of error in the rulings upon evidence require but brief comment.

[11] The claim that there was error in admitting evidence of custom is refuted by cases above cited, namely, California Lettuce Growers v. Union Sugar Co., supra, 45 Cal.2d 474, 482, 289 P.2d 785, 49 A.L.R. 2d 496, and Guipre v. Kurt Hitke & Co., supra, 109 Cal.App.2d 7, 14, 240 P.2d 312. Cases cited by appellant are not to the contrary.

[12, 13] Complaint is made concerning receipt of evidence of negotiations for settlement which followed Westen's discovery of the frequency discount situation and demand for payment of same to plaintiff. Of course, evidence of efforts to compromise are not admissible (19 Cal.Jur.2d § 406, p. 145) except to the extent that they contain admissions against interest or evidence otherwise admissible. California Home Extension Ass'n v. Hilborn, 37 Cal. 2d 459, 465, 235 P.2d 369. Counsel con-

cedes "that since there is no controversy as to the amount of the judgment and since the conversation in question primarily involves amounts of money, the error may not be prejudicial." Clearly this is not a case in which, assuming error, this court could say "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254.

[14] Mr. Norins, local sales manager for KTTV, when asked to explain frequency discounts, said in part: "It is kind of a bulk discount figure which depends upon the number of times an advertiser uses the spot. The more times he uses the spot the less it costs him." After further discussion as to what the advertiser would thus earn, the witness was asked: "Who is entitled to that frequency discount?" Objection being overruled he repeated what he had just said, namely, that the discount is granted to the advertiser. Conceding that the form of the question was objectionable and the ruling erroneous it cannot be said that it was prejudicial.

[15, 16] Four rate cards of KTTV which explain the frequency discount and are available to advertisers were received in evidence over objection. Also the contracts made between defendant and KTTV. It is now said that they are hearsay. There is no merit in this contention. In both instances the writing was independent evidence of a pertinent fact,—in the nature of a verbal act rather than a narrative of a past event. "Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact. Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown. Evidence as to the making of such statement is not secondary but primary, for the statement itself may constitute a fact in issue, or be circumstantially relevant as to the existence of such a fact." 31 C.J.S. Evidence § 239, p. 988. The rate card which explains frequency discounts is a standing offer to advertisers to allow them, not their agencies, the discounts. The contracts between defendant and KTTV constitute admissions of defendant that it was acting as an agent for plaintiff.

Appellant's opening brief contains 49 assignments of error in excluding evidence offered by defendant. Thirty-five of them refer to questions designed to establish circumstantially the fact that defendant was an independent contractor. Were it not for the specific agreement for an agency representation which the parties had made, some of these inquiries would have been proper. But the rulings cannot be said to be prejudicial when viewed in the light of the entire record.

[17] Next counsel urges that, evidence of custom having been received over his objection, it was error to reject his proffered counter showing. In this connection he cites ten specific rulings which sustained objections to questions designed to show a custom of advertising agencies to withhold from the advertiser, the principal, frequency discounts, which of course belonged to the advertiser. Such a custom would sanction a fraud and could not be recognized as binding upon anyone. See 55 Am.Jur. § 16, p. 278. Also, People v. Kiss, 125 Cal.App.2d 138, 142, 269 P.2d 924. There was no error in this series of rulings.

Four rulings are challenged which sustained objections to questions concerning the uncontradicted fact that contracts with KTTV were made by defendant in its own name and not by plaintiff. If answered favorably to defendant's contentions they would have added nothing to the record nor would they have altered the fact that the parties to this action had agreed upon a representation which constituted an agency as matter of law.

We find no miscarriage of justice in this case.

Judgment in favor of plaintiff is affirmed.

MOORE, P. J., and FOX, J., concur.

151 Cal.App.2d 714

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Philip V. AMES and Ruth Haskin,
Defendants and Appellants.
Cr. 5677.**

District Court of Appeal, Second District,
Division 2, California.
June 14, 1957.
Rehearing Denied July 9, 1957.
As Corrected July 12, 1957.
Hearing Denied Aug. 6, 1957.

Defendants were convicted of abortion. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment, and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to establish the corpus delicti and to connect defendants with the crimes.

Judgment affirmed.

1. Abortion 🔑11

Evidence, which revealed doctor's establishment of an unadvertised office, uniformity of procedure in cases of the witness-abortees, direction of witness-abortees to meet the doctor at the remote place, exorbitant charges to young women for only two office calls, doctor's failure to keep case records on the abortees, doctor's failure to give receipts, and confessions of the witness-abortees, was sufficient to establish the corpus delicti of abortion and to connect doctor and his nurse with the abortions.

2. Criminal Law 🔑260(11)

Conviction by trial court is, in absence of prejudicial error, final unless no inference can be drawn other than that the accused is innocent.

3. Arrest 🔑63(4)

In abortion prosecution, evidence, which revealed that arresting officer, while observing activities at doctor's office, had seen all but three of the witness-abortees at office and had received information about confessions of two of the witness-abortees, established that officer had probable cause for arresting doctor. West's Ann.Pen. Code, § 836, subd. 3.

4. Criminal Law 🔑696(9)

Where, in prosecution of doctor and nurse for abortion, defendants moved to strike as hearsay all testimony received with reference to probable cause for making arrest, trial court properly reserved its ruling on such motion.

5. Criminal Law 🔑736(1)

Where, in prosecution of doctor and nurse for abortion, question of probable cause for doctor's arrest was one of law, submission of such question to jury would have been error had it not been for consent thereto given by both sides

6. Criminal Law 🔑351(10)

In prosecution of doctor and another for abortion, doctor's false explanation of notation made by him on bottom of witness-abortee's information slip disclosed a consciousness of guilt and was legal corroboration of the witness-abortee. West's Ann. Pen. Code, § 1108.

7. Abortion 🔑11

In abortion prosecution, sufficient corroboration of the witness-abortee exists if independent testimony of other witness-abortees shows that each abortion was committed in a similar manner. West's Ann.Pen.Code, § 1108.

8. Criminal Law 🔑1186(4)

Miscarriage of justice can be declared to have resulted only when court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in the absence of the error. West's Ann.Const. art. 6, § 4½.

9. Criminal Law 🔑1186(4)

Where, in prosecution of doctor and nurse for abortion, doctor and nurse practically demanded that court submit question of probable cause for the arrest to jury and evidence possessed by arresting officers, and it was probable that a retrial would necessarily result in the identical decision, no prejudicial error resulted from recitals of officers concerning origin of the information which gave them probable cause to arrest doctor and nurse. West's Ann.Const. art. 6, § 4½.

10. Abortion 🔑9

In prosecution of doctor and nurse for abortion, admission of witness-abortees' testimony as to purpose of their going to doctor's office and as to their beliefs that they were pregnant was not error. West's Ann.Pen.Code, § 274.

11. Abortion 🔑9

Woman's testimony as to her having gone to defendant for purpose of obtaining an abortion is admissible in the abortion prosecution on ground that it bears on defendant's intent.

12. Abortion 🔑6

Pregnancy is no longer an issue in an abortion prosecution but is a circumstance which may be proved, if it exists. West's Ann.Pen.Code, § 274.

13. Abortion 🔑11

Elements of crime of abortion, known as corpus delicti, namely, the use of some means by an individual with intent to procure a miscarriage upon a woman, not necessary to save her life, may be shown by the woman's testimony without corroboration by other evidence, and only when the woman testifies to the connection of accused with the crime must her testimony be corroborated in order to justify a conviction. West's Ann.Pen.Code, § 1108.

Murray M. Chotiner and Russell E. Parsons, Beverly Hills, for appellant Philip V. Ames.

Grossman & Rosen, Los Angeles, by Joseph M. Rosen, Los Angeles, for appellant Ruth Haskin.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of having aborted nine[1] expectant mothers, defendants Ames and Haskin separately seek to upset the judgments on the grounds of (1) insufficiency of the evidence, and (2) errors in rulings at the trial.

Philip Ames is a licensed osteopathic physician and has practiced his profession in Los Angeles since 1943. He is a graduate in liberal arts from a popular university, and in osteopathy from a college dedicated to that school of thought. He took training at the Los Angeles College of Osteopathic Physicians and Surgeons and interned for a year at the Los Angeles County Hospital. From the incipiency of his practice he has operated alone as a general practitioner and has maintained a well-equipped office on Sunset Boulevard containing rooms with two machines for administering diathermy and two for ultrasonic treatments; two machines for cauterizing, one for making electro-cardiograms, and one for generating X-ray. He is on the staff of a busy hospital and performs the functions of his profession at a number of such institutions. He has drifted into the treatment of women's diseases, specialized in vaginal disorders and obstetrics. In 1954 he rented an office at 8001 Santa Monica Boulevard, several miles nearer the ocean, where he installed a telephone and met patients by appointment. He installed equipment there similar to that in his Sunset Boulevard office.

In February 1955 there were records of about 2,000 patients at the Sunset office. An employee in both places was his sister, Mrs. Haskin, who figures prominently in the activities under consideration. She worked as a nurse for a salary and checks were issued to her for take-home pay.

For one year prior to January 1955, the police department of Los Angeles had Dr. Ames under surveillance. Many reports of his abortion practice had been received. In January a concerted watch was kept over his Sunset office and at times over 8001. During that period, many women were observed entering both premises. Also, Dr. Ames was seen as he visited 8001, but his name did not appear on the door, and he visited it only by special arrangement. Mrs. Haskin was present there at the time of each of the doctor's visits. However, he ordinarily conducted his medical and surgical services at the Sunset office.

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[1] Mrs. Haskin was convicted on three counts only.

On the morning of February 10, police officers took into custody three women as they were leaving 8001 and transported them to the Los Angeles City Hall. There the women confessed that they had been aborted by Dr. Ames with the assistance of Mrs. Haskin. After that fact had been communicated to Officer Zander, he proceeded to the Sunset office and placed Dr. Ames under arrest. Then he made a search of those premises, took possession of a large number of pieces of paper, each containing words in the doctor's handwriting, a $50 check, a piece of stationery and a key. Thereafter Officer Zander searched the Santa Monica Boulevard office from which he removed a large number of items customarily kept by a physician. Because the officer had no search warrant, no attempt was made to introduce such articles at the trial. Inasmuch as "unreasonable search and seizure" constituted the major portion of the defense at the trial and is now the principal ground for reversal, a discussion of that topic will be deferred until after the "sufficiency of the evidence" has been explored.

Evidence Sufficient

There is no witness who testified that he saw Dr. Ames abort any one of the women who testified that they had been aborted. Not even Mrs. Haskin admits that the doctor either administered a libation to a patient or used instruments to remove living tissue from a woman's uterus. There is no proof that a foetus was ever seen in his office or that either appellant ever admitted that an embryo had been removed. In the absence of such proof, the State is forced to rely upon inferences reasonably drawn from the circumstances placed in evidence. Ten women testified. Not one of them was impeached. Each apparently regretted having been compelled to take the stand. Not one disliked the doctor or the nurse. They may have feared the consequences of disobeying the subpoena, but in any event they were believed by the jury and the court approved.

The report of each woman as to the occurrences at the time of her first call on the doctor is of the same pattern: she called at the Sunset premises; filled out a slip of paper; was admitted to the doctor's office; told him she thought she was pregnant; was escorted into an examination room; was given a manual pelvic examination; the doctor told her he believed her to be pregnant; they agreed upon the amount of the fee for the operation; she was told to go to 8001 at a certain time; she called at that address at the designated hour; was admitted to a room where she disrobed; donned a sanitary belt; placed the money on the cot or gave it to Mrs. Haskin; was escorted into another room; lay upon a table; was given "a shot" by Mrs. Haskin and lost consciousness. Upon regaining her senses in the room where she had disrobed, she found herself equipped with a sanitary napkin and a discharge came from the vaginal tract. Each witness visited Dr. Ames because she thought she was pregnant, and went to his office at 8001 for the purpose of effecting a miscarriage. Each had a restoration of the menstrual period about a month thereafter. In practically every instance the witness believed herself to be in good health. The doctor's charge for the service usually varied between $300 and $450. An increase over the latter sum was measured by the duration of the pregnancy, the anxiety of the patient and her ability to pay.

During January and February 1955, Dr. Ames made examinations at the Sunset office but directed the witnesses to meet him at 8001. At most operations the surgeon did not appear while the patient was conscious, but in the case of Anna Mae, she recognized the voice of Dr. Ames when, as he bore her back to the other room, he said: "Put your arm around my neck, honey." Mrs. Haskin subsequently told her that the doctor had carried her. Before visiting Dr. Ames, most of the witnesses had attempted to induce a miscarriage by imbibing castor oil, quinine or other medicinal concoctions, or jumping from an elevation. In each instance after the patient had disrobed preparatory to the operation, she was ordered by Mrs. Haskin to pay the fee prior to the injection about to be applied by the latter. When the nurse had difficulty in finding the vein into which she aimed to give the injection to Patricia, Dr. Ames entered the room to assist her. He kept no case records of the women served at 8001 whereas at the Sunset office he had history charts of more than 2,000 patients.

Mrs. Haskin Assisted

That Mrs. Haskin participated in the abortions of at least three women at the Santa Monica Boulevard office is readily to be inferred from the established facts. Barbara, Jane and Dorothy testified that when they visited the 8001 premises, they met Nurse Haskin; that upon the latter's request they respectively paid her $400, $300 and $400; that they were given no receipts for such sums; that Nurse Haskin administered the anesthetic which rendered them unconscious.

Moreover, she negotiated with and performed the same services for Gaynel, Anna Mae and Patricia at the same office at the times charged in the information.

Ordinarily Mrs. Haskin and Miss Crow were the only nurses employed at the Sunset Boulevard office. However, only Mrs. Haskin worked with Dr. Ames at 8001 and there performed the services above specified for the witnesses.

Facts other than those given in the testimony of the abortees indicate the guilt of the accused. Dr. Ames rented the 8001 premises and paid the landlord her rent. He did not put his name on the door or otherwise display the fact that it was his professional retreat. While he contracted for a telephone for those premises, he kept its number unlisted. Notwithstanding the elaborate filing system in which he maintained detailed records of 2,000 patients at the Sunset office, he kept no similar record of the women who testified that they had been aborted by Dr. Ames, assisted by Mrs. Haskin as nurse at 8001. After Barbara had paid $400 to Mrs. Haskin, the doctor told Barbara the agreed price was $450, and asked her to make a check for $50. It was introduced as exhibit 20. He gave neither Barbara nor any other confessed abortee a receipt for the fee paid for his service. When Officer Zander told him that he was under arrest for performing illegal abortions, the doctor said, "Well, where?" In repy to the questions of the officer, Dr. Ames stated that he had no office at 8001 Santa Monica Boulevard and that he never visited an office at that location. This false denial indicated a consciousness of guilt on the part of Dr. Ames. Also, it corroborated the testimony of the abortees. People v. Malone, 82 Cal.App.2d 54, 64, 185 P.2d 870; People v. Reimringer, 116 Cal.App.2d 332, 337, 253 P.2d 756; People v. Morris, 110 Cal.App.2d 469, 477, 243 P.2d 66. Furthermore, Dr. Ames' failure to keep his usual detailed history charts with respect to the abortees tends to support their testimony. It evinces a conscious desire to conceal evidence of his illicit activities. People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720. The fact that in some instances Dr. Ames bargained with the abortees with respect to his fee is calculated to establish the truth of their testimony. People v. Smitherman, 58 Cal.App.2d 121, 123, 135 P.2d 674; People v. Malone, supra, 82 Cal.App.2d page 63, 185 P.2d at page 875.

[1] His establishment of an unadvertised office; the uniformity of procedure in cases of the witness-abortees; their being directed to meet the doctor at the remote place; the exorbitant charges to young women for only two office calls; his failure to keep case records of the abortees; his giving no receipts—these circumstances taken with the confessions of the unfortunate women and other established facts leave no room for doubt that the corpus delicti of abortion was in each count proved and the evidence was clear that Dr. Ames and Mrs. Haskin were connected with the crimes.

The testimony of each of the ten women is mutually corroborative of the others in that it shows that each abortion was committed in a similar manner and the procedure followed in each instance was the same. People v. Gallardo, 41 Cal.2d 57, 64, 257 P.2d 29; People v. Kendall, 111 Cal.App.2d 204, 210–211, 244 P.2d 418; People v. Allen, 104 Cal.App.2d 402, 411, 231 P.2d 896.

[2] Insofar as the evidence is concerned, the judgment will not be disturbed. A conviction by the trial court is in the absence of prejudicial error, final, unless no inference can be drawn other than that the accused is innocent. The reviewing court will not determine the weight of the evidence but will approve the judgment unless it concludes that "under no hypothesis could sufficient facts have been found by the jury to warrant the inference of guilt." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. See also People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467; People v. Spreckels, 125 Cal.App.2d 507, 509, 270 P.2d 513.

Probable Cause

At the commencement of the trial, appellants moved outside the presence of the jury to suppress the evidence on the ground that it was obtained through unlawful search and seizure. Appellants contend that the names of the witnesses and the exhibits had been obtained by police in searching the Sunset office without a search warrant and without probable cause. At the conclusion of the hearing, the court denied the motion and recalled the jury. The court then stated with reference to probable cause that in his opinion where there is a conflict in the evidence as to the facts on which the officers asserted the right to arrest without a warrant, the defendants are entitled to try the matter to a jury, notwithstanding that such issue had already been tried by the court sitting without a jury. Of course, in the instant action there was no conflict in the testimony of the witnesses called to prove probable cause. No witness contradicted Officer Zander's statements on which he based his belief. After announcing his view of the law the court further said:

"Now, your representation to the Court at this time that you waive the right to have the matter tried by the jury, at this time, in view of the fact that it was tried by the Court—

"Mr. Parsons: No, we don't waive the right to have it tried by the jury.

"The Court: Well, that is what I want to clear up * * *

"Mr. Chotiner: * * * After your Honor rules on the objection, and if the ruling should be adverse to the defendant, then at the proper time we can present such evidence as we might deem appropriate to present the issues to the jury.

"The Court: Just so we are clear on what we are doing. You may want to take this matter up, and I want the record clear as to what is going on. Nobody is waiving anything, and the Court is not asking them to."

Later the following occurred:

"The Court: * * * Then, at the conclusion proper instructions will be submitted by you and given by the Court relative to the illegal search and seizure.

"Mr. Parsons: That is right.

"The Court: And you are at that time to argue it in your argument?

"Mr Parsons: To the jury * * *

"Mr. Grossman: The only thing I am concerned about now, Judge, is that I take it the jury will be fully instructed even though you are overruling the objection, nevertheless it is for their final consideration as to any questions of fact in determining these issues.

"The Court: Instructions will be given. That is going to make it difficult.

"Mr. Grossman: At the end of the trial.

"The Court: At the end of the trial they will be properly instructed, but not at this time. In other words, I presume you gentlemen have your instructions ready to submit to me, that I will either give or will not give. But in any event, I will give what I believe instructions are adequate to cover the entire subject as near as I can.

"Mr. Parsons: It is our job to help you out."

Thereupon, the abortees severally gave their testimony, identified the exhibits taken from the Sunset office as the information cards they had filled out, or testified that they were similar to those on which they had written for the doctor's use. Also, the women identified (1) the appointment slips which had been received at the Sunset office instructing them when to meet the doctor at 8001, and (2) the instruction slips received by them at that office after they had regained consciousness.

At the conclusion of the testimony of the women, Officer Zander testified that prior to Dr. Ames' arrest he had information that witnesses Patricia, Dorothy and Mary had been aborted by the doctor on February 10 at 8001 Santa Monica Boulevard. Following a colloquy, the court instructed the jury that "This evidence is only on that question of whether or not there was an unlawful search and seizure, and for you to make a determination as to what the true facts are."

[3] Officer Zander testified that he had observed the activities at 8001 from January 30 to February 10 and that he and his fellow officers had observed all but three of the abortees at that address; that he had received information from George Ruppers, investigator for the State Board of Osteopathic Examiners, on several occasions during the preceding two years, also from an investigator for a certain television program and from investigators for the district attorney. In addition to such intelligence, he had received information about the confessions of Patricia, Mary and Dorothy. This was to the effect that Mary, en route with the officers to the City Hall, related in detail her experience of that morning at 8001 and told the cost of the operation. Similar statements were made to Officer Mitchell by Dorothy and Patricia. He relayed the information to Officer Golinda who in turn related it to Officer Zander near the Sunset office. It was then that the latter placed the doctor under arrest. Every officer who passed on the information of the confessions of the three women on February 10 was a reliable informant (People v. Hood, 150 Cal.App.2d 197, 309 P.2d 856), and that information alone was sufficient to give Officer Zander probable cause for making the arrest.

[4] In line with their running general objection, appellants moved to strike as hearsay all the testimony received with reference to probable cause. The court had promptly reserved its ruling and appellants moved for a mistrial on the ground that the admission of hearsay evidence was violative of appellants' constitutional rights. Such motion having been submitted, was denied prior to the close of the trial.

Whose Error?

[5] The contention that the court committed prejudicial error in denying the motions to strike the evidence and to grant a mistrial is without support. In the first place, the identical problem was determined in the court's trial in chambers of the question of probable cause. That decision was correct. Pen.Code, § 836, subd. 3; People v. Soto, 144 Cal.App.2d 294, 298, 301 P.2d 45; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. But it would have been error to submit this question to the jury had it not been for the consent given by both sides. People v. Silvestri, 150 Cal.App.2d 114, 309 P.2d 871; People v. Gorg, 45 Cal.2d 776, 781, 291 P.2d 469; People v. Lawrence, 149 Cal.App.2d 435, 308 P.2d 821. In the Silvestri decision, the appellate court supported its holding by citing People v. Gorg and said that the trial court should have determined the question as a matter of law. But, as previously shown, the submission of this matter to the jury in this case was pursuant to appellants' demand.

Now, what did Officer Zander tell the jury about his information that was prejudicial to appellants? He testified that (1) he had observed activities at the Santa Monica Boulevard office "for the days preceding the 10th"; (2) he had the information received from the Board of Osteopathic Examiners "in the preceding two or three years"; (3) he had information from Mr. George Ruppers (supra); (4) he had "information from the District Attorney investigators as far back as five years." In addition to the foregoing, Officer Zander had the confessions of three of the aborted women given to his fellow officer working on the identical matter. Had the jury tried only the question of probable cause, they could have concluded not otherwise than that Zander's arrest of Ames was justified by reason of the confessions of the three women, and if the case were tried again, it must be conceded that the same result would follow the jury's consideration. Therefore, how can it be said that appellants suffered any prejudice by the recitals of the officers of what had been told them by reliable informants? Moreover, the same women who had confessed to Officers Mitchell and Bates testified to the same facts as witnesses for the People on the question of the guilt or innocence of the defendants. The conclusion is unavoidable that the jury was impressed by this testimony and that no prejudice to the defendants resulted from Zander's summary thereof on the question of probable cause.

That the testimony of the abortees was amply corroborated and that the verdicts would have been the same had the jury not heard the evidence on probable cause is clearly demonstrated by reference to a few exhibits and to Dr. Ames' attempted explanation in reference thereto. At the lower edge of most of the information slips were notations in turquoise ink such as: "5w–3–5–" or "5–4–100." Dr. Ames admitted that such notations were in his own handwriting.

[6] Florence testified that she went to the Sunset office on January 3, filled out a slip, received a pelvic examination, was informed she was pregnant and the fee for curettement would be $350. On January 16 she went to 8001 with $300 cash which she laid on the cot where she was undressing. She was then escorted to another room, given a hypodermic injection by the nurse and lost consciousness. Upon regaining consciousness, she wore a sanitary napkin and later had a bloody discharge from the vaginal tract. She testified that on about January 28 she mailed $25 to Dr. Ames. An envelope postmarked January 29, addressed to Dr. Ames at the Sunset office, marked "Personal and Confidential" bore Florence's return address. (Exhibit 18.) Officer Zander testified that such exhibit was seized in the search of the Sunset office. Florence identified it as the envelope in which she had mailed the money. At the bottom of her information slip (Exhibit 17) was the following notation: "6–7w = 350—pay 3 — 50 later." On the reverse side in the same ink was the following: "1–31–55–pd–25$^{\underline{00}}$ bal 25$^{\underline{00}}$." After admitting the notations were in his handwriting, Dr. Ames gave the following explanation: "Well, offhand I cannot say definitely, but I imagine it would mean that there were six or seven weekly treatments that she needed at $3.50 a treatment and all she could pay, all she had paid was $3.00 a treatment. I don't know." He denied that the notation meant "six or seven weeks pregnant, $350.00, paid $300, $50 later." With respect to the notation on the back he was asked: "Is that a memo of her having paid $25.00?" To which he replied: "It looks like it. It possibly is. She did pay me $25.00." The flagrant falsity of this explanation is demonstrated by simple arithmetic. Seven weekly treatments at $3.50 would amount only to $24.50. Yet the physical evidence alone shows payment of $25 with a balance due of $25. This false explanation disclosed a consciousness of guilt and is legal corroboration of the witness.

One more example will suffice. Barbara testified that after filling out an information slip (Exhibit 19) at the Sunset office, she was given a pelvic examination by Dr. Ames. He told her she was three months pregnant and that the price would be $450. On January 30 Barbara appeared at 8001 and had a conversation with defendant Haskin who told her to disrobe, and asked for the money. Barbara handed Mrs. Haskin $400 in $50 bills, whereupon Mrs. Haskin went into another room and returned with Dr. Ames who reminded Barbara that the price was $450. When she repeated her inability to get all the money, he asked whether she had a personal check. Whereupon Barbara wrote out a check for $50 payable to cash and handed it to either Dr. Ames or Mrs. Haskin. Barbara identified Exhibit 20 as the check, and Officer Zander identified it as having been seized in the search of the Sunset office. At the bottom of Barbara's information slip appears the following: "3m–45–." Thereafter, in a different ink written with a different pen appears: "owe 50$^{\underline{00}}$ left ck." Dr. Ames testified both notations were in his handwriting. He had no definite recollection of what the notations meant but denied that they stood for "three months pregnant, $450.00, owes $50.00, left check." He had no explanation of why the check dated January 30 and seized February 10 had not been cashed sooner.

There were other similar instances concerning which Dr. Ames either gave no explanation of the notations, or resorted to the fiction of weekly treatments at $3.00 or $3.50 each. Many appointment slips[5] given to the abortees were in evidence, all bearing Dr. Ames' notations in the familiar turquoise ink, indicating the day and hour of their appointments at the 8001 office. The requirement of douche, sanitary belt and sanitary pads is corroborative of the abortees' testimony that they went to 8001 for the purpose of effecting an abortion. The requirement that they were not to eat for six hours before arriving is corroborative of their testimony that they received an anesthetic.

Equally significant and corroborative is the instruction sheet[6] given to each abortee after regaining consciousness, particularly the forecast of menstruation in four to six weeks. Each of the women testified that her normal period was resumed as promised.

[7] In addition to the overwhelming physical evidence connecting appellants with the crimes in such a manner as to indicate the abortees were telling the truth, it is now well settled "that there is sufficient corroboration if the independent testimony of the women shows that each abortion was committed in a similar manner." People v. Gallardo, 41 Cal.2d 57, 64, 257 P.2d 29, 33, and cases cited therein. Such is the situation in the matter at bar.

[8, 9] Taking the case, all in all, it is clear that there was no miscarriage of justice. That result in any trial may be declared "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Const. Art. VI, § 4½; People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254. In view of the fact that appellants practically demanded that the court submit the question of probable cause to the jury and the evidence possessed by arresting officers and the probability that a retrial would necessarily result in the identical decision, it must be held that no prejudicial error resulted from the recitals of the officers con-

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[5] "Address . . . 8001 Santa Monica Blvd. (2 blocks W. of Fairfax.)
Important . . . please call if you are not able to keep appointment.
Please try to be earlier than appointment.
Please do not eat 6 hours before coming.
Please Douche before coming.
Please bring Sanitary belt and pads * * * these are absolutely necessary.
Plan to stay about 1 hour. Someone can pick you up.
Time———— Day————"

[6] "All This Is Normal

1. You may have no spotting or discharge or flow.
2. You may have some spotting or discharge until your next period.
3. You may have some slight cramps.
4. You will menstruate in 4–6 weeks.

You may eat anything you wish now.
Do not lift anything heavy for one or two weeks.
Rest or take it easy for one or two days.

Notify Doctor of the Following Signs

1. Severe hemorrhage, more than heavy menstrual period.
2. Fever
3. Severe cramps."

cerning the origin of their information that gave them probable cause to make the arrest of Dr. Ames.

The same is true as to the arrest of Mrs. Haskin. While the testimony of an abortee involved Nurse Haskin in the performance of each abortion, yet her daily life about the doctor's office and her efficient service in waiting upon the patients and in serving the doctor could leave no doubt that she was justifiably convicted of Counts II, IV and VIII under which the abortees named testified that Mrs. Haskin had collected from them the moneys which the doctor had at first demanded as the price each should pay him to effect an abortion.

[10–12] Appellants contend that prejudicial errors followed the rulings that the People's witnesses might testify (1) to the purpose of their going to the 8001 office and (2) to their beliefs that they were pregnant. No error was committed in permitting such evidence. Testimony of a woman as to her having gone to the doctor for the purpose of obtaining an abortion is admissible as bearing on the defendant's intent. (People v. Ramsey, 83 Cal.App.2d 707, 723–724, 189 P.2d 802.) While pregnancy is no longer an issue in an abortion case in view of the deletion of such requirement from Penal Code section 274 by the 1935 amendment, it is a circumstance which may be proved, if it exists. People v. Califro, 120 Cal.App.2d 504, 514, 261 P.2d 332, hearing denied, certiorari denied, 347 U. S. 959, 74 S.Ct. 708, 98 L.Ed. 1103.

One further matter deserves attention. At the time of instructing the jury, at the request of the People the court read the following:

"You are instructed that the testimony of the woman upon whom the abortion was alleged to have been performed, if believed and meeting the requirements of the laws herein stated, is insufficient without corroboration to prove that the crime was committed. The corroboration required by law is such corroboration as tends to connect the defendant with the commission of the alleged crime as is further stated in my instructions."

When the jury returned to court for additional instructions, the court read the following:

"The elements of the crime of abortion known as corpus delicti, namely, the use of some means by an individual with the intent to procure a miscarriage upon a woman, not necessary to preserve her life, may be shown by the testimony of the woman upon whom such act was committed without being corroborated by other evidence."

[13] The instruction was correct. Section 1108 of the Penal Code says: "the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence." This is not contrary to the instruction which refers to the corpus delicti. Surely an abortee may prove the crime itself by her own testimony. It is only when she testifies to the connection of the accused with the crime that she must be corroborated in order to justify conviction. (People v. Malone, 82 Cal.App.2d 54, 61, 185 P.2d 870; People v. Sullivan, 113 Cal.App.2d 510, 524, 248 P.2d 520; People v. Hickok, 28 Cal.App.2d 574, 580–581, 83 P.2d 39.)

The judgment is affirmed.

ASHBURN, J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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